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VOL. 52

1945

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Judge Advocate General's Department

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Volume 52

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CM 278666 - CM 280023

(1945)

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

SPJGN-CM 278666

UNITED STATES v. Second Lieutenant LEONARD M. WILLAN (0-714583), Air Corps.	)	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Harlingen Army Air Field, Harlingen, Texas, 19 March 1945. Dismissal.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Leonard M. Willan, 2123rd AAF Base Unit, Section "B", Harlingen Army Air Field, Harlingen, Texas, did, at a point approximately seven miles south of Laguna Madre Sub-Base, Harlingen Army Air Field, Harlingen, Texas, on or about 9 October 1944, wrongfully violate paragraph 1a, AAF Regulation 60-16A, dated 15 April 1944, to which he was subject, and which provides as follows:

1. General:

a. Reckless Operation. An AAF pilot will not operate aircraft in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons, or property on the ground.

> by wrongfully piloting and flying a TB-26C airplane in such a reckless and careless manner as to endanger a friendly aircraft in the air, to-wit: B-24H airplane, AAF Serial No. 42-95389.

He 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 for a violation of the flying regulations, he was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that formation flights were forbidden at Harlingen Army Air Field, Harlingen, Texas, except on a duly authorized gunnery mission. They were permitted in this one instance both enroute to the gunnery range on the Gulf of Mexico and on the return trip as far as the mainland. The moment land was sighted the pilots were under a duty to "break up" and to complete the journey to their home base independently (R. 8-9, 26, 28, 30-32, 39). Although this policy had not been reduced to writing, it was orally conveyed to all flying personnel at several meetings which were attended by the accused (R. 8-9, 29, 33). All pilots were also instructed as to the content of Army Air Forces Regulations 60-16, 60-16A, 60-16B, 60-16D, and similar Post Regulations, prohibiting planes in operation from approaching within certain prescribed distances of one another (R. 8, 36).

At 1610 on the afternoon of 9 October 1944 a TB-26 C and a B-24 took off from Harlingen Field on a gunnery mission over the Gulf (R. 10, 35; Pros. Ex. C). Second Lieutenant Ernest J. Kinkopf and the accused were the pilot and co-pilot, respectively, of the former plane and Second Lieutenant Richard N. Wadman and "Lieutenant" L. J. Willis Voris were the pilot and co-pilot, respectively, of the latter (R. 11-13, 15, 18, 20, 35, 42; Pros. Ex. C). Both ships proceeded to their destination in formation. After the firing had been completed and the homeward trip was begun, Lieutenant Wadman suggested over the radio that the formation be continued (R. 24, 36, 39). His ship was then flying "on" the TB-26 C, but a few moments later he inquired of Lieutenant Kinkopf whether, "you want to try it a while". Lieutenant Kinkopf replied in the affirmative and "dropped back" to enable the B-24 to assume the lead (R. 20-21). At this point the accused requested and was granted permission to "take over" the controls of the TB-26 C (R. 16, 21). He immediately proceeded to "close in" on the B-24 to a distance less than five hundred feet from its right wing and even less than one-half of its wingspan (R. 16, 38).

Both ships maintained their relative positions until they reached the shoreline. Desiring to terminate the formation, Lieutenant Wadman raised the right wing of the B-24 and "peeled" "off and down" at a sharp "angle of bank" to the left. This was the easier of two methods of signaling the end of a formation flight, the other being radio communication

(R. 17, 23-24, 26, 32-33, 36, 38, 40-41). Although a sharp turn might also properly be understood as a challenge to the pilot of the wing ship to prove his alertness and skill, this interpretation was not justified in the case of TB-26 Cs and B-24s which were too heavy for violent maneuvers (R. 27, 38). The only other possible construction would be as a warning of imminent collision (R. 23).

Although the sharp turn of the B-24 was intended by Lieutenant Wadman as a signal "to break off and go home", was promptly recognized as such by Lieutenant Kinkopf, and was completed over the shoreline beyond which formations were illegal, the accused, instead of pursuing an independent course, veered the TB-26 C to the left in pursuit of the lead ship (R. 17, 33, 36, 38). Just as both planes "leveled off" the right wing of the TB-26 C struck the left wing of the B-24. The TB-26 C immediately went into a "sort of a half roll", and Lieutenant Wadman lost aileron control of the B-24 which began to drop rapidly. With Lieutenant Kinkopf's assistance the TB-26 C was finally restored to an upright position and safely piloted back to the base. The B-24 crash-landed. Both the right wing of the TB-26 C and the left wing of the B-24 had ultimately to be replaced (R. 17-19, 25-26, 35, 37, 39-40).

4. After being apprized of his rights as a witness, the accused elected to remain silent (R. 44). No evidence was adduced on his behalf.

5. The Specification of the Charge alleges that the accused did, "on or about 9 October 1944, wrongfully violate paragraph 1a, AAF Regulation 60-16A, dated 15 April 1944 * * * by wrongfully piloting and flying a TB-26C airplane in such a reckless and careless manner as to endanger a friendly aircraft in the air * * *". This offense was laid under Article of War 96.

The regulation referred to provides that:

> "An AAF pilot will not operate aircraft in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, person, or property on the ground."

Army Air Forces Regulation No. 60-16D, dated 20 September 1944, similarly states that:

> "No aircraft will be operated in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons, or property on the ground."

In line with the policy originally enunciated in Army Air Forces Regulation No. 60-16A, Headquarters of the Army Air Forces Flexible Gunnery

School at Harlingen Army Air Field, Harlingen, Texas, had issued the following directive as of 15 May 1944:

> "Airplanes are forbidden to dive on or come nearer than 500 feet to any other airplane in the air unless by orders of competent authority or unless necessary in the interest of safety, or to render assistance, or engage in a strictly military mission."

The accused was or should have been familiar with all of these prohibitions against the negligent operation of military aircraft. In addition he had been specifically instructed at various meetings of pilots at his base that formation flying would not be countenanced except on duly authorized gunnery missions. Although there is some testimony in the record that this exception became inoperative immediately upon the cessation of firing, the more authoritative view advanced by the Director of Flying at Harlingen Army Air Field was that formations were permitted on the return trip until the shoreline was reached (R. 9, 30-31). In any event such evidentiary conflict as does exist on this issue is immaterial, for the conduct of the accused which is the gravamen of the Specification occurred entirely over land.

From the moment that he had taken over the controls he had "closed in" on the B-24. As an experienced pilot, fully oriented and indoctrinated with Army Air Forces flying regulations, he must have known that his foolhardy act was jeopardizing two valuable planes and the lives of their crews. In his self-conceit he may have believed that his skill and good judgment would preclude any accident. But this is precisely the mental attitude which the Army Air Forces Regulations are designed to extirpate. Certainly the accused meant no harm. At the worst he merely intended to display his courage and ability. Unfortunately for him he was not quite as apt a pilot as he conceived himself to be, and he must pay the penalty for his folly.

Although the "peeling-off" by the B-24 may have been susceptible of three different interpretations, its purpose and intent in the setting in which it occurred should have been obvious to the accused. The two planes had just reached the mainland, and the pilots of both were under a duty to break their formation. The accused was not ignorant of the rule forbidding the continuance of the formation beyond the shoreline, and he could not help but observe that they were passing over terra firma. Under the circumstances he must have anticipated that the lead ship would "peel-off" immediately. When the expected happened, he could not have failed to grasp its significance.

In the closing argument defense counsel attempted to exculpate the accused on the ground that Lieutenant Kinkopf was in complete charge of the plane. This contention is specious, for at the moment of collision

the accused was acting as the pilot. In that capacity he was in command of the ship. The Specification has been sustained beyond a reasonable doubt.

6. The accused, who is single, is about 23 years of age. After being graduated from high school, he was successively employed by various firms from September of 1940 to January of 1943 as a hotel desk clerk, a drill press operator, a turret lathe set-up man, a machine screw operator, and a turret lathe operator. He had enlisted service from 2 February 1943 to 11 March 1944 and was commissioned a second lieutenant on 12 March 1944. The records of the Federal Bureau of Investigation reveal that in 1937 he was detained for three days as a vagrant in Milwaukee, Wisconsin, that on 11 July 1939 he was placed on probation for one year in Wisconsin Rapids, Wisconsin, for burglary and grand larceny, and that on 11 September 1939 he was sentenced to a term of twelve to fourteen years in Green Bay, Wisconsin, for breaking and entering in the night time. He was subsequently discharged from confinement by the Governor of Wisconsin. On 18 September 1944 the accused was convicted by general court-martial of wrongfully piloting and flying a military airplane at an altitude less than 1000 feet above buildings in the town of Los Fresnos, Texas. He was sentenced to be restricted to the limits of his post for three months and to forfeit $100 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. Warner, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 278666 1st Ind
Hq ASF, JAGO, Washington 25, D. C.

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 Leonard M. Willan (O-714583), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of recklessly operating a military airplane so as to endanger the safety of another airplane in the air, in violation of Article of War 96. After evidence of one previous conviction for a violation of a flying regulation had been introduced, he was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. 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.

In a memorandum dated 4 May 1945, the Deputy Commander, Army Air Forces, after personally considering the evidence stated that:

"1. I have reviewed the record of trial of the above-named officer, who was sentenced to dismissal for operating an aircraft in a reckless manner so as to endanger friendly aircraft in the air. Engaged in an authorized formation flight over the Gulf of Mexico, he persisted in formation flying after reaching the mainland, which was contrary to explicit instructions, with which he was familiar. He continued the formation even after the lead ship had made a sharp turn away from him in an attempted signal to break. As he continued to follow the lead plane a mid-air collision took place. Both damaged planes were landed successfully, but the lead plane in the process of making a crash landing collided with the crash truck and ambulance which had been negligently parked on the runway in the path of the plane. As a result of this ground collision two enlisted men lost their lives.

"2. This officer was plainly guilty of a serious, wilful violation of flying regulations. I do not consider that his offense was the proximate cause of the deaths of the two men in the ground collision, which would probably not have resulted except for the intervening negligence of the drivers of the truck and ambulance. However, his offense was the direct cause of substantial damage to both the TB-26 he was piloting and the

other aircraft involved, a B-24. In mitigation of his offense it can be said that his formation flying was not uninvited. Indeed, the other pilot initiated the formation. Giving accused the benefit of all doubt, it may also be considered that he misinterpreted the sharp turn of the lead aircraft as a challenge to him to exhibit his skill in following a difficult maneuver, instead of a signal to break formation. He has admitted that, in following the lead plane after the turn, he was attempting to 'show off'. If the accused had an unmarred past record, and had clearly demonstrated salvage value as a flying officer, there would be basis for his retention in the service.

"3. At the time of this accident accused was under sentence of restriction and forfeiture of pay for an offense committed just two months previously. Although it appears from the staff judge advocate's review that accused's character and efficiency rating had been classified as 'very satisfactory', the opinion of the Harlingen Army Air Field Director of Flying is also quoted to the effect that accused is 'totally worthless' as a pilot, and has 'no sense of responsibility'. Examination of accused's 201 file discloses that, prior to his induction in the Army as an enlisted man, he was arrested numerous times by civil authorities for suspected burglary, grand larceny and other offenses. He was twice convicted of serious crimes and served one year in the State Reformatory at Green Bay, Wisconsin. Under all the circumstances I am of the opinion that this officer should be eliminated from the service.

"4. Therefore, I recommend that the sentence be confirmed and ordered executed".

I concur in the recommendation of the Deputy Commander, Army Air Forces, and also recommend that the sentence 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 confirmed. G.C.M.O. 273, 3 July 1945.)

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

SEP 10 1945
By ALBERT W. JOHNSON

SPJGK - CM 278779

19 APR 1945

UNITED STATES	35TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Susterseel, Germany, 9 February 1945. To be shot to death with musketry.
Private PAUL L. DELAMAR (38077319), Company K, 137th Infantry.	

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

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

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

CHARGE I: Violation of the 75th Article of War.

Specification: In that Private Paul L. Delamar, Company "K", 137th Infantry, being present with his company while it was engaged with the enemy, did, in the vicinity of Champenoux, France, on or about 17 September 1944, shamefully abandon the said company and seek safety in the rear, and did fail to rejoin it until about 26 October 1944 and after the engagement was concluded.

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

Specification: In that Private Paul L. Delamar, Company "K", 137th Infantry, did, without proper leave, absent himself from his station in the vicinity of Velaine, France, from about 28 October 1944 to about 1 December 1944.

He pleaded not guilty to and was found guilty of all Charges and Specifications, all members of the court present at the time the vote was taken concurring in the findings of guilty. Evidence of two prior convictions was introduced, both for absence without leave, one from 12 December 1943 to 20 December 1943, for which accused was sentenced to confinement at hard labor for 3 months (suspended by the reviewing authority) and forfeiture of $18 of his pay per month for 5 months, and the other from 8 March 1944 to 13 March 1944, for which accused was sentenced to confinement at hard

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labor for six months and forfeiture of $18 of his pay per month for six months. He was sentenced to be shot to death with musketry, all members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48. The Commanding General, European Theater of Operations, likewise approved the sentence and forwarded the record of trial for action by the President under Article of War 48.

3. Summary of evidence.

a. For the prosecution.

Accused was in the military service of the United States on and at all times subsequent to 17 September1944 and at the time of the trial, as a Private in Company K, 137th Infantry (R. 6,8,11,13,14).

Without objection, the prosecution offered in evidence a duly authenticated copy of the report of accused's organization, showing the following entries (Pros. Ex. A):

"28 October 1944
38077319 Delamar, Paul L Pvt
Fr Dy to AWOL as of 17 Sept 1944
Fr AWOL to Dy as of 26 Oct 1944

1 December 1944
38077319 Delamar, Paul L Pvt
Fr Dy to AWOL as of 28 Oct 1944
Fr AWOL to Dy 1 Dec. 1944"

Technical Sergeant Eugene Gorrono, Company K, 137th Infantry, testified that on 17 September 1944 he was a squad leader in his company which was located at that time at Champenoux, France. The accused had joined the company near St. Lo, and was assigned to Sergeant Gorrono's squad. However on 17 September, while accused was a member of the Sergeant's section, he had been assigned to duty with another squad (R. 8).

On 17 September the company was engaged in an attack and accused was present for duty. The attack had been checked by the enemy, most of Company I had been lost in the engagement, and Company K had then been committed. Sergeant Gorrono described the area as "pretty hot" about noon, "and they dropped a lot of shells around, artillery and mortar both. We all was nervous and scared, and Delamar was worse than anyone else." Accused remained with his section in the weapons platoon until the enemy barrage subsided, when Sergeant Gorrono "saw him getting scared and taking off." Accused had remained in position throughout the barrage, but immediately thereafter picked up his equipment and withdrew, going to the rear. Thereafter the company

moved forward and reached its objective. At the time accused left, neither he nor anyone in the unit had permission to go to the rear. He did not rejoin his company after 17 September (R. 9). All members of the mortar section, including the accused, had been briefed on the tactical situation, and, at the time accused left, the enemy was occupying a woods which was located on the opposite side of an open field, and the members of the section knew that the woods was the unit objective. Accused was the only soldier seen to withdraw from the area at the time he went to the rear (R. 10).

Technical Sergeant Webster Phillips, Company K, 137th Infantry, testified that he was a squad leader in accused's section on 17 September 1944. The accused was not a member of Sergeant Phillips' squad, but Sergeant Phillips knew accused and saw him with his company on 17 September before the attack. The witness described the action on 17 September as follows:

> "Well, we moved up to the edge of a field in the woods and were supposed to cross this field, and I would say it was around 11 o'clock we got this artillery barrage in the morning, and I didn't see nothing more of him."

The entire mortar section was checked and accused and another member of the section could not be found. That morning all members of the company had been informed of the mission for the day. The witness did not again see accused until the day of the trial. He did not know of anyone giving accused permission to leave (R. 11,12).

Captain William E. Sinex, Commanding Service Company, 137th Infantry, testified that accused was present with Service Company, then situated near Velaine, France, on 28 October 1944. Accused was not a member of Service Company but had been brought there by the Assistant Adjutant for restraint to the company area. The accused left Service Company about 28 October, without permission, returning thereto the latter part of December (R. 13) when he was brought in by the military police (R. 14).

On 26 December 1944, accused, after a full explanation of his rights, voluntarily made the following statement to the Investigating Officer, Major Mylo L. Heen (R. 14,15; Pros. Ex. B):

> "On or about 17 September 1944 we were in the vicinity of Bissoncourt, France. We were digging in when an enemy artillery barrage landed around us. I was very nervous because the day before we had been heavily shelled. I left the front line and went back to the medics and talked to them. They told me that they couldn't do anything for me unless I was wounded. I couldn't go back to the company as I couldn't stand the shelling. I left the medics and went to Nancy. I reached Nancy the 18th

of September and turned myself over to the military police. The military police called Jury and asked if it would be all right for me to guard some bedrolls of Company I, 137th Infantry, while the regular guard was in the hospital. The military police took me out to a house near Tomblaine and told me that I was to guard the bedrolls. The next day Pvt. Kicinski of Company I returned from the hospital and we guarded the bedrolls for about five weeks. We were visited by the military police for the first three weeks, so after the fifth week I went into Nancy and talked to the military police and they took me over to the 35th Division military police. They took me the 137th Infantry anl Captain Freidman sent me to Service Company. I guided a truck to the bedrolls and we brought the rolls back to Service Company. The next evening I left Service Company and went to Nancy. I left Nancy the next day and went to Paris and was picked up about 2300 hours that night. I was kept in the stockade about 3 days, then to the 19th Replacement Depot for 4 days, then to the 17th Replacement Depot for about 2 weeks, and then in the 38th Replacement Depot for about 5 days. I was returned to the Service Company about 1 December 1944."

b. For the defense.

Defense counsel announced that accused had had his rights as a witness explained to him and elected to remain silent. Thereupon accused was interrogated by the President of the court, and expressed his understanding of his rights as a witness and his desire to remain silent. No evidence was introduced by the defense and no unsworn statement was made by or on behalf of the accused.

4. The evidence clearly supports the findings of guilty. No effort was made to contradict or question the proof of absence without leave established by the extracts from the morning reports of accused's organization and the testimony of the Commanding Officer of the Service Company of the 137th Infantry. Accused's admission to the Investigating Officer corroborated the proof of accused's initial absence on 28 October, but his statement to that officer that two or three days later he was apprehended by the military authorities and processed through replacement units until his return to the Service Company about 1 December 1944 was not supported by any evidence whatsoever. The Board, therefore, is of the opinion that the record of trial is legally sufficient to sustain the finding that accused was absent without leave from his station from 28 October 1944 to 1 December 1944, in violation of Article of War 61.

Article of War 75 provides in pertinent part as follows:

"Any officer or soldier who, before the enemy, misbehaves himself, runs away, or shamefully abandons * * * any fort * * * or other command which it is his duty to defend * * * shall suffer

Classification
cancelled

death or such other punishment as a court martial may direct."

The Specification of Charge I (which follows literally suggested form No. 46, p. 244, MCM 1928) plainly sets forth an offense under this Article. The technical legal questions that may be raised as a result of the use of this form are met and fully and properly disposed of as follows in CM ETO 1249, Marchetti, in which an identical offense, except as to place and dates, was charged against the accused therein:

"The evidence in this case establishes the indisputable fact that accused, when his squad was advancing toward the enemy in the direction of Villa Rosa, Sicily, deliberately and without authority ran away from it. The evidence is therefore such as would consistently and appropriately support this averment:

> 'Marchetti * * * being present with his company while it was engaged with the enemy ran away from his company and did not return, etc.'

There was an apparent endeavor on the part of the draughtsman to lay his allegations in such form as to bring the same under the following denouncement of the statute:

> 'Any * * * soldier who, before the enemy * * * shamefully abandons * * * any * * * command which it is his duty to defend' (Underscoring supplied).

The pleading, however, fails to include the highly relevant allegation 'which it is his duty to defend'. It is therefore manifest that if the legal sufficiency of the record depends upon this provision of the Article only, a serious question would be presented as to whether the specification states facts constituting an offense under this particular clause of the Article. Fortunately, however, the allegations of the Specification are sufficiently broad to avoid this dilemma. It is alleged that Marchetti 'did shamefully abandon the said company, and seek safety in the rear'. Synonyms of 'abandon' are: leave, quit, renounce, resign, surrender, relinquish, vacate, remit, discard, forswear (Webster's New International Dictionary - 2nd Ed.). Judicially 'abandon' has been defined as totally withdrawing oneself from an object; laying aside all care for it; leaving it altogether to itself (Pidge v. Pidge, 44 Mass. (3 Meto.) 257,265. Cf: 1 W. & P. Perm.4). The Specification's allegations are beyond doubt equivalent to the allegation 'did run away from his company'. Interpreted in such manner the Specification clearly alleged facts constituting an offense under the clause of the Article which denounces as an offense the act of a soldier who 'before the enemy runs away'.

"(b) In order to constitute an offense under the 75th Article

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of War the various acts of dereliction of duty by an accused must be committed 'before the enemy'. Winthrop comments as follows upon its meaning:

> '"Before the enemy." This term is defined by Samuel as - "in the face or presence of the enemy." It is not necessary, however, that the enemy should be in sight. If he is confronting the army or in its neighborhood, though separated from it by a considerable distance, and the service upon which the party is engaged, or which he is especially ordered or properly required by his military obligation to perform, be one directed against the enemy, or resorted to in view of his movements, the misbehaviour committed will be "before the enemy" in the sense of the Article.' (Winthrop's Military Law & Precedents - Reprint - pp. 623-624).
>
> 'Whether a person is "before the enemy" is not a question of definite distance, but is one of tactical relation'. (Manual for Courts-Martial 1928, par. 141a, p. 156).

"The Specification fails to allege in the words of the statute that accused was 'before the enemy' when he ran away from his company. However, it does allege that he was 'present with his company while it was engaged with the enemy'. The phrase 'engaged with the enemy' is properly construed as an allegation of place as well as time. It is identical in meaning with 'before the enemy' (CM, France, 24 May 1919, OAJAG 201-4170, Samuel Stone; CM France, 28 January 1919, OAJAG 201-1200, Francis Slagle). The Specification, therefore, alleges the crucial fact that accused was 'before the enemy' when he 'ran away'."

The evidence in the instant case without contradiction shows that Company K, 139th Infantry, to which accused belonged and with which he was present on 17 September 1944, was engaged in an attack on an enemy position in the woods near Champenoux, France, and had been temporarily checked at the edge of a field in the woods by a heavy enemy artillery and mortar barrage. Accused remained with his section until the barrage subsided. He was then seen to pick up his equipment, and, without authority, go to the rear, abandoning his company entirely and withdrawing to a place of safety. He did not rejoin the company until 26 October. Like all other members of his company, he had been present that morning when the mission of the company was explained. Later that day, after accused's unauthorized departure, the company moved forward and reached its objective. Consequently, it is obvious that accused was guilty of voluntarily and consciously running away from and leaving his company

Classification
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when engaged with the enemy and going to the rear, without authority, a course of misbehaviour with which he is, in effect, charged and which unquestionably constitutes an offense under Article of War 75. (Winthrop (2d Ed.) p. 623; CM ETO 1249, Marchetti, and cases therein cited; CM ETO 2205, La Fountain; CM ETO 1404, Stack.)

5. The Charge Sheet shows that accused is 25 years of age, was inducted on 8 December 1941, and was assigned to the 137th Infantry on 13 July 1944. According to the report of the Division Psychiatrist, on file in the record but not offered in evidence, accused stated that he had married in 1943, after a two weeks' courtship, that he has no children, and that his civilian occupation had been farmer and truck driver.

6. 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 course of the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. The death penalty is authorized upon a conviction of a violation of Article of War 75.

Tony G. Zam, Judge Advocate.
Earle E. Blum, Judge Advocate.
Thomas Mayne, Judge Advocate.

(16)

SPJGK - CM 278779 1st Ind. 15 MAY 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 Private Paul L. Delamar (38077319), Company K, 137th 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. The accused was found guilty of shamefully abandoning his company on 17 September 1944 while engaged with the enemy and seeking safety in the rear and of failing to rejoin the company until 26 October 1944 after the engagement had been concluded (Specification of Charge I) in violation of Article of War 75, and of being absent without leave from 28 October 1944 to 1 December 1944 (Specification of Charge II) in violation of Article of War 61. He was sentenced to be shot to death with musketry. All members of the court present at the time the vote was taken concurred in the findings of guilty and in fixing the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The Commanding General, European Theater of Operations, likewise approved the sentence and forwarded the record of trial for action by the President under Article of War 48. The evidence shows that Company K, 137th Infantry, of which accused had been a member for some weeks, was engaged in an attack on an enemy position in the woods near Champenoux, France, on 17 September 1944. Like all other members of the company accused had been advised of the company's mission. Following an enemy barrage, which held up the advance, accused ran away and sought safety in the rear, not returning until 26 October. Later, on September 17, after accused's departure, the company successfully reached its objective. On 28 October 1944, while temporarily in restraint with the Service Company of the 137th Infantry, accused absented himself without leave and remained absent until about 1 December. In a statement to the Investigating Officer accused imputed his misconduct to his nervousness, induced by the heavy artillery barrage that day and the preceding day. The psychiatric diagnosis of accused is "mental deficiency, borderline type, with psychopathic personality." Accused had two previous convictions by special court-martial for absences without leave for eight and five days respectively. While General Eisenhower through his approval has impliedly recommended the confirmation of the sentence, since the date of his approval, by cablegram to the War Department dated 9 May 1945, he has recommended that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life. I concur in that recommendation and recommend

(17)

that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, 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. Drft ltr sig S/W
3. Form of Ex. action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for life. G.C.M.O. 319, 9 July 1945).

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

SPJGH-CM 278796

8 MAY 1945

UNITED STATES	OKLAHOMA CITY AIR TECHNICAL SERVICE COMMAND
v.	Trial by G.C.M., convened at Tinker Field, Oklahoma City, Oklahoma, 31 March 1945. Dismissal, total forfeitures and confinement for three (3) years.
Second Lieutenant NUNZIO E. STALLONE (0-859535), Air Corps.	

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

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

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

CHARGE: Violation of the 93d Article of War

Specification 1: In that Second Lieutenant Nunzio E. Stallone, Section A, 4136th AAF Base Unit (Area Command), did, at Tinker Field, Oklahoma, on or about 17 February 1945, feloniously take, steal and carry away about forty-nine dollars ($49.00), lawful money of the United States, the property of Lieutenant W. D. Lindholm.

Specification 2: In that Second Lieutenant Nunzio E. Stallone, * * *, did, at Tinker Field, Oklahoma, on or about 22 February 1945, feloniously take, steal and carry away about four dollars ($4.00), lawful money of the United States, the property of Major Albert L. Watkins.

Specification 3: In that Second Lieutenant Nunzio E. Stallone, * * *, did, at Tinker Field, Oklahoma, on or about 22 February 1945, feloniously take, steal and carry away a seventeen jewel Waltham yellow gold wrist watch, value about thirty dollars ($30.00), property of Major Albert L. Watkins.

Specification 4: In that Second Lieutenant Nunzio E. Stallone, * * *, did, at Tinker Field, Oklahoma, on or about 22 February 1945, feloniously take, steal and carry away about seven dollars ($7.00), lawful money of the United States, the property of Lieutenant William Grimes.

Specification 5: In that Second Lieutenant Nunzio E. Stallone, * * *, did, at Tinker Field, Oklahoma, on or about 1 March 1945, feloniously take, steal and carry away about twenty dollars ($20.00), lawful money of the United States, the property of Lieutenant J. B. Holloway.

Specification 6: In that Second Lieutenant Nunzio E. Stallone, * * *, did, at Tinker Field, Oklahoma, on or about 10 March 1945, feloniously take, steal and carry away about eleven dollars ($11.00), lawful money of the United States, the property of Captain R. L. Murdock.

He pleaded not guilty to and was found guilty of the Charge and all Specifications thereunder. No evidence of any previous conviction was introduced. He was sentenced to dismissal, total forfeitures and confinement at hard labor for three (3) 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:

The prosecution introduced into evidence, without objection, two pre-trial, voluntary statements signed by accused under oath, one dated 24 March 1945 (Pros. Ex. 1) and the other dated 26 March 1945 (Pros. Ex. 2). The first statement was signed by the accused at approximately 10 p.m. on 24 March 1945 in the Intelligence Office at Tinker Field, Oklahoma. The only persons present besides the accused were Captain Edward L. Bartlett, Chief of the Investigating Branch, Intelligence Office, Tinker Field, and P. M. Juvenal, a civilian investigator attached to the Intelligence Office. Their first conversation with the accused on the subject of the larcenies under investigation had been commenced at approximately 6:45 p.m. on the same day. At the beginning of the conversation, and before any questions regarding the larcenies were asked, Juvenal said to accused "Lieutenant, of course you don't have to talk, but if you do talk, anything you say can be held against you." No threats were made, nor was any hope of reward for the making of a statement held out. At 8 p.m. accused signed a "waiver of search" and he and Juvenal thereupon left the office and did not return until 9:15 p.m. Captain Bartlett did not accompany them. Between the beginning of the conversation at 6:45 p.m. and the signing of the statement at 10 p.m., Captain Bartlett was present with

accused and Juvenal approximately 1 3/4 hours. He was called as a witness, but Juvenal was not. Although Captain Bartlett's testimony on the point is not wholly clear, a reasonable inference from it is that the 24th Article of War was not read to the accused or explained to him until immediately prior to the signing of the statement (R. 3-5, 7-11).

The balance of the prosecution's evidence will be summarized under the several Specifications.

Specification 1:

On 17 February 1945 accused entered the locker of Lieutenant W. D. Lindholm, in the Base Gymnasium at Tinker Field, without authority and removed therefrom Lieutenant Lindholm's wallet containing, according to accused's first pre-trial statement, either $43 or $49 (Pros. Ex. 1). He used the money for his own benefit and threw the wallet away near the center of Oklahoma City. The locker was not locked. Lieutenant Lindholm testified that the wallet contained $69 or $70 at the time it was taken (R. 25, 26; Pros. Ex. 1).

Specifications 2 and 3:

On 22 February 1945 accused entered the locker of Major Albert L. Watkins, in the above-mentioned gymnasium, without authority and removed therefrom Major Watkins' 17 jewel Waltham wrist watch, worth $25 or $30, and his wallet containing $4. Accused removed the money from the wallet and threw the wallet away in Oklahoma City. He then pawned the watch at a pawn shop in Oklahoma City for $12. After admitting his theft of the watch and the money, accused went with the investigator to the pawn shop and redeemed the watch, turning it over to the investigator. The locker was unlocked when accused entered it (R. 9, 20-23; Pros. Exs. 1, 2).

Specification 4:

On 22 February 1945 accused entered the locker of Lieutenant William Grimes, in the above-mentioned gymnasium, without authority and removed therefrom Lieutenant Grimes' wallet containing $7. He removed the money from the wallet and threw the wallet away in Oklahoma City. This locker was located in the same section of the gymnasium in which were located the lockers of the accused and Major Watkins, respectively (R. 27; Pros. Ex. 1).

Specification 5:

On 1 March 1945 accused entered the locker of Lieutenant J. B. Holloway, in the above-mentioned gymnasium, without authority and removed

therefrom Lieutenant Holloway's wallet containing $20 or $24. He removed the money from the wallet and threw the wallet away in Oklahoma City (R. 28; Pros. Ex. 1).

Specification 6:

On 10 March 1945 accused entered the locker of Captain R. L. Murdock, in the above-mentioned gymnasium, without authority and removed from Captain Murdock's wallet $11. This money "was taken from the confines of this field" and used by accused for his own benefit (R. 29-30; Pros. Ex. 1).

4. Evidence for the defense:

No witnesses were called by the defense.

Accused, after having his rights as a witness explained to him, elected to testify under oath in his own behalf. He testified that he was not warned as to his rights until "just prior to signing the statement" and that no one had taken notes during his conversation with Juvenal and Captain Bartlett (R. 31). On cross-examination, however, he identified eight longhand corrections in the instrument and admitted that he personally made and initialed each of them. He further admitted on cross-examination that the statements of fact made in the instrument were "true and correct" to the best of his knowledge (R. 32).

At the conclusion of accused's testimony, defense counsel made a motion "that the court disregard and remove from the record" accused's sworn statement "and all statements associated with it, on the grounds that the accused was not apprised of his rights except immediately prior to the signing of this statement when everything was just about completed and all Mr. Juvenal had to do was type up a statement, using his own wording, and get the accused to sign it" (R. 32). The motion was denied (R. 33).

5. Since accused's confession, set out in Prosecution's Exhibits 1 and 2, is complete and the required corpus delicti is amply supplied in the testimony of the several victims of accused's thievery, the only question requiring consideration is whether the court erred in denying defense counsel's motion to exclude the confession. For the reasons stated below, the Board of Review is of the opinion that it did not.

The prosecution's evidence shows that when accused was first approached by the two investigators one of them warned him that he was not required to talk and that anything he might say might be used against him. It further appears from such evidence that no threats were resorted to for the purpose of inducing the making of a statement and that no hope of any reward was held out. Under these

circumstances, it could hardly be said that the failure of the investigators to use the specific language of Article of War 24 until immediately prior to the signing of the sworn statement (if there was such a failure) requires that the confession be excluded.

Since the larcenies described in Specifications 2 and 3 were committed in the same locker and at the same time it would have been better practice to have charged them as a single offense (MCM, 1928, par. 149g). Also, it would have been better practice to have included in the same offense the larceny described in Specification 4, since it was committed at the same time the larcenies described in Specifications 2 and 3 were committed and in the same section of lockers (MCM, 1928, par. 149g). No injury resulted to accused's rights, however, as a consequence of these three larcenies having been charged separately, since the validity of the sentence is in no way brought in question.

The Board of Review is of the opinion, therefore, that the record of trial amply supports the findings of guilty of the Charge and all Specifications thereunder.

6. The records of the War Department show that accused is 29 years of age and married. He is a high school graduate and has had 3½ years of college training. In civilian life he worked for two years as a clerk for a dry goods firm. He was inducted into the Army on 2 February 1942 and was commissioned a second lieutenant, AUS, on 18 February 1943 upon graduation from the Army Air Forces Technical School, at Yale University, New Haven, Connecticut.

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

Thomas N. Tatty, Judge Advocate

William H. Lambrell, Judge Advocate

Robert C. Trevethan, Judge Advocate

SPJGH-CM 278796 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 Second Lieutenant Nunzio E. Stallone (0-859535), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of six acts of larceny, in violation of the 93rd Article of War. He was sentenced to dismissal, total forfeitures and confinement at hard labor for three (3) 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. The Board 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. I concur in that opinion. During the months of February and March, 1945, while accused was stationed at Tinker Field, Oklahoma City, Oklahoma, he rifled the lockers of five different officers, in the Base Gymnasium at said Field, and stole therefrom, respectively, items of property and money ranging in value from $7 to $49. These larcenies occurred on four different days. There appear to be no extenuating or mitigating circumstances. This officer is plainly a confirmed thief. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution. I further recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

4. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation 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 forfeitures remitted. G.C.M.O. 313, 7 July 1945).

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

SPJGK - CM 278891

10 MAY 1945

UNITED STATES	)	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.	)	
Second Lieutenant RUSSELL L. BACON (0-732435), Air Corps.	)	Trial by G.C.M., convened at Hendricks Field, Sebring, Florida, 26 and 27 March 1945. Dismissal, total forfeitures, and confinement for one (1) year.

OPINION of the BOARD OF REVIEW

LYON, HEPBURN and MOYSE, Judge Advocates.

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

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

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

Specification 1: In that Second Lieutenant Russell L. Bacon, Air Corps, Army Air Forces Pilot School (Specialized 4-Engine), Hendricks Field, Sebring, Florida, did, in the month of November 1943, by personally making and issuing checks drawn on and paid out of his bank account in the National Bank of Fort Sam Houston, San Antonio, Texas, wrongfully and unlawfully convert to his own use and benefit, the proceeds of a Class "E" Allotment check for the months of August, September and October 1943, paid by the Treasurer of the United States in the amount of Three Hundred ($300.00) Dollars, to the said National Bank of Fort Sam Houston, San Antonio, Texas, as Allottee, for deposit to the credit of the account of the said Second Lieutenant Russell L. Bacon, said allotment check having been erroneously issued, delivered and made payable to the said National Bank of Fort Sam Houston for deposit to the credit of Second Lieutenant Russell L. Bacon's said account, he, the said Second Lieutenant Russell L. Bacon then knowing that the said Class "E" Allotment check had been erroneously issued, delivered and made payable to the said National Bank of Fort Sam Houston for deposit to his said account, and that he had no right, title or authority to receive, retain or use the proceeds of said Class "E" Allotment check.

Note: Specifications 2 to 13 are identical with Specification 1 except as to the amount alleged to have been converted, which, in each of the twelve specifications is declared to be $100, and except as to the month for which the payment was made and the month or months of conversion, as follows:

	Month for which check was issued	Month of Conversion
Specification 2	November 1943	December 1943
Specification 3	December 1943	January 1944
Specification 4	January 1944	February 1944
Specification 5	February 1944	March 1944
Specification 6	March 1944	April 1944
Specification 7	April 1944	May 1944
Specification 8	May 1944	July and August 1944
Specification 9	June 1944	July and August 1944
Specification 10	July 1944	August 1944
Specification 11	August 1944	September 1944
Specification 12	September 1944	October 1944
Specification 13	October 1944	November 1944

Specifications 14 to 20, including Specification 17 as formally amended: (Findings of not guilty).

Specification 21: (Finding of not guilty under par. 71d, MCM).

Specification 22: In that Second Lieutenant Russell L. Bacon, * * *, did, on or about 17 December 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Tampa Terrace Hotel, Tampa, Florida, a certain check in words and figures as follows, to wit:

December 17 1944

National Bank of Fort Sam Houston, San Antonio, Texas.
Write name of your bank & where located on this line

PAY TO THE ORDER OF Tampa Terrace Hotel -------- $25.00

Twenty five and no/100 ---------- DOLLARS
100

/s/ Russell L. Bacon
2nd Lt. O-732435

he, the said Second Lieutenant Russell L. Bacon, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of said check, and by means thereof, did fraudulently obtain from the Tampa Terrace Hotel, Tampa, Florida, Twenty-five ($25.00) Dollars.

Specification 23: In that Second Lieutenant Russell L. Bacon, Air Corps, * * *, did, on or about 8 August 1944, wrongfully fail to maintain a sufficient bank balance in his account with the National Bank of Fort Sam Houston, San Antonio, Texas, to meet payment of a certain check made and uttered by the said Second Lieutenant Russell L. Bacon, on or about 8 August 1944, to the Gordon Hotel, Albany, Georgia, in the sum of Ten ($10.00) Dollars.

Note: Specifications 24 to 31 are identical in all material respects with Specification 23, except as to dates of execution and utterance payees and amounts, as follows:

	Date	Payee	Amount
Specification 24	22 August 1944	Gordon Hotel	$25.00
Specification 25	4 September 1944	Gordon Hotel	25.00
Specification 26, as amended	16 October 1944	The Exchange	75.00
Specification 27	20 October 1944	The Exchange	100.00
Specification 28	23 October 1944	The Exchange	30.00
Specification 29	23 October 1944	The Exchange	35.00
Specification 30	15 August 1944	Popular Dry Goods Company	116.00
Specification 31	17 December 1944	Tampa Terrace Hotel	25.00

CHARGE II: (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Defense counsel moved to strike out Specifications 1 through 13 of Charge I on the grounds that those Specifications did not state any crime or offense (R. 19). Upon denial of this motion accused pleaded not guilty to Specifications 1 through 22 of Charge I (including Specification 17 as amended) and to Charge II and its Specifications, and guilty to Charge I and Specifications 23 through 31 thereof, including Specification 26 as amended. A motion for a finding of not guilty of Specification 21 of Charge I under the provisions

of paragraph 71d of the Manual for Courts-Martial was sustained, and a similar motion as to Specifications 1 to 13 of Charge I was denied. He was found guilty of Specifications 1 to 13 and Specifications 22 to 31 of Charge I, including Specification 26, as amended, and of Charge I, and not guilty of Specifications 14 to 20 of Charge I and of Charge II and its Specifidations. 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 one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

Accused was in the military service at the time of the trial (R. 45, par. 1a of Ex. 1), and on the various dates on which he is alleged to have committed the offenses with which he is charged (Exs. 2 to 20, 28 to 35).

a. Specifications 1 to 13, Charge I (Converting funds erroneously deposited to accused's credit).

For the prosecution.

On 3 November 1942, accused executed a W.D.,A.G.O. Form No. 29, "Authorization for Allotment of Pay," whereby he authorized a Class "E" Allotment of his pay to the National Bank of Fort Sam Houston, San Antonio, Texas (hereinafter for brevity referred to as "the bank") for an indefinite period, commencing 1 November 1942, in the amount of $100, to be deposited to accused's credit in the bank (Exs. 2, 22 and 23). This allotment was required by the bank in connection with a loan of $600 which accused sought and obtained from it. Out of the $100 to be received for and deposited to the credit of the accused, $50 each month was to be applied to the reduction of the loan by charging that amount against accused's account. The net proceeds of the loan, amounting to $533.50, were credited to accused's account on 4 November 1942. Subsequently additional loans were made to accused, one for $600 on 25 March 1943, as a result of which he was credited with $555 and two on 2 June 1943 for $50 each, as a result of which his account was credited with $47.25 (later increased by a correction of $1.00) and $48.50. A total of $2500 was received through the Class "E" allotments and credited to accused's account, $100 being received on 5 January 1943, $100 on 12 January 1943, and $100 during each month thereafter up to and including 7 December 1944, except during the months of September and October 1943, in which nothing was received and the month of November 1943, in which $300 was received. With the exception of the proceeds of the loans and the allotment checks no deposits were made by accused. The repayment of the two $600 loans was completed on 5 April 1943 and 3 March 1944, respectively, and of the two $50 loans on 9 August 1943 and 23 November 1943, respectively. At

no time "from November 1942 up to and including November 1944" did the accused notify the bank that he had discontinued or was discontinuing his allotment. On the contrary on 4 October 1943 accused telephoned the bank that the allotment should come in and that he had not discontinued it. The bank, which had not received the allotment which should have been received in September, thereupon wrote to the Office of Dependency Benefits that accused had not discontinued his allotment and requested information concerning its status. On 8 November 1943 that office notified the bank in part as follows:

> "A special payment to adjust arrears for the months of August through October 1943, amounting to $300 will be mailed shortly * * * Beginning November, 1943, payments will be made at the rate of $100.00 a month."

At that time accused's indebtedness to the bank amounted to $400. The Office of Dependency Benefits duly forwarded the check for $300, which was credited to accused's account on 23 November 1943 (Ex. 23).

It was stipulated that accused had executed a "Notification of Discontinuance of Allotment" on W.D., A.G.O. Form No. 30, a photographic copy of which was accepted in evidence as Exhibit 3, terminating an allotment of $100.00 to the bank as of 1 October 1943, and that at the time it was signed by accused the date "July 31" which appears above the typewritten effective date of discontinuance, "Oct. 1" did not appear on the form (Exs. 1 and 3). The allotment sought to be discontinued is described as one for $100 per month to the National Bank of Fort Sam Houston, commencing "May 1943," and the effective date of discontinuance, as it originally appeared, as "Oct. 1 1943." Below accused's signature appears the following, signed by "John C. Toole, Capt., A.C., O/C Allotments":

> "This officer was last paid to include Sept. 30, 1943, and allotment will be continued on pay (vouchers/rolls) until acknowledgment is received of this notification, as required by A.R. 35-5520." (Ex. 3)

This notice was received by the Office of Dependency Benefits, which acknowledged receipt on 8 November 1943 on Form W.D., O.D.B. Form No. 508, mailed to accused at the address shown on his notice of discontinuance. In actuality there was no allotment by accused payable to the National Bank of Fort Sam Houston, "commencing May 1943," as described in the notice of discontinuance. It was not until 12 December 1944 that a correct and complete request for a discontinuance of the original allotment, commencing 1 November 1942, was received by the Office of Dependency Benefits. After the Office of Dependency Benefits had mailed to accused its acknowledgment of receipt of the first notice of discontinuance of the allotment, according to the testimony of its representative, Lieutenant Colonel Howard M. Nelson, it "erroneously issued, delivered and made payable to said bank for deposit to the credit of Lt. Russell Bacon" Class "E" Allotment checks at the rate of $100 per month from "31 July 1943

through November 1944." This witness stated that the date "July 31," appeared to have been inserted by the Office of Dependency Benefits in lieu of "Oct. 1," probably because a search of the records at the time showed that no payments had been made subsequent to 31 July 1943 (Ex. 22).

It was stipulated (Ex. 24) that during the month of February 1944, accused forwarded the following telegrams to the bank:

"DESIRE INFORMATION ON EIGHT HUNDRED DOLLAR LOAN WILL INCREASE ALLOTMENT OR USE PRESENT ENTIRE ALLOTMENT TO REPAY. PLEASE CANCEL CHECKING ACCOUNT USE ALLOTMENT TO PAY OFF LOAN. ADDRESS WIRE 722CC NAAC NASHVILLE TENN. THANK YOU."

"DEAR SIRS I WANT TO CANCEL MY CHECKING ACCOUNT AND BORROW EIGHT HUNDRED DOLLARS HAVING MY ENTIRE ALLOTMENT PAY THE LOAN. IF SATISFACTORY WOULD YOU SEND NECESSARY PAPERS MY ADDRESS CAMDEN S C . THANK YOU."

Statement of accused's account with the bank from 23 November 1943 through 9 November 1944, showing the deposit of $300 on the former date and a deposit of $100 each month thereafter up to and including the latter date ($100 was also deposited on 7 December 1944 (Ex. 23)) was admitted as Exhibit 21 without objection and partly by stipulation (R. 25, Ex. 1). The assistant cashier of the bank, in response to the request that he state the dates when bank statements were mailed by the bank to the accused, the periods they covered, and the addresses to which they were sent, gave the following information (Ex. 23):

"DATE STATEMENT MAILED	PERIOD COVERED
November 28, 1942	11-4-42 to 11-21-42
December 28, 1942	11-21-42 to 12-26-42
February 27, 1943	11-26-42 to 2-23-43
March 29, 1943	2-27-43 to 3-26-43
April 28, 1943	3-26-43 to 4-26-43
May 27, 1943	4-26-43 to 5-26-43
August 25, 1944	5-27-43 to 8-23-44
September 26, 1944	8-23-44 to 9-25-44
October 26, 1944	9-25-44 to 10-25-44
November 27, 1944	10-25-44 to 11-22-44
February 26, 1945	11-22-44 to 12-21-44

Statements from September 28, 1943, to July 31, 1944, were mailed to 470th Bomb. Sqdn, G.A.A.B., Greenville, South Carolina. From July 31, 1944, to Feb. 26, 1945 the statements were mailed to Turner Field, Albany, Ga."

According to the bank statement (Ex. 31) when accused's account was credited on 23 November 1943 with the proceeds of the $300 allotment check received from the United States there was no balance to his credit. During the month of November his account was charged with checks totaling $226.64, leaving a balance of $73.36 at the end of that month, which was augmented by a deposit of $100 on 8 December. Checks totaling only $51 were charged against the account in December, leaving a balance of $122.36 at the end of that month. The account was debited with a withdrawal of $100 on 4 January 1944 and credited with a deposit of $100 on 7 January. Before the end of the month accused's account was overdrawn. Despite deposits of $100 in February, March and April, accused's account was likewise overdrawn in each of those months. $100 was deposited in May, and at the end of that month there appeared a balance to accused's credit of $3.24, although checks totaling $263.50 had been dishonored by the bank during that month because of lack of sufficient funds (Ex. 23). There was only one withdrawal of $1.00 during June, so that with the deposit of $100 credited on 7 June there was a balance at the end of that month of $102.24, increased during July to $202.24 by the deposit of $100 on 6 July. Checks totaling $101.90 were charged against the account in July, leaving a balance at the end of that month of $100.34. Despite the deposit of $100 on 7 August, the account was again overdrawn before the end of that month. The same situation developed in September and October. On 9 November there was a deposit of $100 and on the same day a withdrawal of $70, which, together with an overdraft of $1.16 from the preceding month, reduced accused's balance to $28.84. The statement does not show the date in November on which accused overdrew his account, but checks totaling $75 were dishonored by the bank during that month because of insufficient funds (Ex. 23).

By stipulation (Ex. 1) there were accepted in evidence 17 pay and allowance vouchers on the regular War Department form, signed by accused between July 1943 and October 1944 (Exs. 4 to 20). That for July 1943 properly shows a deduction of $100 as a Class "E" Allotment. No such deduction appears on the August voucher. On the September and October vouchers appears a deduction for a Class "E" Allotment of $150 for each month. (As will appear from accused's testimony, in addition to the $100 allotment in favor of the bank, accused had made an allotment of $50 to the South Carolina National Bank, Florence, South Carolina.) However, in November 1943, accused executed a voucher for $250, claiming a refund for that amount, described as having been "erroneously deducted on" his September and October vouchers. To this voucher were attached acknowledgments of receipt of accused's notices of discontinuance of his allotment of $100, effective 31 July 1943, and of his allotment of $50 effective 31 September 1943. No deduction for Class "E" allotment was made on the twelve vouchers which accused executed for the months of November 1943 to October 1944. It was further stipulated that the amount for which the seventeen vouchers were drawn by accused were paid by the United States to and "receipted by" him.

There were introduced in evidence as Exhibits 25 and 26 statements made by the accused to the Investigating Officer, First Lieutenant Norman F. Carroll, on 1 December 1944 and 4 February 1945. Two other statements made to the same officer were not offered, although it was stipulated that four statements had been made (Ex. 1). Pertinent to the specifications presently being considered, accused admitted that he had received statements from the bank for the period from May 29, 1943 to February 27, 1944, from February 18, 1944, to July 26, 1944, and from July 28, 1944, to August 23, 1944, all showing the deposit of the monthly allotment of $100, and that he knew that he was receiving the $100 allotment all through 1944. He contended, however, that he was somewhat confused, as there was a period when the allotment was not in effect. He admitted having executed the original allotment of $100 to the bank, but stated that he had discontinued it and that he had signed another authorization for the allotment "to start again." He could not say when he had done this. He was unable to explain or account for his failure to deduct the allotment from his pay vouchers. All the vouchers (Exs. 4 to 20) had been signed by him and he had received the full amounts thereof. In asking for the refund of $250 for allotment deductions claimed to have been erroneously made, he attached to his voucher the two acknowledgments of notice of discontinuance of his allotment on W.D.O.D.B. Form No. 508, one showing 31 July 1943 as the effective date of the discontinuance of the $100 to the Fort Sam Houston Bank, and the other 30 September 1943 as the effective date of the discontinuance of the $50 allotment to the South Carolina Bank. Accused stated that he was under the impression that the date of discontinuance of the $100 allotment was October 31, 1943, and that although he received bank statements and made no deposits personally the first he knew that the allotment was still going to the bank was in November or December 1944. Accused stated that he had "no intention to defraud" and that upon learning that the allotment had "erroneously been going to [his] account immediately reimbursed the Government the full amount that had been sent to the bank" (Exs. 25 and 26).

For the defense.

Early in December 1944, Major Hugh W. Govern, Finance Department, Hendricks Field, Sebring, Florida, who had previously been "communicated with" by the investigating officer, Lieutenant Carroll, spoke over telephone with accused, who stated that he had apparently failed to have some deductions made for existing Class "E" allotments. Major Govern was not certain but believed that he was called by accused and not accused by him. Major Govern thereupon "checked with the Investigating Officer who had already secured letters from various Finance Officers concerning his [accused's] deductions" and eventually determined $1700 to be the exact amount of accused's indebtedness to the Government (R. 45,46). This amount was refunded to the Government by accused approximately two months after the first conversation between Major Govern and accused, namely, 23 January 1945 (R. 46,47,48; Ex.A). Major Govern advised accused to send in another notice of discontinuance of allotment (R. 46).

Accused elected to testify in his own behalf. After the allotment of $100 to the bank, he made an allotment of $50 to the Second National Bank of Florence, South Carolina, effective 1 August 1943, in connection with a loan from that institution. Because the first payment failed to reach the latter bank promptly, accused stated that, upon being notified in August by this bank of the delay, he determined to retire his indebtedness and cancel his allotment to it. He almost immediately executed a discontinuance, making it effective 31 September 1943. While he did not discontinue his allotment to the National Bank of Fort Sam Houston at that time, the Government failed to forward an allotment for August and September to that bank, which notified him by telephone of this failure some time in September 1943. He assured the bank that he had not stopped the allotment. As a result of the situation, however, accused decided to pay the entire indebtedness and stop that allotment as well. In furtherance of the latter purpose accused "went to Personnel" and executed a discontinuance, effective October 1, 1943 (R. 51, Ex. 3). The pencil notation "July 31" above the typewritten date "Oct. 1," was not on the form when he executed it. The date of the commencement of the allotment "May 1943," as given in the notice of discontinuance, was not the correct date of the allotment to the National Bank of Fort Sam Houston, but, according to accused, was "about the time" he started his $50 allotment to the Second National Bank of Florence, South Carolina. Accused stated that the notice was not made up by him but by the Personnel Officer at the Greenville Army Air Base, who made the mistake of inserting "May 1943" instead of "October 1st."

Shortly after the execution of the notice of discontinuance accused stated he received a letter from the bank advising him that it had received "the $300 back allotment checks" from the Office of Dependency Benefits and that that office had notified it that "the allotment would continue as before" (R. 52,53). Accused stated that he had thereupon communicated this information to "Finance Office" at Greenville, and was advised by it not to submit a second notice of discontinuance, as the cancellation of the allotment probably had not yet reached the Office of Dependency Benefits (R. 53). He applied for the refund of $250 in November 1943 in the mistaken belief that he was entitled to it, based on his impression that he had been in error in deducting that total on his two vouchers referred to in his application for the refund. He received his refund of $250 on 15 November 1943, at which time the $300 from the Office of Dependency Benefits, representing the past-due allotments, had not yet been received or credited to his account by the bank. Accused testified that in December 1943 or January 1944, while stationed at Greenville Army Air Base, South Carolina, he had advised the Finance Officer there that the allotments were continuing, despite his discontinuance notice, and was advised that writing to Office of Dependency Benefits might complicate matters. In the latter part of January or early in February 1944, in contemplation of procuring a new loan from the bank, which, however, was refused, he consulted the Finance Officer at Nashville, and was told that if he executed a new allotment, the Office of Dependency

Benefits would probably send the bank $200 instead of $100. The next occasion he had to discuss the matter was when he called on Major Govern in the latter part of December 1944 to help him straighten out the mistakes that he had made in his pay and allowances vouchers so that he might refund whatever amount was due by him (R. 55,56). At the time, "Lt. Carroll of Courts and Boards" was investigating accused's actions in cashing checks, but no demand had yet been made on accused by the Office of Dependency Benefits. In November 1944 he executed a second notice of discontinuance of allotment to the bank, effective 30 November 1944 and "stopped the account at the bank." From November 3, 1942, when accused opened his account with the bank until July 1943, he received duplicate deposit slips regularly from the bank, but after that he "didn't receive them regularly." Since August 1943 he had received only three statements from the bank, there was considerable delay in their delivery, each was for a "considerable length of time," and he believed that at one time nine months or a year elapsed without his receiving a bank statement (R. 58).

On cross-examination accused stated that the loan from the bank in South Carolina was made in the early part of August or the latter part of July 1943 (R. 67), that while the allotment of $100 to the bank in San Antonio was a requirement of that bank, he believed that it was he who suggested the allotment to the South Carolina Bank, and that when he discontinued the allotment to the South Carolina Bank on or about 21 October 1943, he was still indebted to it, this discontinuance having been made without notice to that bank (R. 67). He admitted that he had not mentioned in any of his four statements to the Investigating Officer that he had sought the advice of the Finance Officers at Greenville or Nashville. It was not until November 1944, either during or at the end of the investigation of his allotments, that he wrote to the Office of Dependency Benefits. Accused claimed that he did not keep up with his bank statements, but he knew that some of the allotments had been credited to his account during the period from November 23, 1943, to December 7, 1944. While he made no deposits personally, he relied on some being made from home (R. 72).

b. Specification 22 (execution and utterance of worthless check for $25 to Tampa Terrace Hotel with intent to defraud), and Specifications 23 to 31, Charge I (execution and utterance of 9 worthless checks without maintaining sufficient balance for their payment).

For the prosecution.

Accused pleaded guilty to the wrongful issuance and utterance of the nine checks described in Specifications 23 to 31, without maintaining sufficient funds for their payment. Under Specifications 14 to 22 he was charged with issuing these same checks with intent to defraud, not having and not intending that he should have sufficient funds on deposit for their payment. He was found guilty of only one of these latter specifications, that charging fraud in connection with the issuance of a $25 check to the Tampa Terrace Hotel (Specification 22), which is the same check described

in Specification 31. Consequently, only nine checks are actually involved. Four of these checks were issued to and cashed by "The Exchange," Hendricks Field, Sebring, Florida; three were issued to and cashed by the Gordon Hotel, Albany, Georgia, one was issued to Popular Dry Goods Company, in payment of a past due account, and one was issued to and cashed by the Tampa Terrace Hotel, Tampa, Florida. Except in the case of the check issued to Popular Dry Goods Company, accused actually received the face amounts thereof in cash, on the dates set forth in the specifications. It was stipulated that if the Assistant Cashier of the National Bank of Fort Sam Houston, San Antonio, Texas, on which all of the checks were drawn, were present, he would testify that each of the said checks "when presented to the National Bank of Fort Sam Houston, San Antonio, Texas /was/ returned dishonored by said bank to their respective payees for the reason that at the time that each of said checks was presented for payment to the said bank, the accused, Second Lieutenant Russell L. Bacon, did not have sufficient monies in his account to meet the payment of each of said checks" (Ex. 24). Between 18 January 1944 and 10 November 1944 64 checks, drawn by accused, totaling more than $2,000, were dishonored by the bank because of insufficient funds.

Mr. William A. Hendricks, Assistant Manager of the Tampa Terrace Hotel, testifying by deposition, stated that on 17 December 1944 accused presented to him for "encashment" accused's check, drawn on the National Bank of Fort Sam Houston, for $25.00, stating that he needed the money for an emergency. When asked whether the hotel subsequently deposited the check for collection, the witness replied: "No. Notation from bank was to effect that account was closed." On 15 January 1945 accused forwarded a money order to the hotel to cover the check (R. 34).

On 9 November 1944, in an endorsement by accused to an official request from his commanding officer that he explain his actions in continuing to write checks with insufficient funds for their payment, accused stated in part: "I have discontinued writing checks and at the same time I have discontinued my checking account" (Ex. 36).

In his statement to the Investigating Officer on 4 February 1945 (Ex. 26) accused admitted that he had executed all of the checks described in the specifications on or about the dates specified, that he had procured the amounts of each in cash, except in the case of the Popular Dry Goods Company, that at the time he issued his check to the Tampa Terrace Hotel for $25 on 17 December 1944 he was sure his account had not yet been closed, although he admitted writing the indorsement to his Commanding Officer on 9 November 1944, previously quoted. He further stated that he thought he had sufficient funds on deposit to meet this check, based on his last bank statement, but could not state what statement he was relying upon. He denied any intention to defraud any one or to issue bad checks, and in partial explanation of the lack of sufficient funds stated to the Investigating Officer:

"There have been several instances in the past few months where I have requested money be deposited to my account from my home, but through mistake and error at different times this money was not deposited, consequently checks were returned and then were liquidated with the money originally intended to be deposited" (R. 26).

For the defense.

Testifying in his own behalf accused stated that at the time of issuance of the nine checks he was under the impression that he had or at the time of their presentation would have sufficient funds on deposit to meet them. He expected money to be deposited by his mother as a result of his request that out of an allotment to her by his brother she would repay accused the amount due to him by his brother, which he claimed to be about $450 (R. 60). In actuality the money was not deposited. Instead a part of the money was forwarded accused by his mother in cash (R. 61). With regard to the check for $25 issued to the Tampa Terrace Hotel, accused testified that he thought he had a sufficient amount on deposit to pay it, but that by the time the check arrived the account was closed on his own instructions. Accused stated that he did not know that the check was outstanding when he closed the account. "I was confused on the dates. I cashed the check on the 17th of December and within a few days I wired the bank that I was closing the account, to send me the balance from the bank, which they did, and then I wrote the check but the account was closed before the check reached there." At the time the check was cashed, accused stated that he actually had "some ninety dollars" on deposit and received that amount subsequently from the bank. Realizing that the check might get to the bank after the account was closed, accused telephoned the manager of the hotel and told him that "due to a mistake on my part the check may be returned, and if it was would he please contact me and I would send the money to liquidate the check." Accused likewise stated that he had paid all of the checks described in the Specifications and that there were no unpaid checks outstanding.

Mrs. Gertrude Bacon, mother of accused, testified by deposition (Ex. B) that her son, Thomas J. Bacon, was indebted to accused in the sum of $450 and had authorized her to pay accused out of the allotment which he made to her. She stated that about the first of August 1944 accused requested her to deposit $100 of the amount due him by his brother to his account with the National Bank of Fort Sam Houston, but that through a misunderstanding she failed to do so and likewise failed to notify accused that she had not done so until he telephoned her about the 8th of September 1944. At that time he requested a deposit of $100 immediately and a further deposit of $250 at the end of September. She did not deposit either sum, but forwarded accused $100 by money order and wired him $250 during the latter part of October.

5. Specifications 1 to 13, Charge I. The evidence is absolutely clear

and convincing that with full knowledge of the fact that a disbursing officer of the United States Army was erroneously forwarding allotment checks to the National Bank of Fort Sam Houston, San Antonio, Texas, as an allotment of the accused's pay at the rate of one hundred dollars per month for each month from August 1943 up to and including October 1944 (an allotment for November 1944, also forwarded to the bank and deposited to accused's account, is not involved in these specifications) for deposit to his credit and that he was not entitled to these funds, accused wrongfully and unlawfully converted them to his own use and benefit, by drawing checks on his account, which were duly paid by the bank. The following facts, established by the record, not only justify but require that inevitable conclusion:

a. In October 1942, in connection with a loan from the bank, accused, as required by the bank, voluntarily executed an allotment of $100 of his pay, commencing 1 November 1942, in favor of the bank, to be deposited to his credit, with authority granted the bank to apply $50 each month to the repayment of his indebtedness to it. Thereafter, prior to July 1943, three other loans, one of $600 and the other two of $50 each were made to accused by the bank.

b. No deposits were made by or credited to the account of accused other than the proceeds of these four loans and the allotment checks forwarded to the bank by the United States for deposit to his account.

c. In September 1943, while accused was still indebted to the bank in the sum of $400 he advised it, in reply to an inquiry by it, prompted by failure to receive an overdue allotment check, that he had not discontinued his allotment. Shortly thereafter, without any notice to the bank whatsoever and before the collection by it of the accumulated arrearage of $300, due under the allotment, accused notified the Office of Dependency Benefits on the prescribed form that effective 1 October 1943 he desired to discontinue the allotment of $100, which had commenced on 1 November 1942, but which was erroneously described in the notice as having started in May 1943.

d. Through some unexplained error the effective date of the discontinuance was changed from 1 October 1943 to 31 July 1943, after the execution of the notice of discontinuance by accused, and an acknowledgment of receipt of notice of discontinuance, dated 8 November 1943, was furnished accused, showing the discontinuance effective as of the wrong date, 31 July 1943. Accused at no time notified the bank that he had filed this notice of discontinuance, and, as pointed out hereinafter, actually held out to the bank in February 1944 that the allotment was in full force. Nor did accused communicate with the Office of Dependency Benefits about its error. It was not until more than a year later that he forwarded to it a second notice of discontinuance, effective 30 November 1944. Through error, the Office of Dependency Benefits failed to discontinue the allotment, as directed in the first notice, and not only forwarded to the bank the arrears of $300, but

regularly forwarded to it the allotment checks of $100 through November 1944.

e. Accused admitted that he had received statements from the bank for three periods between 29 May 1943 and 23 August 1944, showing the deposit of the monthly allotment of $100 and that he knew that he was receiving the allotment all through 1944. It was further established by the testimony of the assistant cashier of the bank that other statements had been forwarded to him.

f. In February 1944, in seeking to obtain a new loan of eight hundred dollars from the bank, accused forwarded it two telegrams in which he offered to increase his allotment to the bank or to allow it to use the "present" entire allotment to repay the loan, and expressed his desire to cancel his "checking account" so as to permit the application of the entire allotment to the repayment of the contemplated loan.

g. With no balance to his credit as of 1 November 1943, and with no sources for deposits thereafter other than the allotments from the Government, accused began drawing checks against his account in that month and continued doing so each month, with the possible exception of June 1944, until the end of November 1944. Without considering the charges made by the bank against the account to cover the balance due it on its loan to accused, amounting to $400, and a number of small debits of $1 and 50¢, which probably represented service charges, accused, against a total deposit of $1500, issued during that period 32 checks for a total of approximately $1100, which were paid by the bank, and 64 checks, totaling more than $2,000, which were dishonored by the bank for want of sufficient funds, or a grand total of 96 checks for at least $3100.00.

h. Accused failed to deduct any Class "E" allotment on any of the 12 pay and allowances vouchers which he submitted for the period from 1 November 1943 to 31 October 1944, although he had made proper deductions on the four earlier vouchers submitted in evidence, namely, those for July, August, September and October 1943. Moreover, he sought and obtained from the United States a refund of the deductions of this allotment on his September and October vouchers, on the grounds that he had erroneously entered these deductions after the termination of his allotment, and in support of his claim attached to the voucher the acknowledgment of receipt of notice of discontinuance, forwarded him by the Office of Dependency Benefits, showing the effective date of the discontinuance as 31 July 1943.

As against this convincing and overwhelming array of evidence accused offered a puerile and half-hearted defense of good faith and ignorance of the error committed by the Government. The court very properly did not believe these protestations of accused, nor does the Board.

The sole questions that are presented are (1) whether the specifications set forth a military offense, and (2) whether the allegations as to

the dates of conversion have been proved.

There is no necessity or occasion for a discussion of the technical meaning of the term "convert" as used in connection with the offense or tort known as conversion. The gravamen of the offenses charged against the accused, a commissioned officer in the Army of the United States, is the discredit brought upon the military service by, and the disorder to the prejudice of good order and military discipline resulting from, his unlawful and wrongful exercise of ownership over and use for his personal benefit of funds, in actuality belonging to the United States and erroneously forwarded by a disbursing officer of the Army of the United States for deposit to his credit in a banking institution, with full knowledge on his part of the error committed by the disbursing officer and of his lack of right, title or authority to receive, retain or use such funds or any part thereof. Webster's New International Dictionary defines the verb "to convert" as "to appropriate dishonestly or illegally." Certainly in that common and all-inclusive meaning of the word, a meaning clearly conveyed to accused by the wording of the Specifications, accused did convert the funds when he wrongfully applied them to his own use, by drawing checks, thereafter duly paid by the drawee bank, which he well knew he had no authority to draw on an account made up of deposits that did not belong to him. Accused's entire course of conduct reeks of dishonesty, and the mere statement of his proved misconduct is sufficient to show his guilt of the basic offenses with which he is charged. The Board of Review feels no hesitancy in holding that the several specifications set forth and the evidence establishes the commission of a series of offenses in violation of Article of War 96 that do not constitute but closely resemble conversion, in the technical sense of the term, or unlawful appropriation. It naturally follows that the Board approves the action of the court in refusing to strike out these specifications and in denying the motion for a finding of not guilty thereof.

From a legal viewpoint, however, the record of trial does not support the findings of guilty of Specifications 1, 2 and 7 in full, in that the affirmative evidence, offered by the prosecution, shows that in November 1943, December 1943, and May 1944 accused did not draw on and have paid by the bank out of his account the full amount received for the immediate preceding months or month, as charged in these particular specifications. The bank statement shows that at the end of each of these months there was still a balance to the credit of the accused in excess of the balance that existed at the beginning of the month, prior to the deposit of the proceeds of the allotment check received during that month. As pointed out in the summary of the evidence (par. 4), on 1 November 1943 there were no funds on deposit in accused's account. However, there was a balance at the end of the month of $73.36. Consequently accused had not during November converted the entire $300 deposited that month as charged in Specification 1. The proceeds of only one allotment check, for $100, was deposited in December 1943, bringing accused's balance up to $173.36. Since accused's account during December was charged with only $51, it

cannot be said that during that month he appropriated the entire proceeds of the $100 allotment check for November as charged in Specification 2. A similar situation exists with respect to Specification 7. When the April allotment check was deposited in May 1944, there was actually an overdraft as of 1 May of $3.26. There was no deposit in May other than that of this $100 check on the sixth. At the end of May, accused's account showed a balance of $3.24. It cannot be held, therefore, that during May accused withdrew all of the proceeds of his April allotment check, as charged in Specification 7. While the direct evidence does not show a complete withdrawal in November 1944 of the proceeds of the $100 allotment check for October (Specification 13), the conclusion that this did occur is naturally and properly inferable from the fact that checks totaling $75 were dishonored during that month, that accused notified his commanding officer during that month that he had stopped writing checks, and that, according to accused's admission, after the deposit of $100 on 7 December 1944, there was only "ninety-some dollars" to his credit in the bank, clearly showing an overdraft during November. Accordingly, as to Specifications 1, 2, and 7 only the findings of guilty should be modified by inserting the words "in part" between the words "wrongfully and unlawfully convert to his own use and benefit" and the words "the proceeds of a class 'E' Allotment check".

6. Specifications 23 to 31, Charge I. Not only did accused plead guilty to these specifications charging him with wrongfully and unlawfully failing to maintain a sufficient balance to meet the payment of nine separate checks, issued by him to various payees, but the evidence established and the accused admitted every element of the offenses as charged. That his actions constitute offenses under Article of War 96 is now well recognized (CM 249232, III Bull. JAG 290).

7. Specification 22, Charge I. In addition to being charged with failure to maintain a sufficient balance to meet the payment of nine checks which he had issued (par. 6, supra), there was a separate specification as to each check, charging accused with having issued such check with intent to defraud, knowing that he did not have and not intending that he should have sufficient funds on deposit for its payment. Accused was found not guilty of all of these specifications except that involving the check for $25 made and uttered to the Tampa Terrace Hotel on 17 December 1944. With the exception of the stipulation that the assistant cashier of the drawee bank, if present, would testify that this check, like the other eight of earlier date, was not paid upon presentation because of insufficient funds, accused's previous bad record for the issuance of worthless checks, and possibly accused's statement in writing to his commanding officer on 9 November 1944 that he was closing his account and would not write any more checks, there is nothing in the record to sustain a conclusion that when accused issued this check on 17 December 1944 he intended to defraud the hotel. The prosecution did not establish and did not offer any evidence to establish that accused had no funds on deposit at the time of the issuance of the check, as charged in the specification. All questions submitted by the prosecution to

the assistant cashier of the drawee bank pertained to transactions prior to the end of November 1944, and the prosecution failed to offer the bank statement for the latter part of November or the month of December, the last entry on the statement offered by the prosecution being 9 November 1944, at which time there was a balance of $28.84 to the credit of accused. Despite the fact that the assistant cashier testified by deposition that there was a deposit of $100 to accused's account, representing the November allotment check, on 7 December 1944, no questions were asked him by the prosecution relative to withdrawals against this amount. As opposed to this lack of evidence of insufficient funds on 17 December, which was certainly available to the prosecution, if it existed, accused testified that at the time he issued the check for $25 to the Tampa Terrace Hotel his account with the bank had not yet been closed; that there was on deposit "ninety-some dollars;" that when he ordered the account closed in December he thought that the check had cleared; that he subsequently notified the hotel that as a result of his action in closing the account the check might not be paid on presentation; that when he received his check for the balance on deposit, amounting to "ninety-some dollars," he realized that the check to the Tampa Terrace Hotel had not cleared; and that he forwarded his money order for $25 in payment of the check. The latter statement was verified by the assistant manager of the hotel, who, probably through a mistake, also testified that the original check had not been deposited for collection by the hotel. While accused's record is not such as to justify the imputation of much weight to his testimony, the failure of the prosecution to present testimony to contradict his statements, which would have been available to it if such testimony existed, and the positive showing that there was actually a deposit of $100 on 7 December, just ten days prior to the issuance of the check, without any showing that any checks had been drawn against it or that there were not sufficient funds left on 17 December, the date on which the check was drawn, for the payment of the checks, leave no facts which show or from which the inference may reasonably be drawn that accused did not have sufficient funds on deposit when the check was drawn for its payment, a vital element of the offense with which he was charged. The testimony naturally shows accused guilty of a lesser included offense, failure to maintain a sufficient balance to meet the check, but since he was found guilty of this offense, as charged against him under Specification 31, it necessarily follows that it would be illegal to find him guilty of the same offense twice. Consequently, the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 22.

8. The records of the War Department show that accused is 26-1/2 years of age and single. However, it appears from the record of trial that he is married and has no children. He was graduated from high school, took various correspondence courses in radio engineering, and did radio maintenance, repair and construction work in civil life. He enlisted in the Army on 4 December 1940, and after a course of training in 1942 as an aviation cadet was commissioned a Second Lieutenant, Army Air Forces, Officers' Reserve Corps of the Army of the United States, on 31 October 1942.

9. The court was legally constituted and had jurisdiction of the person and the offenses. Except as above noted, 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 insufficient to support the finding of guilty of Specification 22 of Charge I, legally sufficient to support all other findings of guilty, with the words "in part" inserted between the words "wrongfully and unlawfully convert to his own use and benefit" and the words "the proceeds of a Class 'E' Allotment check" in Specifications 1, 2, and 7 of Charge I, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK - CM 278891 1st Ind.

19 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 Russell L. Bacon (O-732435), Air Corps.

2. Upon trial by general court-martial this officer was found guilty, in violation of Article of War 96, of (1) thirteen charges of unlawful conversion of the proceeds of Class "E" allotment checks, erroneously paid by the Treasurer of the United States for his account to, and deposited to his credit in, the National Bank of Fort Sam Houston, the conversion having been effected by his drawing checks against his account in the bank, with full knowledge on his part that the funds were being forwarded and credited through error and that he had no right to receive, use or retain them (Specifications 1 to 13, Charge I); (2) issuance of a worthless check for $25, with intent to defraud (Specification 22, Charge I); and (3) nine charges of failure to maintain a sufficient balance in his bank account to meet the payment of checks, ranging from $10 to $116, issued by him (Specifications 23 to 31, Charge I). He pleaded guilty to the last nine described 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 one year. 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 insufficient to support the finding of guilty of Specification 22 of Charge I (issuance of a worthless check with intent to defraud); legally sufficient to support all other findings of guilty, with the insertion of the words "in part" between the words "wrongfully and unlawfully convert to his own use and benefit" and the words "the proceeds of a Class 'E' Allotment check" in Specifications 1, 2 and 7 of Charge I, and legally sufficient to support the sentence and to warrant confirmation thereof.

In connection with a loan of $600 made by the National Bank of Fort Sam Houston to accused in November 1942, accused made a monthly allotment of one hundred dollars of his pay to this bank for an indefinite period, the entire proceeds to be deposited to his credit, with authority granted the bank to withdraw therefrom and apply fifty dollars each month to the reduction of his loans. Prior to 1 July 1943, three additional loans had been made by this same bank to accused; one of $600 and the other two of $50 each. Without notifying the bank, and while he was still indebted to it in

the sum of $400, accused in October 1943 forwarded a notice, directing discontinuance of this allotment, to the Office of Dependency Benefits. However, due in part to certain errors in the notice, and in part to unexplained errors or oversight on the part of the Office of Dependency Benefits, the discontinuance was not put into effect. After the Office of Dependency Benefits had failed for two months to forward an allotment to the bank for accused's account, it sent a check for $300 in November 1943 to cover the arrearage and thereafter, for a period of thirteen months, forwarded a check for $100 to the bank for accused's account each month, the last payment being made in December 1944. No funds other than the proceeds of the four loans and of the allotment checks were deposited to accused's credit in the bank. He received several bank statements, showing these deposits, sent two telegrams to the bank during February 1944, showing his knowledge that the allotment had not been discontinued, and admitted that he knew that allotment checks were being received by the bank. In the meanwhile he discontinued the deduction of this allotment from his monthly pay and allowance vouchers. During the period from 1 November 1943 to the end of November 1944, the bank credited accused's account with the proceeds of allotment checks, totaling $1500, $400 of which it applied to accused's indebtedness. During the same period accused drew 32 checks against the account, amounting to approximately $1100.00, which were paid, and 96 checks for a total of more than $2,000, which were not paid because of insufficient funds. While the entire proceeds of the allotment checks were thus converted, the funds referred to in Specifications 1, 2 and 7 of Charge I were only partially converted in the months therein designated. Accused's sole defense was his alleged good faith, evidenced by his subsequent repayment to the United States of the funds improperly received. Accused pleaded guilty to failure to maintain a sufficient balance to meet the payment of the nine checks described in Specifications 23 to 31 of Charge I. The issuance of each of these checks was made the basis for an additional specification (Specifications 14 to 22), charging fraud in connection with its issuance, in that accused, at the time of issuance, did not have, and did not intend that he should have, sufficient funds on deposit for its payment. He was found not guilty of these latter specifications, with the exception of Specification 22, which refers to a check dated 17 December 1944, being the same identical check also described in Specification 31. There is no evidence that at the time of issuance of this particular check there were insufficient funds on deposit for its payment. On the contrary it appears that the proceeds of the $100 check received in December had been deposited to accused's account and that it was only after 17 December that the account was closed. According to accused's uncontradicted testimony, upon closing the account, he notified the payee that the check might not be honored because of the possibility of its arriving after the account had been closed, and he repaid the payee shortly after being notified that it had not been honored.

I recommend that the sentence be confirmed, but that the forfeitures be remitted, that the sentence as thus modified be ordered executed, and that

the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part, sentence confirmed but forfeitures remitted. GCMO 384, 9 July 1945).

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

SPJGN-CM 278912

17 MAY 1945

UNITED STATES	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Perrin Field, Sherman, Texas, 27 March 1945. Dismissal and total forfeitures.
Second Lieutenant CHARLES R. DEMLER (0-694050), Air Corps.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Charles R. Demler, Air Corps, did, at or near Bennington, Oklahoma, on or about 7 March 1945, wrongfully pilot a military aircraft at an altitude of approximately 200 feet above the ground in violation of paragraph 16, Army Air Forces Regulation Number 60-16.

Specification 2: In that Second Lieutenant Charles R. Demler, Air Corps, did, at or near Bennington, Oklahoma, on or about 7 March 1945, wrongfully engage in unauthorized acrobatic maneuvers at an altitude of less than 1500 feet while piloting a military aircraft in violation of Paragraph 10 (d) Army Air Forces Regulation Number 60-16.

Specification 3: In that Second Lieutenant Charles R. Demler, Air Corps, having observed a crash of a military airplane at or near Bennington, Oklahoma,

did, at Perrin Field, Sherman, Texas, on or about 7 March 1945, wrongfully fail to report such crash and to furnish pertinent information relative thereof in violation of paragraph 6 (a), Perrin Field Post Regulation Number 55-1.

Specification 4: In that Second Lieutenant Charles R. Demler, Air Corps, did, at Perrin Field, Sherman, Texas, on or about 7 March 1945, with intent to deceive the Commanding Officer of that station, officially report on War Department, Army Air Forces Form Number 1 that he had completed 2-1/2 hours of instrument flight with Aviation Cadet John C. Hall, or words to that effect, which report was known by the said Second Lieutenant Charles R. Demler to be untrue in that only about 15 minutes of instrument flight was in fact completed.

The accused pleaded not guilty to, and was found guilty of, the Charge and all of the Specifications thereunder. 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 early on the afternoon of 7 March 1945 several officers, including the accused, had assembled in the "Flight 9 flight room" at Perrin Field, Sherman, Texas. In the course of the conversation which ensued a "Lieutenant Saxman" stated that he "was going * * * to Lake Fannin, and anybody that wanted to come up there, could, for some formation flying". When Second Lieutenant George Anderson Vogel remarked that he "hadn't heard of the place", Lieutenant Saxman pointed it out on a map (R. 24-25, 27).

A few minutes later between 1415 and 1430 o'clock the accused, who was an instructor, took off from Perrin Field in a military airplane with Aviation Cadet John C. Hall, a student. The latter was at the controls, and, since the purpose of the flight was to familiarize him with dual instrument navigation, he performed the duties of a pilot while "under the hood". Climbing to about three thousand feet and flying "straight" for about fifteen minutes, they arrived at "a small horseshoe lake beside the Red River, northwest of Madill". At this point the accused took over the controls and ordered Hall to come out from "under the hood". After they had circled the lake for a short while, they were approached by a plane carrying Lieutenant Saxman and a passenger (R. 7-8, 44-45). The two ships "did some circles around together" over the lake at an altitude of less than 1000 feet and then proceeded to engage in the more exciting pastimes of aerial acrobatics and low flying. Descending to a height of approximately 200 feet, Lieutenant Saxman assumed the lead with the accused following at a slightly higher level and at a distance to the rear of some 1500 feet (R. 8-9, 13, 15, 17, 19, 21-22, 45).

The accused's plane completed two slow rolls and Lieutenant Saxman's engaged in at least one. Passing over Bennington, Oklahoma, the lead ship buzzed a railroad trestle, "dove to the left", "pulled up, did a steep turn to the left, a sort of a peel-off and dropped down, buzzed the field, pulled up over some trees, completed a slow roll then crashed" and "burst into flames". One of the occupants was beheaded and the other was probably instantly killed by the concussion (R. 9-10, 12-13, 15-19, 21, 31, 32, 44; Pros. Exs. 2, 3). After circling twice over the fatal scene, the accused and Hall proceeded toward Gaskin Auxiliary Field. As they set off in this new direction, the accused commented that "they were both dead, and that he would gladly give up his commission to go back there and help them, but would just get us both into trouble". Upon landing at Gaskin Auxiliary Field, he explained what he meant by "trouble". He admonished Hall not to "tell anybody about what just happened * * * because it may end up in a loss of rank, a court-martial, possibly a prison sentence for both of us" (R. 10).

Leaving Gaskin Auxiliary Field, the accused and Hall flew to Perrin Field. Upon arriving at the base, Hall saw the accused writing on a "Form 1", the purpose of which was to record flight time for each member of a crew (R. 11, 35-36). The "Form 1" covering the plane operated by the accused that day showed two hours and thirty minutes of dual instrument time and five minutes of passenger time for Hall (R. 35; Pros. Ex. 4). Part of the writing on the instrument was in Hall's hand, and the rest was not positively identified. He did not see the accused make any particular entry (R. 39-40).

A "Form 1A" pertaining to the same flight was also prepared and submitted. This document was designed "to keep a record on the status of the airplane". Although instructors were ordinarily charged with the responsibility of certifying the condition of the plane upon landing, the task of signing was often delegated to the student. The "Form 1A" in question contained the entry "O.K." followed by a signature purporting to be that of the accused but it was not definitely established to be his (R. 37, 39; Pros. Ex. 5).

No report of the crash was made to the control tower at Perrin Field on the afternoon of 7 March 1945. If the news had been received, it would have been heard over the loud speaker by everyone on duty in the room. Corporal Anne Cefalo and Private Leo F. Rose and two others were continuously at their posts in the tower from 1200 to 1700 (R. 29-30, 33).

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

5. Specification 1 of the Charge alleges that the accused did, "on or about 7 March 1945, wrongfully pilot a military aircraft at an altitude of approximately 200 feet above the ground in violation of paragraph 16, Army Air Forces Regulation Number 60-16". Specification 2 alleges that

he did, "on or about 7 March 1945, wrongfully engage in unauthorized acrobatic maneuvers at an altitude of less than 1500 feet while piloting a military aircraft in violation of Paragraph 10 (d) Army Air Forces Regulation Number 60-16". These offenses were laid under Article of War 96.

The two paragraphs of Army Air Forces Regulation Number 60-16 referred to read as follows:

"10. Acrobatic Flight. No pilot will perform acrobatics:

* * *

d. Unless the maneuvers can be completed and the aircraft under complete control at or above 1,500 feet (altitude above the surrounding terrain).

16. Minimum Altitudes of Flight:

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

(1) Below the following altitudes:

a. 1000 feet above any building, house, boat, vehicle, or other obstructions to flight.

b. At an altitude above the congested sections of cities, towns, or settlements to permit an emergency landing outside of such sections in the event of complete power failure.

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

d. 500 feet above the ground elsewhere than as specified above."

As a pilot and particularly as an instructor, the accused must have familiarized himself with these provisions and must have been cognizant of their meaning and purpose. Despite their express language, he accepted Lieutenant Saxman's invitation to an afternoon of aerial sport and participated in several minutes of acrobatics and low flying at an altitude of some 200 feet leading to the destruction of a military airplane and the loss of two lives. Had the accused not encouraged this reckless conduct by his presence, it is possible that Lieutenant Saxman would have refrained from attempting to exhibit his aerial prowess. In the light of the regulations quoted the accused's low flying and his execution of at least "two slow rolls" at an altitude of 200 feet were clearly violative of Article of War 96. Specifications 1 and 2 have been sustained beyond a reasonable doubt.

6. Specification 3 of the Charge alleges that the accused, "having observed a crash of a military airplane * * * did * * *, on or about 7 March 1945, wrongfully fail to report such crash and to furnish pertinent information relative thereof in violation of paragraph 6(a), Perrin Field Post Regulation Number 55-1". Specification 4 alleges that he did on the same day "with intent to deceive the Commanding Officer of that station, officially report * * * that he had completed 2½ hours of instrument flight with Aviation Cadet John C. Hall, or words to that effect, which report was known by the said [accused] to be untrue in that only about 15 minutes of instrument flight was in fact completed". These acts were also set forth as being in contravention of Article of War 96.

Subparagraph 6a of the Post Regulations in effect at Perrin Field on the date of the fatal accident specifically stated that:

> "Any pilot observing a crash while flying will communicate with the control tower, giving location of crash and pertinent information. He should then return to the scene of the crash and continue to circle around the spot at a normal safe altitude, as a guide for the ambulance, truck, and other equipment."

The accused neither contacted the control tower nor remained at the scene of the crash. To make matters worse he attempted to intimidate his student into silence concerning the events of the afternoon. This was a gross violation of the regulation cited clearly sustaining Specification 3.

Specification 4, on the other hand, has not been satisfactorily established. Although the accused was seen writing on Form 1 shortly after the crash, none of the entries on that instrument were definitely shown to be in his handwriting. This being the state of the evidence, Specification 4 must be disapproved for lack of proof.

7. The accused is about 22 years of age. The records of the War Department show that he completed eleven grades in elementary and high school but that he did not graduate. Prior to entering the service he was employed for ten months as a lens blockery polisher. He entered the enlisted service on 10 October 1942. Thereafter on 19 November 1942 he became an aviation cadet and on 30 September 1943 he was commissioned a second lieutenant in the Army of the United States.

8. The court was legally constituted. In the opinion of the Board of Review the record of trial is legally insufficient to support Specification 4 of the Charge and legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Robert J. Homer, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 278912 1st Ind
Hq ASF, JAGO, Washington 25, D. C. JUN 12 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 Charles R. Demler (0-694050), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully piloting a military aircraft at an altitude of approximately 200 feet above the ground; of wrongfully engaging in unauthorized acrobatic maneuvers; of wrongfully failing to report an airplane crash and of failing to furnish pertinent information relative thereto; and of making a false official report with intent to deceive, all in violation of Article of War 96. 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 that the record of trial is legally insufficient to support Specification 4 of the Charge (making a false official report), and legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof.

After personally considering the evidence the Deputy Commander, Army Air Forces, in a memorandum dated 14 May 1945 has stated that:

"1. I have reviewed the record of trial of the above-named officer, who was sentenced to dismissal for low flying, the performance of acrobatics below the minimum altitude, failure to report the crash of a companion aircraft in which two occupants lost their lives, and the making of a false official report.

"2. The record discloses that prior to the fatal accident both the pilot of the plane which crashed and the accused had been guilty of serious wilful violations of flying regulations. The violations of the one pilot actually resulted in his death and the death of his passenger, while those of the accused resulted in no injury or damage. Although the accused was flying at a dangerously low altitude, all witnesses agreed that he maintained throughout the performance a higher altitude than that of the death plane. Although the arrangement was informal, the other pilot was the leader. The accused piloted his aircraft 200 feet above the ground and performed slow rolls below 1000 feet. Such infractions constituted serious, wilful violations of flying regulations, but did not necessarily create a high probability of serious personal

injury or substantial property damage. Indeed, the accused apparently refrained from following the pilot of the death plane through the final maneuvers, which resulted in the fatal crash. Accordingly, I do not consider the low flying and low altitude acrobatics of a sufficiently aggravated nature to require his elimination from the service.

"3. However, Lt. Demler's failure to report the crash of the other plane as required by post regulations was a flagrant and unpardonable offense. Abandonment of the fallen plane without any effort to render assistance was totally inexcusable. The explanation of his conduct based upon the belief that the occupants of the plane were already dead is not considered a mitigating circumstance.

"4. My attention has been invited to the possible lack of adequate proof in the record of trial of the commission by accused of the offense of making a false official report. However, I do not consider it necessary to comment upon this non-operational offense as my opinion in the matter would not be altered by a holding of legal insufficiency as to it.

"5. I recommend that the sentence be confirmed and ordered executed."

I concur with the recommendation of the Deputy Commander, Army Air Forces, that the accused should be eliminated from the service, but I believe that the forfeitures imposed are unnecessary. I accordingly recommend that the sentence be confirmed but that the forfeitures be remitted 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
Incl 1 - Record of trial
Incl 2 - Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part. Sentence confirmed but forfeitures remitted. G.C.M.O. 294, 7 July 1945).

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

SPJGK - CM 278968

9 MAY 1945

UNITED STATES v. Second Lieutenant HOMER H. SALYER, (0-1050450), Infantry.	)	INFANTRY REPLACEMENT TRAINING CENTER Trial by G.C.M., convened at Camp Roberts, California, 23 March 194[redacted] Dismissal, and confinement for five (5) years.

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

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

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

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

Specification 1: In that Second Lieutenant Homer H. Salyer, Company B, 95th Infantry Training Battalion, Camp Roberts, California, did, without proper leave absent himself from his organization at Camp Roberts, California, from about 14 January 1945 to about 1 February 1945.

Specification 2: In that Second Lieutenant Homer H. Salyer, Company B, 95th Infantry Training Battalion, Camp Roberts, California, did, without proper leave absent himself from his organization at Camp Roberts, California, from about 4 February 1945 to about 6 February 1945.

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

Specification: In that Second Lieutenant Homer H. Salyer, Company B, 95th Infantry Training Battalion, Camp Roberts, California, having been duly placed in arrest in quarters on or about 1 February 1945,

did, at Camp Roberts, California, on or about 4 February 1945 break his said arrest before he was set at liberty by proper authority.

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

Specification 1: In that Second Lieutenant Homer H. Salyer, Company B, 95th Infantry Training Battalion, Camp Roberts, California, did, at Camp Roberts, California, on or about 21 December 1944, with intent to defraud, wrongfully and unlawfully make and utter to Camp Roberts Post Exchange, Camp Roberts, California, a certain check in words and figures as follows, to wit:

Ch. St. Branch (Ink)
90-1150 ~~ATASCADERO BRANCH~~ 90-1150
American Nat'l Bank (Ink)
~~BANK OF AMERICA~~
~~Trust and~~
~~National Savings Association~~
Nashville, Tenn. (Ink)
~~Atascadero, Calif.~~, 21 Dec (Ink) 1944 (Ink)

Pay to the
Order of Cash (Ink) $ 33.00 (Ink)

Thirty-three and - - - - - - - - - - - - - - - - - - no/100 (Ink) DOLLARS

Member
Federal Reserve
System

Homer H. Salyer (Ink)
0-1050450

and by means thereof did fraudulently obtain from the said Camp Roberts Post Exchange, Camp Roberts, California, the sum of $33.00 lawful money of the United States, he, the said Second Lieutenant Homer H. Salyer, then well knowing that he did not have and not intending that he should have sufficient funds in the American National Bank of Nashville, Tennessee, for the payment of said check.

Specification 2: (Finding of not guilty)

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

Specification 1: In that Second Lieutenant Homer H. Salyer, Company B, 95th Infantry Training Battalion, Camp Roberts, California, did, at Camp Plauche, New Orleans, Louisiana, on or about 4 January 1945, present for payment a claim in the amount of $254.00 against the United States, by presenting said claim to E. W. McLarren, Colonel,

Finance Officer at Camp Plauche, New Orleans, Louisiana, an officer of the United States duly authorized to pay such claims, for services alleged to have been rendered to the United States by said Second Lieutenant Homer H. Salyer in the month of December 1944, which claim was false and fraudulent and was then and there known to be false and fraudulent by the said Second Lieutenant Homer H. Salyer, in that said Second Lieutenant Homer H. Salyer had theretofore, on or about 22 December 1944, at Camp Roberts, California, received partial payment in the amount of $190.00 for said services rendered to the United States by said Second Lieutenant Homer H. Salyer for the month of December 1944.

Specification 2: In that Second Lieutenant Homer H. Salyer, Company B, 95th Infantry Training Battalion, Camp Roberts, California, did, at Nashville, Tennessee, on or about 17 January 1945, present for payment a claim in the amount of $254.00 against the United States, by presenting said claim to F. F. Flagel, Lt. Col., Finance Officer, Memphis Army Service Forces Depot, Memphis, Tennessee, an officer of the United States duly authorized to pay such claims, for services alleged to have been rendered to the United States by said Second Lieutenant Homer H. Salyer in the month of December 1944, which claim was false and fraudulent and was then and there known to be false and fraudulent by the said Second Lieutenant Homer H. Salyer, in that said Second Lieutenant Homer H. Salyer had theretofore, on or about 22 December 1944, at Camp Roberts, California, received partial payment in the amount of $190.00 for said services rendered to the United States by said Second Lieutenant Homer H. Salyer for the month of December 1944.

He pleaded not guilty to all of the Charges and Specifications. He was found not guilty of Specification 2 of Charge III and guilty of all of the Charges and remaining Specifications, except, with reference to Specification 1 of Charge III, the words "with intent to defraud", "fraudulently", and "well knowing that he did not have and not intending that he should have;" substituting for the last excepted words, the words "not having". He was found not guilty of the excepted words, but guilty of the substituted words. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service 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 in support of the findings of guilty may be summarized as follows:

Charge I and Charge II and their Specifications. The accused, a second lieutenant in the Infantry, member of the 95th Infantry Training Battalion, stationed at Camp Roberts, California (R. 12, 26), on or about

23 December 1944 was granted a 21 day leave of absence which expired 14 January 1945. He failed to return to his station on that date and was entered on his organization's Morning Report on 15 January 1945 as AWOL on 14 January 1945 (R. 11, Ex. 1). Accused returned to Camp Roberts on 1 February 1945 and was on that date placed in arrest in his quarters by the written order of Lieutenant Colonel B. J. Lindauer, commanding officer of the 19th Regiment of which accused was a member (R. 12-13, 17, Ex.2A). This order was given to the accused on that date and acknowledged by him by an indorsement thereto. On 3-4 February 1945, Major S. D. Brown was Duty Officer for the 95th Battalion. During 3 February he periodically checked on the presence of the accused in his quarters and found him present. About 9 a.m. on Sunday, 4 February 1945, the accused was not present in his quarters and he could not be found in the battalion area. Accused had no authority to be absent (R. 15-16). Accused was entered on his organization's Morning Report as "AWOL 0930 4 February 1945", and from "AWOL to Conf Cp Stockade 1530 6 February 45" (Ex. 2).

There was introduced in evidence a type-written statement voluntarily signed and sworn to by the accused, prepared from previous verbal statements made by him after "Articles of War 24 and 70 and paragraph 35a, MCM" had been read to him and he had indicated that he understood his rights. In the statement it is set forth that he intended to plead guilty to the Charges and Specifications under discussion, but, in extenuation, that he was on his way back toward Camp Roberts on 10 January 1945, accompanied by his wife, who was ill. On that date he reached Albuquerque, New Mexico. His wife was in such pain that he was forced to stop. He wired to Colonel Floyd, Station Hospital, Camp Roberts, that due to "extenuating circumstances", he had to "have or take" fifteen extra days leave. He then returned with his wife to Nashville, Tennessee. In Nashville his wife received a telegram to the effect that he, the accused, was absent without leave. It was signed "Lawrence". Accused's wife telephoned General Lawrence from Nashville and explained the reason for accused's absence and stated that he would return as soon as possible. They left for Camp Roberts the next day. While he was confined to his quarters both he and his wife were without money. He was four weeks behind in his rent. His automobile has been seized for nonpayment of installments. So he "left confinement" to try and secure sufficient funds from friends and banks to take care of his obligations. As soon as he had taken care of these things he immediatly returned to Camp Roberts (R. 38, Ex. 10).

Charge III and its Specification. On a date not appearing in the record but presumably in December 1944, the Camp Roberts Exchange cashed a check signed by the accused as maker in the sum of $33.00. The check was drawn on "Ch. St. Branch American Nat'l Bank", Nashville, Tennessee, and was dated 21 December 1944(R. 17-18,Ex.3). The check was deposited by the Camp Roberts Exchange in its own depository but returned unpaid. It was subsequently redeemed or paid by a money order sent to the Camp Roberts Exchange by the Judge Advocate of the Infantry Replacement Training Center, Camp

Roberts (R. 18-19). The Assistant Cashier of the American National Bank, Nashville, Tennessee, testified by deposition (R. 19, Ex. 4) that accused on 21 December 1944 had a checking account with that bank which showed, on that date, a balance in favor of the accused of $6.98. The witness' testimony that a check of the accused's in the sum of $33.00 was presented for payment on 2 January 1945 but payment was refused because of "insufficient funds" was stricken from the record by the Law Member upon motion of Defense Counsel because the witness was not shown the check referred to and described in the Specification (R. 21).

Charge IV and its Specifications. On 22 December 1944 at Camp Roberts, California, accused presented a pay voucher to the Finance Department at the camp for partial payment of his pay for December 1944, and, because he was going on leave, he was paid the sum of $190 on account of his December pay (R. 26-27, Ex. 6). On 4 January 1945 at Camp Plauche, New Orleans, Louisiana, the Agent Finance Officer for Colonel E. W. McLarren, Finance Officer, United States Army, caused to be paid the sum of $254 in cash to the person who identified himself as Homer H. Salyer, Second Lieutenant, Infantry, AUS, upon the latter's pay voucher representing that sum to cover the entire pay and allowance due that officer for December 1944 (R. 29, Ex. 7, 7a). No credit for any payment on account appeared in the voucher (Ex. 7a). Attached to and made part of the deposition of the Agent Finance Officer was the signature used by the person who represented and identified himself to be Homer H. Salyer. On 17 January 1945 the accused appeared at the counter of the Finance Office of the 558th AAFBU in Nashville, Tennessee, presented copies of his leave of absence order and his pay data card, and asked for payment for services rendered by him to the government for the month of December 1944 which he claimed he had not been paid. With the aid of the local officer accused made out a pay voucher for December 1944 in the sum of $254. No credits for any previous payment appear therein (Ex. 3 and 9a). Accused was thereupon paid $254 from the accounts of F. F. Flagel, Lieutenant Colonel, FOUSA (R. 33, Ex. 8, 9).

On 27 February 1945 Captain Ernest V. Illig, Investigating Officer, visited the accused in The Post Stockade at Camp Roberts, and, after informing him again of his rights, asked him if he wished to make any statement concerning Charge IV and its Specifications, which he then read to him. The accused stated, "I admit drawing that pay but on 6 February the money was telegraphed to General Lawrence to cover those withdrawals". He also said that the money was turned over to the Inspector General, Infantry Replacement Training Center (R. 42).

4. The accused, after having been duly advised of his rights, elected to take the stand, be sworn as a witness in his own behalf and testify as to Specifications 1 and 2 of Charge III only (R. 53). He testified that the $33.00 check mentioned in Specification 1 of Charge III was drawn on the American National Bank, Nashville, Tennessee, in which he had a joint account with his mother; that the last statement he saw was the November statement showing a balance between $34.00 and $35.00; that he did not receive any indication from her that she had drawn against this account; that he had cashed no other checks on it and that to the best of his knowledge

the check in question was good for $33.00 at the time he drew it. He offered in evidence as Defense Exhibit A a check drawn against the American National Bank, Nashville, Tennessee, by his mother on 24 July 1944, to establish the fact that the account was also subject to withdrawal by her (R. 54). The accused further introduced in evidence a Western Union Telegram addressed to himself at Camp Roberts, California, disclosing the contents of a night letter sent by him on 12 January 1945 to Colonel J. Floyd, Station Hospital, wherein the accused informed Colonel Floyd that due to "extenuating circumstances" occurring on his way back to Camp Roberts, he was forced to "ask or take" a 15-day extension of leave and that he would return on 28 January (R. 57; Def. Ex. B). A copy of a telegram received by Major H. R. Bryan, Station Hospital, stating "Due to illness Marie Salyer will not be in until 28 January. H. Salyer", was likewise admitted in evidence (R. 57; Def. Ex. C). The accused also made an unsworn statement to the court in which he stated that:

> "I don't know if it could be attributed directly to nervousness or not. The reason that these circumstances occurred, sir, is not thinking on my part. In 1937 I was confined for nine months for a nervous breakdown and extreme nervousness. It has occurred twice since then and I was under the care of a doctor in New York City. But up to this time I had not been bothered too much for being too nervous" (R. 58).

Mrs. Homer H. Salyer, wife of the accused, was sworn as a witness and testified as follows: That her husband has been at Camp Roberts since September 1944 and that she has been living with him in the vicinity of that station since October of the same year; that prior to 1 January 1944 he was hospitalized at that station for over a week and upon his release she and the accused took a trip by automobile to her home near New Orleans, Louisiana ; that they left on 23 December 1944; that they arrived in New Orleans about 9 days later; that the weather enroute was very unfavorable and that they encountered much rain, snow and ice (R. 43 to 45). She further stated that the accused's health is not as good as it should be although "it seemed to be alright"; that her health "isn't good"; that she has not been well for the past year and had to stay in bed two days with a bad cold before they left for the trip and that she suffers from a female disorder which causes her considerable pain and discomfort (R. 45). She also stated that, after visiting her folks who live a short distance outside of New Orleans, they started back to Camp Roberts with the intention of driving through to that station; that they left about six days before the expiration of his leave; that she consulted a doctor in Corrigan, Texas, who advised her to take hormone shots for six or eight weeks, after which, if her condition did not improve, she should submit to an operation; that they continued on to Albuquerque, New Mexico, but turned back to Nashville, Tennessee, where accused's parents lived, because she became quite ill and they had decided that she would undergo an operation which had been recommended (R. 46-47). At that time she was vomiting constantly and her nose was bleeding. At Nashville she consulted another doctor, who felt an operation would be unnecessary but advised her to continue the hormone "shots" and plenty of rest. About three days later they again left for Camp Roberts,

California. While at Nashville a telegram was received by her from General Lawrence, Camp Roberts, California, advising that her husband was AWOL as of January 14 and asking information as to his whereabouts. She talked with General Lawrence over the telephone and advised him that a telegram had been sent to Colonel Floyd at the Station Hospital, Camp Roberts. She and her husband thereafter drove straight through to Camp Roberts, except for a two day stop in Houston, Texas, for car repairs. They returned to Camp Roberts either on January 31 or February 1 (R. 47-49). She also testified that she and the accused have been married for two years; that her husband is a strong person mentally and that the only reason he turned back from Albuquerque was due to her illness. She stated that after their return to Camp Roberts her husband visited her on 4 February 1945 and advised her that he had left camp for the purpose of clearing up a few charges against him due to finances; that he put through several long distance calls; that his mother sent money to General Lawrence to take care of "the overdrawn voucher" and also sent "money to Colonel Devlin for the outstanding checks"; and that he helped her pack her things ready to move, after which he returned to camp without delay (R. 49 and 50).

5. Discussion.

Charge I and Charge II and their Specifications. The evidence for the prosecution and the admissions of the accused clearly established that the accused did without proper leave absent himself from his organization at Camp Roberts, California, from 14 January 1945 - the date of the expiration of his leave of absence - until 1 February 1945 - the date of his actual return. It showed further that on 4 February 1945 accused again without authority absented himself from his organization and did not return until 6 February 1945. All of the elements of the offenses charged in Charge I and its Specifications were therefore conclusively proved. The testimony of the accused concerning the illness of his wife during their return by automobile to Camp Roberts does not constitute a legal defense to the charge of absence without leave. Such testimony, if believed, could only be considered by the court as an extenuating circumstance in imposing its sentence. Upon his return to Camp Roberts on 1 February 1945 from his first unauthorized absence accused was placed in arrest in quarters by a formal written order by his regimental commander, delivered to the accused. An officer may be placed in arrest by commanding officers only. This may be accomplished "in person, through other officers, or by oral or written order or communications" (MCM, 1928, par. 20, p. 14). The term "commanding officer" includes the commanding officer of a regiment (idem). It therefore follows that the accused was properly and legally placed in arrest. (CM 269690)

The evidence clearly shows that accused was actually in arrest in his quarters on the night of 3 February and that on the following morning he was not in his quarters and could not be found. The accused admitted that he breached his confinement and left camp, and contended that this was done for the purpose of taking care of his financial difficulties. Again, his reasons for his unauthorized breach of arrest constitute only extenuating circumstances and do not constitute a legal defense to the charge.

The record of trial therefore amply supports the findings of guilty of Charge I and Charge II and their respective Specifications.

Charge III, Specification 1. The accused was charged with fraudulently issuing a worthless check for $33.00 to the Camp Roberts Post Exchange and fraudulently obtaining $33.00, well knowing that he did not have and not intending to have sufficient funds on deposit for the payment of the check. By exceptions and substitution the court has eliminated from its findings any fraudulent intent on the part of the accused and any knowledge of the lack of and intention not to have sufficient funds in the bank for its payment.

The evidence in support of this Specification is very meager. All that appears is that on a date not shown the Post Exchange at Camp Roberts cashed for a person not named a check for $33.00 dated 21 December 1944 and signed by the accused. The Exchange deposited the check in its own bank and it was returned unpaid. The reason for its nonpayment was not shown. Sometime thereafter, on a date not shown, the check was paid by a money order. The cashier of the bank upon which the check was drawn testified that on the date the check was dated the balance in the accused's checking account was less than the face of the check. It was not shown when or whether the check was presented to the bank for payment, nor if it was presented, the reason payment was refused, or the amount of the balance when and if it was presented.

The accused's testimony did not supply the missing facts. He admitted that he wrote the check. He did not admit that he cashed it at the Exchange. He claimed that when he wrote it he thought he had a balance in his account of $34.00 to $35.00. "To the best of my knowledge this check was good for $33.00 at the time I drew it" (R. 53). He admitted that he made restitution on the check by furnishing the money to a Colonel Devlin (R. 58-59) within a week or ten days after 1 February 1945 when for the first time he learned that a check had been "returned from the post exchange here" (R. 59).

In other words, based on the acceptance of accused's uncontradicted testimony, it appears from the record that the accused, having good reason to believe and believing that he had at least $33.00 in his checking account issued a check in that amount. On the date the check was dated and presumably issued there was actually less than $33.00 in the bank. Someone cashed the check at the Post Exchange. The latter deposited the check in its own bank but it was returned. Shortly after the accused learned that the Post Exchange held his unpaid check he redeemed it.

The court found the accused not guilty of any fraudulent intent and not guilty of knowing that he did not have and not intending that he

should have sufficient funds on deposit with the drawee bank for the payment of the check. The Specification, redrafted in conformity with the findings would read substantially as follows:

> "In that * * * (accused) did at Camp Roberts, California, on or about 21 December 1944, wrongfully and unlawfully make and utter to Camp Roberts Post Exchange * * * (his) check(for $33.00)* * * and by means thereof did obtain from the * * * Exchange * * * the sum of $33.00 * * *, he * * * (the accused) not having sufficient funds in the * * * bank * * * for the payment of said check."

It is readily apparent that there was in reality no evidence of record to support the finding that the accused uttered the check "to Camp Roberts Post Exchange" or that he "by means thereof did obtain from the * * * Exchange * * * the sum of $33.00". The offense, if it is an offense, in the final analysis consists in the alleged wrongful and unlawful issuance and utterance of a check by accused at a time when he did not have sufficient funds in the bank for its payment.

In CM 202601, Sperti, 6 B.R. 171, a case involving many charges and specifications, which is often cited to sustain the now well recognized principle that the conditions surrounding the issuance and utterance of a worthless check may be such as to constitute a violation of Article of War 96, although no value is received for the check, the Board of Review, in connection with Specifications 2, 3, and 8 of Charge III (pages 226 to 230, and pages 240 to 241) had occasion to consider the very problem presented in the instant case. Fraud in the issuance and utterance of the checks described in those specifications was not charged, but it was charged that each of the checks was issued, apparently in payment of outstanding obligations, with knowledge on the part of the accused that "he did not have on deposit in the said * * * bank sufficient funds for the payment of said check, in consequence whereof said check when presented was dishonored to the discredit of the military service". In holding that Specification 2 did not set forth an offense, the Board of Review expressed the following views, which it reiterated in connection with its holdings that Specifications 3 and 8 were also legally insufficient:

> "The Board of Review is of the opinion that this specification is fatally defective in that it fails to allege that accused did not intend to have sufficient funds on deposit for the payment of this check when presented. Such an allegation is an essential requisite in charging this offense. Par. 151, MCM., CM 158679, Dig. Ops. JAG 1912-30, sec. 1497 (c); for 114, appendix 4 MCM."

In recognition of the obligation and the responsibility of officers to maintain the integrity and reputation of the military service in financial matters, the Board of Review has not hesitated to sustain as conduct of a nature to bring discredit on the military service in violation of Article of War 96 the issuance of worthless checks under circumstances which would not subject the drawer to charges in the civil courts. Depending upon the

circumstances and the nature of the offense with which the officer was charged or of which he was found guilty, it has been held that an officer may be subject to punishment although his action in issuing a worthless check was not tainted with fraud (CM 224286, Hightower, 14 B.R. 97), or although no value was received for the check (CM 249006, Vergara, 32 B.R. 5; Sperti, supra); and that where knowledge of the lack of funds at the time of the issuance of the check was established and the element of fraud was not involved, accused's good intantions, which failed to materialize, to have sufficient funds on deposit at the time of presentation was no defense (CM 232592, Law, 19 B.R. 117, 226). There has likewise been frequently recognized as an offense in military jurisprudence the "wrongful and unlawful" failure on the part of the drawer to maintain a sufficient balance, after the issuance of a check, for the payment of the check upon presentation (CM 249232, Norren, 32 B.R. 95, III JAG Bull. 290); but the Board finds no instance in which it has been held that it is wrongful and unlawful to issue and utter a check for value or for any other purpose where it is merely charged that at the time of issuance and utterance the drawer did not have sufficient funds on deposit for its payment, unaccompanied by any charge of fraud, intention not to have sufficient funds for its payment, failure to maintain an adequate balance, or knowledge that it would not be paid. The discredit upon the military service does not result from the issuance of the check without sufficient funds -- it is only when the check is dishonored because of the depleted condition of the drawer's account that the harm is done. In the instant case there was no evidence that the check was ever presented for payment to the drawee bank and dishonored because of the insufficiency of funds on deposit for its payment. There was therefore no basis for sustaining any inference that discredit was brought upon the military service. The Board sees no occasion to disagree with the holding in the Sperti case (supra) or to extend the scope of Article of War 96 so as to make it an offense merely to issue a check at a time when there are insufficient funds on deposit for its payment. It follows that the Board finds the record of trial legally insufficient to support the findings of guilty of Charge III and Specification 1 thereof.

Charge IV and its Specifications. The evidence shows that on 22 December 1944 the accused presented a voucher to the Finance Officer at Camp Roberts for services rendered in December 1944 and received in partial payment the sum of $190.00. On 4 January 1945 at Camp Plauche, New Orleans, Louisiana a person who identified himself by his identification card and other means as Lieutenant Homer H. Salyer, ASN 0-1050450, presented for payment a claim of $254 against the United States to an agent of E. W. McLarren, Colonel, Finance Officer at that locality, for services rendered during the month of December 1944. In that manner he obtained from that Finance Officer the sum mentioned. These circumstances indicate that it was the accused himself who presented the claim and received the payment. It appears from the record that he was in that locality at that time. The documents, such as the identification card and leave orders, necessary to be presented to the finance officer in order to procure payment for services, would normally be and should be in the possession of the accused. His admission to the investigating officer that he drew the pay set forth in the

Specifications and that he had made restitution removed all doubt concerning his identity as the one who presented the claim. Having received $190 of his pay within two weeks previous to 4 January 1945 the court was justified in drawing the inference that the accused knew that his claim was false and therefore fraudulent as averred in the Specification.

By virtue of the same reasoning it follows that the accused knew that the claim that he presented on 17 January 1945 was false and fraudulent as alleged in Specification 2 of Charge IV. His identity upon that occasion was clearly established by the officer who unwittingly assisted him in making out the claim. Again he failed to mention the receipt of the payment of $190 that he had previously received. His act on 17 January 1945 of again claiming and collecting his December pay removes any possible doubt that he acted in good faith upon either occasion. His acts were unquestionably fraudulent.

Article of War 94 expressly provides for the punishment of any person subject to military law who "makes * * * any claim against the United States or any officer thereof, knowing such claim to be false and/or fraudulent".

MCM 1928, par. 150b, page 181, provides,

> "The claim must be presented, directly or indirectly, to some person having authority to approve or pay it. False and fraudulent claims include not only those containing some material false statement, but also claims that the person presenting knows to have been paid or for some other reason knows he is not authorized to present or to receive money on."

It was clearly shown that the accused on the two occasions alleged presented a false and fraudulent claim against the Government, and that he presented them in each instance to a person, or his agent, who had authority to, and did, pay the claim. We find no difficulty in sustaining the findings of guilty of the Specifications and the Charge.

6. War Department records show the accused to be 28-8/12 years of age and married. He completed 11 grades of schooling but did not graduate. He was employed as manager of a restaurant in New York City and intermittently on the side played a trumpet in an orchestra for six years until on 17 September 1940 he enlisted in the service for one year. He was honorably discharged from the service on 1 September 1941 in the grade of corporal, but he reenlisted 3 December 1941. He served as an enlisted man in the Infantry and the Coast Artillery reaching the grade of Technical Sergeant until 21 January 1943 when he was commissioned a second lieutenant, AUS, CAC.

7. 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. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Specification 1 of Charge III and Charge III, legally sufficient to support the findings of guilty of the remaining Charges and their respective Specifications and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of Articles of War 61, 69 or 94.

Judge Advocate.

Judge Advocate.

Judge Advocate.

SPJGK - CM 278968 1st Ind.

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 Homer H. Salyer (0-1050450), Infantry.

2. Upon trial by general court-martial this officer was found guilty of being absent without leave on two separate occasions, the first for seventeen days and for two days on the second, in violation of Article of War 61 (Charge I, Specifications 1 and 2); of a breach of an arrest in violation of Article of War 69 (Charge II); of issuing a check for $33 when he did not have that amount in his checking account in violation of Article of War 96 (Charge III, Specification 1); and of presenting for payment false and fraudulent claims for his pay against the United States in violation of Article of War 94 (Charge IV, Specifications 1 and 2). He was sentenced to be dismissed the service 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. The Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Specification 1 of Charge III and Charge III (giving of worthless check for $33), but legally sufficient to support the remaining Charges and Specifications of which he was found guilty and the sentence and to warrant confirmation of the sentence. I concur in the opinion of the Board of Review.

Accused absented himself without leave from his station by reporting 17 days late from a 15-day leave of absence. He was placed in arrest in his quarters. He breached his arrest and was again absent without leave for two days. Prior to his initial leave of absence accused presented a voucher for and collected from the Finance Officer at his station $190 as partial payment of his pay for December 1944. Thereafter and during his absence, the accused presented for payment to the Finance Officer at two military stations false and fraudulent claims for his December 1944 pay, each in the amount of $254.00, from which he omitted any reference to the partial payment theretofore received, and by means thereof twice collected from the United States Government his pay for December 1944 over and above the partial payment of $190.00 which he had theretofore received. The Government was subsequently reimbursed in full.

The conduct of accused demonstrates that he is morally unworthy to remain a commissioned officer of the Army of the United States. I recommend that the sentence be confirmed, but, in view of the legal insufficiency of the record to support the findings of guilty of Charge III and its

Specification and the fact that restitution was promptly made, I recommend that the period of confinement be reduced to three years, that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

4. Consideration has been given to a letter from the wife of the accused to The Adjutant General of the Army dated 24 May 1945 and to the doctors' certificates thereto attached. The letter and its attachments are attached to the record of trial.

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
1. Record of trial
2. Form of action
3. Ltr fr wife of acc'd to TAG w/incls

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part. Sentence confirmed but confinement reduced to three years. GCMO 283, 5 July 1945).

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

SPJGN-CM 278970

U N I T E D S T A T E S	)	SIXTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened
	)	at Army Air Base, Albrook
First Lieutenant NATHAN	)	Field, Canal Zone, 26-27
FINK (O-568132), Air Corps.	)	February 1945. Dismissal.

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 95th Article of War.

Specification 1: In that First Lieutenant Nathan Fink, Air Corps, 6th Airways Squadron, did, at Guatemala City, Guatemala, on or about 25 October 1944, wrongfully and publicly associate with notorious prostitutes on the public highways in and near Guatemala City, Guatemala.

Specification 2: In that First Lieutenant Nathan Fink, Air Corps, 6th Airways Squadron, did, at Army Air Forces Airways Station, Guatemala City, Guatemala, on or about 25 October 1944, wrongfully introduce six (6) notorious prostitutes onto the Station, he, the said First Lieutenant Nathan Fink, being then and there the Commanding Officer of said Station.

Specification 3: In that First Lieutenant Nathan Fink, Air Corps, 6th Airways Squadron, did, at Army Air Forces Airways Station, Guatemala City, Guatemala, on or about 25 October 1944, wrongfully entertain in his quarters notorious prostitutes, while other officers were present in said quarters, which action seriously compromised his character and standing as an officer.

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

Specification 1: In that First Lieutenant Nathan Fink, Air Corps, 6th Airways Squadron, did, at Army Air Forces Airways Station, Guatemala City, Guatemala, on or about 25 October 1944, wrongfully and willfully violate telegraphic order dated 8 October 1944 from the Commanding Officer, Rio Hato Army Air Base, Republic of Panama, his Commanding Officer, restricting all military personnel to the Army Air Forces Airways Station, Guatemala City, Guatemala, by driving a Government vehicle from the said Station into Guatemala City, Guatemala, for unofficial purposes, taking with him two (2) other officers.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of the Specifications of Charge I, the Specification of Charge II, and Charge II, and not guilty of Charge I but guilty of a violation of the 96th Article of War. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 25 October 1944 the accused was Commanding Officer of the Army Air Forces Airways Station, Guatemala City, Guatemala (R. 7, 36, 46, 54, 82). Because a revolution was in progress in that locality, military personnel were restricted to their base, and were not allowed in Guatemala City except on urgent official business and with the approval of the Commanding Officer (R. 7, 36, 46, 75; Pros. Exs. D, D-1, I, J). On the evening of 25 October 1945 the accused attended a promotion party at the Officers' Club on the local Field. At about eight o'clock, accompanied by Captain John H. Yeaman and Captain Walford Walden, he drove a government vehicle off the Base and into Guatemala City (R. 9,12, 13, 39). According to Captain Yeaman, they were not on official business at the time (R. 14). After making several "stops" and "picking up" five or six women, the accused drove back to the Officers' Club, arriving there about 9:15 (R. 14-16, 21, 40, 43). Shortly thereafter several persons went from the Club to the house which the accused occupied as his quarters and there partook of eggs, bacon and coffee (R. 19, 20, 41, 87, 88). The men present were Captain Yeaman, Captain Walden, Lieutenant Nowak, Mr. Heston, Mr. Butler, Mr. Moore, and the accused (R. 19, 54, 56). Among the three or four women who accompanied them, one was known as "Edith" or "Edie", one as "Conchie", and another had a nickname "similar to Sonia" (R. 20, 21, 56, 57, 88). Edith was a licensed prostitute and "Edith's Place" was a house of prostitution in Guatemala City (R. 66, 68, 76; Pros. Exs. A, I, J). Captain Yeaman, who testified that "Conchie" was present at the accused's quarters, was not able to identify her purported picture as the person whom he saw there (R. 21, 67; Pros. Ex. F).

Technical Sergeant Nat Jacks was "roving guard" at the Field from midnight to six o'clock on the morning of 26 October 1944 (R. 62). About 12:30 a.m. he discovered three women, known to him as prostitutes, walking along the main road of the post (R. 62, 72). He "drove them" to the main gate and directed them to leave the post (R. 63). He recognized one of the women as Conchie, a prostitute from Guatemala City, but could not identify her purported picture (R. 70; Pros. Ex. F). He was shown a picture of "Josefina" and stated that he had seen her in Guatemala but did not see her on the night in question (R. 71; Pros. Ex. B). He believed that the girl pictured in Prosecution's Exhibit C (Sonia) worked for "Edie" (R. 71).

Technician Third Grade Joseph E. Rauch was on guard at the main gate from midnight to 6 a.m. on 16 October 1944 (R. 75). He recognized as "Conchie" one of the three women brought to the gate by Sergeant Jacks, but, when shown a purported picture of Conchie, he could not remember whether he had ever seen her (R. 75, 76; Pros. Ex. F). He knew, however, that the Conchie whom he saw on the Field worked in "Edith's place" (R. 76). About 5 a.m. he saw Edith and "one or two other girls" leaving the post with three Guatemalan officers in a Guatemalan jeep (R. 75). According to Sergeant Rauch, prostitutes were never allowed on the Field (R. 77). He recounted a conversation which he subsequently had with the accused in which the latter stated that, if he were convicted of the charge he might receive a "dishonorable discharge and possibly a fine", which he thought was a "pretty high price to pay for one night of fun" (R. 78).

Private Harry C. Braddee, who was also on guard, recognized "Concha" but did not know the other two women who were brought to the main gate by Sergeant Jacks. He testified, however, that he saw the girl pictured in Prosecution's Exhibit B (Josefina) leaving the post between 11:45 p.m. and 12:15 a.m. and also saw "Sonia", a prostitute at "Edie's", on the Field (Pros. Ex. I). According to Private First Class John J. Brust, "Josefina" (Pros. Ex. B) was a prostitute of Guatemala City (Pros. Ex. J). Mr. Clyde H. Moore, a witness for the prosecution, believed that Sonia (Pros. Ex. C) was a member of the group at the accused's quarters (R. 89), but that Conchie (Pros. Ex. F) was not there (R. 85).

Colonel Raymond G. Miller, Inspector General of the Sixth Air Forces, testified that he interviewed the accused in connection with the matters here in issue. According to Colonel Miller, the accused admitted that, on the evening of 25 October 1944, he went to Guatemala City, "picked up" several prostitutes, and brought them back to the Officers' Club (R. 95, 96). There they had "a limited number of drinks" and then a decision was made "by someone" to visit the accused's quarters (R. 99). The accused further admitted that two of the prostitutes, one of whom was "Edie", went into his quarters. A fire was lighted in the fireplace and eggs and hot tea were served (R. 97). The male guests

present included Mr. Moore, Counter Intelligence Corps agent. According to Colonel Miller, the accused "maintained" that only the living room and kitchen of his quarters were occupied by the party (R. 99). The girls left his quarters about 11:30 in a government car which was ordered either by the accused or one of the male guests (R. 97, 98).

The witnesses for the prosecution were questioned by the Defense Counsel as to the character of the accused. Captains Yeaman, Walden, and Scheuer, and Lieutenant Nowak each testified that the accused enjoyed a good reputation as an officer and gentleman, and that they would be glad to serve under him again (R. 22, 44, 52, 58). Sergeant Jacks and Sergeant Rauch stated that the accused was known as an officer and gentleman among both officer and enlisted personnel (R. 73, 79). Mr. Moore added that the accused's reputation was good among the military and civilian population, as well as the government officials, in Guatemala (R. 91). According to Private Braddee, the accused "had a swell reputation" (Pros. Ex. I).

4. Captains Walter J. Scheuer, Walford Walden, and John H. Yeaman, and Mr. Clyde C. Moore, who appeared as prosecution witnesses, were also introduced as witnesses for the defense. Each of them testified that he was interviewed by Colonel Raymond G. Miller in the course of what was considered a casual, routine inspection. There was no suggestion by Colonel Miller that a serious offense was involved or that court-martial charges against any officer might result from the statements given. Each of these officers testified in effect that no adequate explanation of the meaning of Article of War 24 was made to him (R. 117, 118, 123, 124, 129, 135).

Captain Carl G. Stanley, the officer appointed to investigate the charges, was introduced as a witness for the defense. He testified that in the course of his investigation he interviewed Captain Yeaman, Captain Walden, and Lieutenant Nowak in January 1945 and that, in his opinion, they did not understand the 24th Article of War (R. 149). He again met with these officers and Captain Scheuer, a few days before the trial, in the office of Major Magdlen, Acting Staff Judge Advocate of the Sixth Air Force. Also present were Lieutenant Taecker, Colonel Miller, and Colonel Smith, the latter being "Judge Advocate General, Panama Canal Department" (R. 149). The purpose of the conference, according to Captain Stanley, was "to clarify in the minds of these witnesses their rights under the 24th Article of War, and also the matter of refusal to testify to certain questions was taken up" (R. 150). The witnesses were advised that refusal to answer proper questions might be interpreted as an act obstructing justice, which was a court-martial offense (R. 150). The questions asked at that time were more fully answered, "particularly by Captain Yeaman and Lieutenant Nowak", than at the time of the formal investigation of the charges (R. 151). In the opinion of Captain Stanley no one at the time of the conference in Major Magdlen's office was forced to give false or manufactured testimony (R. 152). No member of the defense was present. (R. 151)

The accused's Officer's Qualification Card, WD AGO Form 66-1, was introduced by the defense. This document showed that the accused had received three performance ratings of Superior and three of Excellent. The last rating of Unsatisfactory was entered after the alleged acts for which the accused was tried (R. 153; Def. Ex. 1). Also admitted with evidence for the defense was a letter from the Charge d' Affaires of the American Embassy of Guatemala commending the accused for the manner in which he accomodated a number of American families during the revolution (R. 153; Def. Ex. 2).

The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to remain silent (R. 154).

5. Specification 1 of Charge I alleges that the accused did "wrongfully and publicly associate with notorious prostitutes on the public highways in and near Guatemala City, Guatemala." Specification 2 of Charge I alleges that the accused did "wrongfully introduce six (6) notorious prostitutes onto the Station, he [the accused] being then and there the Commanding Officer of said Station." In Specification 3 of Charge I the accused allegedly did "entertain in his quarters notorious prostitutes, while other officers were present in said quarters, which action seriously compromised his character and standing as an officer." These offenses are set forth as violations of Article of War 95. In the Specification of Charge II the accused is alleged to have violated an order restricting all military personnel to the Station, "by driving a Government vehicle from the said Station into Guatemala City, Guatemala, for unofficial purposes, taking with him two (2) other officers." This offense is laid under Article of War 96. All offenses are alleged to have occurred on the evening of 25 October 1944.

The evidence, including the statements of the accused, clearly shows that on the occasion alleged the accused, accompanied by two officers, left the area to which he and his organization were restricted and drove a Government automobile into Guatemala City for an unofficial purpose. There the accused procured the companionship of five or six notorious prostitutes who returned with him to his station where he entertained them in his quarters. This evidence is legally sufficient beyond a reasonable doubt to sustain the finding of guilty of Specification 2, Charge I, substituting therein the words "five (5) notorious prostitutes" for the words "six (6) notorious prostitutes"; and legally sufficient to sustain all the other findings.

The record presents several problems which require discussion. The first of these arises from the testimony of the four witnesses, who, having participated with the accused in the offenses alleged, were required over their own objection to incriminate themselves. Thus Captain Yeamen was forced to testify that he left the base with the accused and was present with him when they met certain women whose names he was required to give. He was also forced to testify that these women accompanied them back to the base. Captain Walden was required to testify

over his objection to substantially the same effect and that he was present at the accused's quarters on the occasion in question. Both Lieutenant Nowak and Mr. Moore were also compelled to testify that they were in the company of the women on the base on the day alleged.

The ruling of the law member, in requiring the above witnesses to give evidence incriminating themselves in an offense for which they might be prosecuted, violated the mandatory provisions of Article of War 24, which reads as follows:

> "Compulsory Self-Incrimination Prohibited.--No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, 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."

The ruling of the law member in extorting self-incriminating testimony from several witnesses was a flagrant violation of their personal rights but these errors did not inure to the benefit of the accused. In Orum v. State, 175 N.E. 876, (Ohio, 1930) the court stated:

> "In such a case, if a witness refuses to answer a question on the ground that the answer solicited would incriminate him, and the court disregards the claim of the witness, and requires him to answer, the defendant has no right to object, and it is not reversible error in the reviewing court even if the trial court erred in requiring the witness to answer and the testimony of the witness tended to prove the defendant guilty of the crime charged."

Similarly the Board of Review in 1 BR 73; Dig. Op. JAG, 1912-1940, sec. 381, in considering the same problem stated:

> "The error committed, however, is not one of which the accused may complain as a violation of his legal rights (State v. Cobley, 103 N.W. 99; Par. 122b, M.C.M.). The testimony, though improperly obtained, was competent against the accused." See also to the same effect Morgan v. Halberstadt, 90 F. 592.

The second problem arises from the testimony of Colonel Miller concerning the pre-trial statements given to him by the accused. During the course of his testimony Colonel Miller was asked whether he warned the

accused, on the occasion of his pre-trial investigation, that the accused's statements might be used against him. The objection of the prosecution to this question was sustained and the witness did not answer. Although this ruling was clearly error the subsequent cross-examination of Colonel Miller shows that it did not prejudice the substantial rights of the accused.

Moreover, the defense does not directly contend that the accused's pre-trial statement was involuntary. On this point Colonel Miller testified, on direct examination, as follows:

> "I read the 24th Article of War to Lt. Fink and then explained it as follows: That he would be the judge of all questions which were incriminating, and that he would not be required to answer any incriminating questions; that he was required to answer all questions material to the issue, and that I would be the judge of which questions were material. After I made this explanation I asked if he understood the provisions of the 24th Article of War, and my explanation, to which he replied in the affirmative" (R. 94).

Later, on cross-examination, he elaborated further on this point, as follows:

> "[I said to Lieutenant Fink] I will be the judge of all questions material to the issue. You will be required to answer all questions material to the issue which aren't incriminating. Do you understand the 24th Article of War, and my explanation thereof? * * * * [Lieutenant Fink] indicated that he did" (R. 101).

Although the explanation given to the accused by Colonel Miller was not as clear and full as it should have been, Colonel Miller's testimony does show that the 24th Article of War was read to the accused and that he was told that he did not have to answer any questions that might incriminate himself. It is believed, therefore, that the statements in the form of answers which were made by the accused to Colonel Miller were of a voluntary character and that the accused's privilege against self-incrimination was not violated.

A third problem is raised by the ruling of the court on the defense's challenge for cause of Lieutenant Colonel Robert W. Benn as a member of the court. When examined as to his prior knowledge of the case, Colonel Benn stated that he had read "about two paragraphs" of Colonel

Miller's report and had discussed the report with him. When asked whether he could make a fair decision in the case, Colonel Benn replied, "I thought of challenging myself, but I didn't because I have challenged myself on so many occasions". He was then asked, "Do you feel you could render an unbiased opinion in this case?" to which he replied, "If I hadn't thought so, I would have challenged myself". Although Colonel Benn's first statement that he had thought of challenging himself may indicate that he felt some reluctance to serve on the court, his further statement was a clear assertion of his belief in his ability to adjudge the accused fairly. Since Colonel Benn has not impeached his impartiality but has positively affirmed his lack of bias, the action of the court in accepting him as a member cannot be criticized.

6. The records of the War Department show that the accused is about 29 years of age. After being graduated from high school, he attended college for 2½ years. He was inducted into the Army on 1 July 1941 and received a character rating of "Excellent" as an enlisted man. After attending Officer Candidate School, he was commissioned a second lieutenant in the Army of the United States on 9 December 1942. He was promoted to the rank of First Lieutenant on 2 July 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Specification 2, Charge I, substituting therein the words "five (5) notorious prostitutes" for the words "six (6) notorious prostitutes"; legally sufficient to sustain all the other findings and legally sufficient to sustain the sentence and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Article of War 96.

Abner E. Lefcourt, Judge Advocate.

Robert J. Cannon, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 278970 1st Ind
Hq ASF, JAGO, Washington 25, D.C. 15 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 First Lieutenant Nathan Fink (0-568132), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully and publicly associating with notorious prostitutes on a public highway in and near Guatemala City, Guatemala; of wrongfully introducing six notorious prostitutes into the military station of which he was the commanding officer; of entertaining several prostitutes and officers in his quarters; and of violating an order restricting all military personnel to the limits of his station, all 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. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specification 2, Charge I, substituting therein the words "five (5) notorious prostitutes" for the words "six (6) notorious prostitutes"; legally sufficient to sustain all the other findings and legally sufficient to sustain the sentence and to warrant confirmation thereof.

On 25 October 1944 a revolution was in progress in Guatemala and as a result thereof the accused and the organization of which he was in command were restricted to the limits of their base. During the evening he and several officers attended a promotion party at the local officers' club. In a spirit of gaiety the accused, who was unmarried, left the party with two other officers and drove into Guatemala City where they procured the companionship of five notorious prostitutes with whom they returned to the officers' club at their post. Shortly thereafter the accused, accompanied by several of the women and several officers, went to the accused's quarters where they partook of eggs, bacon, and coffee. The women left the accused's quarters about 11:30 that evening. The evidence revealed no improper conduct at the accused's quarters other than that involved in the presence of the women.

A number of officers and enlisted men who were prosecution witnesses testified at the trial that the accused had a good reputation as an officer and a gentleman, and that they would be glad to serve under

him in the future. In addition to this evidence of the accused's good reputation, Congressman George G. Sadowski appeared before the Board of Review attesting to the accused's excellent family background and his good reputation as a gentleman in civilian life. At the same time he presented some thirty affidavits consisting of statements from Guatemalan civilians, United States Army officers and enlisted men, and one United States consular official, all certifying to the good reputation enjoyed by the accused in Guatemala City. The accused has received three efficiency ratings of "Superior" and three of "Excellent".

Although the accused's conduct in associating with prostitutes on the occasion alleged was reprehensible, it occurred in a spirit of gaiety following a promotion party and did not seriously compromise his moral standing as a gentleman. In view of the fact that the accused's conduct involved no actual immorality, that his previous record, both in civilian life and in the service was excellent, and that relatively light punishment was imposed under Article of War 104 upon his fellow officers who participated in the same misconduct, I believe that clemency is warranted. I recommend, therefore, that the sentence be confirmed, but commuted to a reprimand and a forfeiture of pay of $50 per month for three 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.

MYRON C. CRAMER
Major General
The Judge Advocate General

3 Incls
Incl 1 - Record of trial
Incl 2 - Form of action
Incl 3 - 30 affidavits presented by Hon. Sadowski

(Findings disapproved in part. Sentence confirmed but commuted to reprimand and forfeiture of $50. pay per month for three months. G.C.M.O. 261, 29 June 1945).

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

SPJGQ - CM 278971

UNITED STATES v. Second Lieutenant LOUIS R. TALBOTT (0-536802), Air Corps.	ELEVENTH AIR FORCE Trial by G.C.M., convened at Adak, Alaska, 29 March 1945. Dismissal and total forfeitures.

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

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

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

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

Specification 1: In that Second Lieutenant Louis R. Talbott, Air Corps, 400th Base Headquarters and Air Base Squadron (Reduced Strength), did, at Shemya, Alaska, on or about 23 December 1944, wilfully, unlawfully, and with intent to defraud, falsely alter a certain writing, to wit: WD AAF Form No. 1 tentative-12-18-41, Flight Report, for United States Aircraft AT-7, #41-21043, dated 12 December 1944, by adding thereto the following name, words and figures, to wit: "01 Fleischman, RS, 1st Lt QD QD AI QD QD AI"
1:00 1:00 2:10 1:00
which said Flight Report was a writing of a public nature which might operate to the prejudice of the United States.

Specification 2: Identical with Specification 1 except that the Flight Report was dated 17 December 1944 and the entries appearing after Lieutenant Fleischman's name were:

QD QD
0:30 2:10

Specification 3: Identical with Specification 1 except that the Flight Report was dated 19 December 1944 and the entries appearing after Lieutenant Fleischman's name were:

QD	QD AI
1:30	1:30

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

Specification 1: In that Second Lieutenant Louis R. Talbott, Air Corps, 400th Base Headquarters and Air Base Squadron (Reduced Strength), did, at Shemya, Alaska, on or about 23 December 1944, with intent to deceive the United States Government, officially report to the United States Government on WD AAF Form No. 1 tentative-12-18-41, Flight Report, for United States Aircraft AT-7, #41-21043, dated 12 December 1944, that another, viz: First Lieutenant Robert S. Fleischman, did accompany him as co-pilot on a flight from Anchorage, Alaska to Cold Bay, Alaska, by way of Kodiak, Alaska, which report was known by the said Second Lieutenant Louis R. Talbott to be untrue, in that First Lieutenant Robert S. Fleischman did not accompany him on such flight.

Specification 2: Identical with Specification 1 except that the date of the Flight Report was 17 December 1944 and the flight was from Cold Bay, Alaska to Umnak, Alaska.

Specification 3: Identical with Specification 1 except that the date of the Flight Report was 19 December 1944 and the flight was from Umnak, Alaska to Adak, Alaska.

The accused pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was submitted. He was sentenced to dismissal and forfeiture of 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 is as follows:

During December 1944, Staff Sergeant Murray Anzek was Chief Clerk in the Base Operations Office, 400th Base Headquarters and Air Base Squadron, Shemya, Alaska (R. 5, 6). Accused and a Lieutenant Fleischman "worked" in the same office, accused apparently being Assistant Base Operations Officer (R. 7). Anzek was charged with the duty of keeping Army Air Forces Forms 1 and 5. Form 1 is a Flight Report of Operations. The information entered on it includes the date of the flight, type and number of airplane, names of personnel

participating in the flight, duties performed (such as pilot or co-pilot), time of performance of duties, landings, point of departure and destination, and total time involved in the flight. Form 1 is prepared by the pilot, co-pilot, or crew chief. The completed Form 1 is turned over to Anzek, who extracts from it information applicable to each participant in the flight who is on flying status, and posts the information onto the Individual Flight Record (known as Form 5) of the person concerned. Thereafter, Anzek files the Form 1.

Form 5 contains the flying hours credited to the individual and is used as a permanent record to show his flying experience and "for the purpose of attaining a higher aeronautical rating or an instrument rating." One copy of Form 5 is sent to the Commanding General, Army Air Forces, for the attention of the Chief of Flying Safety (R. 6, 7).

Technical Sergeant Gerald J. Griffin, Headquarters and Headquarters Squadron, 11th Air Force, Adak, Alaska, was with the 39th Air Depot Repair Squadron, APO 942 in December 1944. In that month he was transferred to his present organization, and about 12 December 1944 traveled from APO 942 to APO 980 in an AT-7 airplane piloted by the accused. The route flown was from APO 942 to Kodiak, Kodiak to Cold Bay, Cold Bay to Umnak, and Umnak to APO 980, arriving at APO 980 about 19 December. Accused and Griffin were the only persons on the plane during the flight. Griffin did not prepare a Form 1 for any part of the trip, but saw accused prepare a Form 1 showing five hours and ten minutes total flying time, which Form 1, Griffin believed, covered that portion of the flight between Elmendorf and Kodiak and between Kodiak and Cold Bay. The only names appearing on the Form 1 prepared by accused were those of Griffin and accused. Griffin made no alterations, erasures, or changes on any Form 1 covering the flight from APO 942 to APO 980 (Ex. 1).

During December 1944, accused turned in three Forms 1 to Anzek. The forms contained no other names except those of Griffin and accused (R. 7, 9). One morning during the last week in December, accused said to Anzek: "Sergeant Anzek, I am going to insert Lt. Fleischman's name on the Form 1 on my flight down the chain that was performed in the AT-7". Anzek replied: "Sir, you are Assistant Operations Officer, I am merely a clerk and the responsibility is yours" (R. 7).

Accused did not tell Anzek, nor did Anzek know, whether Lieutenant Fleischman had accompanied accused on the flight (R. 10). On the afternoon of the day when the above conversation took place, Anzek took the three forms out of the files to see whether any changes had been made on them, and discovered that Lieutenant Fleischman's name and certain data concerning him had been added to each form (R. 8, 9). Anzek did not see the accused make the alterations (R. 9, 10).

The three forms were received in evidence without objection (R. 9; Exs. 2, 3, 4). All three show the "Station" as APO 942, "Airplane Model" as AT-7, and "Airplane Serial No." as 41-21043. Exhibit 2 is dated 12 December 1944; Exhibit 3, 17 December 1944, and Exhibit 4, 19 December 1944. Exhibit 2 shows a "total flight time" of 5 hours 10 minutes; Exhibit 3, 2 hours 40 minutes; and Exhibit 4, 3 hours. The entries concerning the places covered on the respective flights appear to be in code and the record contains no explanation thereof.

Opposite Lieutenant Fleischman's name on each Form 1 appear the entries alleged in the Specifications of Charge I, which, as explained by Anzek, indicate that Lieutenant Fleischman spent the designated periods of time on "qualified dual" (QD) or "qualified dual actual instruments" (QD AI) (R. 8; Exs. 2, 3, 4).

Anzek extracted from the three forms, and posted to a draft copy of Lieutenant Fleischman's Form 5 for the month of December 1944, the data concerning Lieutenant Fleischman, showing altogether 10 hours and 50 minutes flying time (R. 7, 9). Except for 40 minutes in a B-25, Lieutenant Fleischman had no other flying time for December. Anzek kept the Form 5 on his desk "for the purpose of informing Lt. Fleischman of that change" (R. 9). The subsequent disposition of this Form 5 does not appear from the evidence.

4. The defense introduced no evidence, and the accused elected to remain silent (R. 11).

5. It is apparent that the offense charged in each of the three Specifications of Charge I is forgery, for each Specification follows exactly the form prescribed for that offense in the Manual for Courts-Martial (MCM 1928, p. 250, Form 97) and the Specifications are laid under Article of War 93. It is equally apparent that the actions of accused, however reprehensible, do not constitute forgery. It is an essential element of forgery that the writing must be false, must purport to be what it is not (MCM 1928, par. 149j). In the present instance the writing is exactly what it purports to be; namely, a report prepared by accused which includes a recital that certain personnel took part in a certain flight, together with other data about the flight. False recitals of fact in a genuine document do not render the document false and do not amount to forgery. The principle is admirably explained by the following quotations from State v. Young (46 N.H. 266):

> "The term falsely, as applied to making or altering a writing in order to make it forgery, has reference not to the * * * fact stated in the writing * * *, but it implies that the paper or writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains - a writing which is the counterfeit of something which is or has been a genuine writing, or one which purports to be a

genuine writing or instrument when it is not. The writing or instrument must in itself be false, not genuine, a counterfeit, and not the true instrument which it purports to be" (at p. 270).

"A man may make a statement in writing of a certain transaction, and may represent and assert ever so strongly that his statement is true, but if it should prove that by mistake he is in an error, and that his statement is entirely wrong, that could not be forgery; and suppose we go further, and admit that the statement was designedly false, when made, and so made for the purpose of defrauding some one, it does not alter the case, it is no forgery. The paper is just what it purports to be, it is the statement of the man that made it, it is a true writing or paper, though the statement it contains may be false" (at p. 269).

In view of the fundamental principle referred to, it is our opinion that the offenses alleged in the Specifications of Charge I were not proved. Nor do the acts of accused permit conviction of a lesser included offense. Inserting a false statement in a report prepared by the accused is entirely different from, and not included in forgery.

Each of the Specifications of Charge II alleges that with intent to deceive the United States Government, accused officially reported to the Government on Form 1 that Lieutenant Fleischman accompanied him as co-pilot on a certain flight, and that accused knew that the report was untrue. The evidence shows beyond peradventure of doubt that accused filed the reports covering flights performed on the dates alleged and that Lieutenant Fleischman did not accompany him as recited in the reports. The reports were made to the agent of the United States Government assigned to receive them. Intent to deceive the Government may be inferred from the fact that the information contained in such reports was regularly transmitted to the office of the Commanding General, Army Air Forces, and served as a basis for aeronautical and instrument ratings of the persons concerned. It is patent that accused's actions were prompted by the desire to give Lieutenant Fleischman credit for having flown a number of hours as co-pilot when in fact he had not been on the flights so reported.

There can be no real doubt that the flights alleged were the same flights covered by the Flight Reports and referred to in the testimony of Griffin, although the proof is not as definite as it might be. The dates, airplane model, and airplane number stated on the reports correspond to those alleged in the Specifications, and the date of departure and date of arrival at the final destination,

as testified to by Griffin, show Griffin's trip to have been made during the period covered by the Specifications and reports. Griffin's testimony with relation to the airplane model (AT-7) also conforms to the Specifications and reports. The reports show the "Station" as APO 942, which, according to Griffin, was the point of departure, and which may be identified as Anchorage, Alaska, the point of departure alleged in Specification 1 (Sec. IV, W.D.Circular 97, 29 Mar. 1945). The total flying time of 5 hours and 10 minutes which Griffin saw the accused enter on a Form 1 is identical with the total flying time on Exhibit 2, and, as Griffin recalled, that flight covered the trip to Kodiak and from Kodiak to Cold Bay, which corresponds to the trip alleged in Specification 1. The remainder of the flight, according to Griffin, was from Cold Bay to Umnak and Umnak to APO 980. Specification 2 covers a flight from Cold Bay to Umnak, and Specification 3 a flight from Umnak to Adak. Adak and APO 980 are one and the same. In addition to all of the above, the three Flight Reports in evidence were the only ones turned in by accused during December 1944.

After careful consideration of the evidence, the Board of Review is of the opinion that the offenses alleged in the Specifications of Charge II were proved beyond a reasonable doubt. The issuance of such false reports with intent to credit an officer on flying status with flying experience which he did not have, is conduct unbecoming an officer and a gentleman in violation of Article of War 95.

6. Attached to the record of trial is a letter from the defense counsel and assistant defense counsel recommending that accused be retained in the military service. In substance, the reasons advanced for the recommendation are as follows: (1) Accused did not realize the consequences which might result from his actions and he was attempting to help a fellow officer, not himself; (2) Accused enlisted in the Regular Army on 17 September 1940, was commissioned a second lieutenant on 13 October 1943, and has not been previously convicted by court-martial nor punished under Article of War 104; (3) Accused has 1346.15 hours flying time to his credit and holds a current instrument rating, and the technical training acquired by him will be of great value to the military service.

7. War Department records disclose that accused is 22 years old and married. So far as appears, he has no children. He is a high school graduate and has not engaged in any civilian occupation, having enlisted in the Army on 17 September 1940. On 9 October 1942, after the customary course of training, he was graduated as a pilot from the Southeast Army Air Forces Training Center, Maxwell Field, Alabama. He was appointed flight officer, Army of the United States, on 10 January 1943, and second lieutenant, Army of the United States, on 9 October 1943.

8. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Charge I and the Specifications thereof, but legally sufficient to support the findings of guilty of Charge II and the Specifications thereof and to support the sentence and to warrant confirmation thereof. Dismissal is mandatory for a violation of Article of War 95.

Fletcher R. Andrews, Judge Advocate

Herbert B. Fredricks, Judge Advocate

_____, Judge Advocate

SPJGQ-CM 278971 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 Louis R. Talbott (0-536802), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of forgery of three flight reports, in violation of Article of War 93 (Specs. 1, 2, 3, Chg. I), and of making three false official flight reports, with intent to deceive the United States Government, in violation of Article of War 95 (Specs. 1, 2, 3, Chg. II). He was sentenced to dismissal and forfeiture of 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.

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 Charge I and the Specifications thereof, but legally sufficient to support the findings of guilty of Charge II and the Specifications thereof and to support the sentence and to warrant confirmation thereof. I concur in that opinion.

The accused was a pilot and Assistant Base Operations Officer at an air base in Alaska. Official reports of flights are made to the chief clerk at the base on a document known as "Form 1", which document contains, among other data, the flying hours to be credited to each person on the flight. The chief clerk posts the information contained in Form 1 to a document known as "Form 5", which document contains a record of the particular individual's flying experience. Form 5 is sent to the office of the Commanding General, Army Air Forces, for the attention of the Chief of Flying Safety, where it serves as a permanent record of the individual's flying experience and "for the purpose of attaining a higher aeronautical rating or an instrument rating." On 12, 17, and 19 December 1944, accused was the pilot of an AT-7 airplane on flights covering various points in Alaska. The only other participant in these flights was Staff Sergeant Griffin. After the flights, the accused made out and delivered to the chief clerk at the base, three flight reports on Form 1, covering, respectively, the flights made on 12, 17, and 19 December, and showing the accused and Griffin as the only persons on the flights. Subsequently, before the chief clerk had extracted the information from the reports

and entered it upon each individual's Form 5, the accused told the chief clerk that he was going to add the name of Lieutenant Fleischman to the reports. The chief clerk did not know whether Lieutenant Fleischman had accompanied accused on the flights. Thereupon accused added the name of Lieutenant Fleischman to each Form 1 and inserted data indicating that Lieutenant Fleischman had flown as co-pilot on each flight, and that his aggregate flying time for the three flights was 10 hours and 50 minutes. The reports as thus altered were then returned to the files of the chief clerk, who entered the information on Lieutenant Fleischman's Form 5 and held the form to discuss the matter with Lieutenant Fleischman. The record does not show whether such a discussion ever took place or what disposition was made of the particular Form 5.

It is apparent from the evidence that the accused, with intent to deceive the United States Government, knowingly made false reports concerning Lieutenant Fleischman's participation in the flights, as alleged in the Specifications of Charge II. It is equally apparent that his motive in doing so was to help Lieutenant Fleischman by giving him credit for flights which he never performed. Accused is only 22 years old, enlisted in the Regular Army on 17 September 1940, has 1346.15 hours of flying time to his credit, and has not previously been court-martialed or punished under Article of War 104. Although his actions are inexcusable and not to be condoned, it is my opinion that, considering all the circumstances, he would be of further value to the service if retained therein. Accordingly, I recommend that the sentence be confirmed but that the forfeitures be remitted and the execution of that portion of the sentence adjudging dismissal 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
1 Rec of Trial
2 Form of Action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part. Sentence confirmed but forfeitures remitted and dismissal suspended. GCMO 329, 9 July 1945).

AUG 14 1946

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

SPJGH-CM 278972

9 MAY 1945

UNITED STATES	ELEVENTH AIR FORCE
v.	Trial by G.C.M., convened at Adak, Alaska, 20 and 30 March 1945. Dismissal and fined $250.
First Lieutenant ROBERT S. FLEISCHMAN (0-667504), 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 94th Article of War

Specification: In that First Lieutenant Robert S. Fleischman, 400th Base Headquarters and Air Base Squadron (Reduced Strength), Shemya, Alaska, did, at Shemya, Alaska, on or about 31 December 1944, present to Captain R. E. Ewing, Finance Department, Finance Officer, Fort Richardson, Alaska, an officer of the United States duly authorized to approve, allow, and pay claims, a claim against the United States in the amount of $405.91 for approval and payment by signing and certifying a Pay and Allowance Account, WD Form No. 336, dated 31 December 1944, which claim was false and fraudulent in that the said First Lieutenant Robert S. Fleischman represented therein that he did participate in regular and frequent flights, while on a duty status, sufficient to meet minimum requirements of Executive Order No. 9195, 7 July 1942, for aviation pay for December, 1944, and there was due from the United States to said First Lieutenant Robert S. Fleischman as for pay and allowances the

sum of $405.91, when in truth and in fact, said First Lieutenant Robert S. Fleischman did not participate in regular and frequent flights, while on a duty status, sufficient to meet minimum requirements of Executive Order No. 9195, 7 July 1942, for aviation pay for December, 1944, and there was not due from the United States to said First Lieutenant Robert S. Fleischman $405.91 or any sum in the excess of $310.07, and which representations and claim were then known by said First Lieutenant Robert S. Fleischman to be false and fraudulent.

CHARGE II: Violation of the 95th Article of War

Specification 1: (Finding of not guilty)

Specification 2: In that First Lieutenant Robert S. Fleischman, 400th Base Headquarters and Air Base Squadron (Reduced Strength), Shemya, Alaska, did, at Shemya, Alaska, on or about 31 December 1944, with intent to defraud the United States Government, wrongfully and unlawfully pretend and represent to Captain R. E. Ewing, Finance Department, Finance Officer, Fort Richardson, Alaska, an officer of the United States duly authorized to approve, allow, and pay claims, that the said First Lieutenant Robert S. Fleischman had complied with the minimum requirements of Executive Order No. 9195, 7 July 1942, and that the said First Lieutenant Robert S. Fleischman was entitled to additional pay for flying for the month of December, 1944, and did so certify on his Pay and Allowance Account, WD Form No. 336, dated 31 December 1944, well knowing that said pretense and representation and said certificate were false and by means thereof did fraudulently obtain from the said Finance Officer the sum of $95.84.

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

Specification: (Finding of not guilty)

Accused pleaded not guilty to all Specifications and Charges and was found not guilty of Specification 1 of Charge II, 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 dismissal and a fine of $250. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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3. The prosecution introduced evidence to show that on 12 December 1944, a Lieutenant Talbott and Technical Sergeant Gerald J. Griffin departed in an AT-7 type airplane from APO 942 bound for APO 980, where Headquarters Squadron, Eleventh Air Force was located. The plane was piloted by a Lieutenant Talbott while Sergeant Griffin served as crew chief and engineer. No persons other than these two were aboard the plane. During the flight, stops were made at Kodiak, Cold Bay and Umnak, Alaska. The air trip was concluded on 19 December 1944 upon arrival at APO 980 (R. 6; Pros. Ex. 2).

Under Army Air Forces Regulations a record is maintained on AAF Form No. 1 of each flight made by an Army plane. Among other things there is reported on that form the time consumed during the particular flight and the personnel participating therein. For each officer and enlisted man regularly participating in airplane flights there is maintained an AAF Form No. 5 (Individual Flight Record) on which is recorded each flight made by the individual and the elapsed time thereof. The information appearing on the Forms No. 5 is obtained from the original entries made on the relevant Forms No. 1 (R. 7).

During the month of December 1944, Staff Sergeant Murray Anzek, a member of accused's organization and chief clerk of Base Operations Office, Shemya, Alaska, received three AAF Forms No. 1 relative to three flights made by an Army aircraft. Each of these forms indicated that Lieutenant Talbott and Technical Sergeant Griffin had been the only participants in the flights. Sergeant Anzek thereafter entered the appropriate data on the AAF Forms No. 5 of these two individuals (R. 8). Sometime later in the month Lieutenant Talbott informed Sergeant Anzek that he intended to insert accused's name on these three AAF Forms No. 1 so as to indicate that accused participated in "the trip made by the AT-7 from Elmendorf" (R. 13). When Sergeant Anzek later examined these three AAF Forms No. 1 he found that accused's name had been inserted thereon to indicate his participation in these three flights (R. 9; Pros. Exs. 3, 4, 5). Sergeant Anzek then posted this matter on accused's AAF Form No. 5 and when later in the day he informed accused what had been done the latter replied, "O.K. that's swell" (R. 10). As a result, at the end of the month accused's AAF Form No. 5 indicated that he had participated in airplane flights on the following days and accumulated the following amount of flying time, viz (R. 11; Pros. Ex. 6):

Date of Flight	Type of Plane	Flying Time
12 Dec 44	AT-7	5 hrs 10 min
17 Dec 44	AT-7	2 hrs 40 min
19 Dec 44	AT-7	3 hrs
30 Dec 44	B-25 D	40 min

Classification
Cancelled
Date-
By AUG 14 1946

It is not clear from the evidence whether these entries related to the air journey made by Lieutenant Talbott and Sergeant Griffin from APO 942 to APO 980 or whether they related to other flights. During the entire month of December 1944, accused was present for duty with his organization, 400th Base Headquarters and Air Base Squadron at Shemya, Alaska (R. 6; Pros. Ex. 1).

For the month of December 1944, accused signed and filed a pay voucher on which he claimed flight pay for the month and on the reverse side of which he signed a certificate stating, among other things,

> "that during the period for which aviation pay is claimed on this voucher I was, by orders of competent authority, required to participate regularly and frequently in aerial flights; and, in consequence of such orders, I did participate in regular and frequent flights, while in a duty status sufficient to meet requirements of Executive Order No. 9195, 7 July 1942 (AR-1480)" (R. 11, 12, 18, 23; Pros. Ex. 7)

At accused's station it was customary for the personnel officers to prepare pay vouchers for the officers. The only amounts that a personnel officer inserted on any pay voucher were the debits against the particular claim. The amounts of all pay credits, i.e. base pay, flight pay, allowances, etc., were thereafter inserted by the finance officer who would then compute the pay due the particular claimant. As a matter of administrative practice at accused's station all pay vouchers of officers claiming flying pay were filed with the finance officer by the 20th of the month after the claimant had signed the certificate in blank (16) at the bottom of the incomplete voucher certifying that "the foregoing statement and account are true and correct" and after he had signed the certificate relative to flight pay on the reverse side. Although the certificates signed by any claimant on or before the 20th of the month would be incorrect if the officer had not by that date accumulated sufficient flying time to claim flight pay for the month nevertheless by the end of the month the finance office would assume the claiming officer had sufficient flying time to his credit if he accepted flight pay on the voucher from the disbursing officer (R. 16, 17, 20). Many officers followed the practice of filing their pay vouchers after the 20th of the month if by that date they had not accumulated sufficient flying time to entitle them to flight pay (R. 22, 24). When an officer received his pay in cash at the end of the month he receipted therefor in blank (18) at the bottom of his pay voucher.

After accused had signed the certificate in blank (16) and also the certificate on the reverse side of his pay voucher for December 1944, he filed it with the finance officer who thereafter entered all pay credits thereon, including a credit for flight pay for December 1944 in the amount of $95.84, which was subsequently paid in cash to accused at the end of the month (R. 16, 17, 20; Pros. Ex. 7).

A1. Classification Cancelled Date-AUG 14 1950 By- (93)

Pursuant to AR 35-1480, 10 October 1942, and E.O. 9195, 7 July 1942, an officer required to participate regularly and frequently in aerial flights is entitled to an increase of 50 per centum of his pay for each and every month during which he is "in the air a total of at least four hours."

4. The defense introduced the depositions of various individuals and unless otherwise indicated, the testimony hereinafter summarized was all obtained by way of deposition.

Captain John F. Willey, Base Personnel Officer at Shemya, Alaska, deposed that the pay vouchers of officers of accused's organization were prepared in his office and that those to be paid in cash were signed by the claimant a few days before the 15th of the month and were filed on or before that date with the post finance officer. Pay for the month of December 1944 was delivered to the various claimants by a Class A officer appointed to represent Major Peter J. Ashenbrenner, Finance Department (R. 24; Def. Ex. A).

Private First Class John T. Tokarz deposed that "to the best of my recollection" it was on 12 December 1944 that accused signed his December pay voucher in blank (16) and also signed the certificate on the reverse side thereof relative to participation in aerial flights as provided by E.O. 9195, 7 July 1942 (R. 24; Def. Ex. B).

Major William B. Allen of accused's organization deposed that he had known accused since October 1944 and that his reputation for honesty and veracity was excellent. He also stated that, following the practice of the officers in accused's organization, he signed his pay voucher for the month of December 1944 during the first part of that month although he did not accumulate sufficient time to entitle him to flight pay for that month until thereafter (R. 25; Def. Ex. C).

First Lieutenant Peter R. Wynne of accused's organization deposed that the latter's reputation for honesty and veracity was "of the highest." He also stated that he followed the same practice as Major Allen in signing his pay vouchers "with the understanding that if I do not complete the necessary minimum flying time by the end of that particular month, the voucher will be destroyed and I will not receive flying pay for that month" (R. 25; Def. Ex. D).

Accused's commanding officer, Colonel George R. Bienfang, also deposed that accused's reputation for honesty and veracity was excellent. He further stated that he would like to have accused continue in his command and that accused "has performed valuable service in the past and will continue to perform valuable service in the future if given the opportunity" (R. 25; Def. Ex. E).

Classification
Changed - cancelled
Date- AUG 14 1946
By- ALBERT W. JOHNSON

First Lieutenant Wallace G. Anderson, also of accused's organization, deposed that he had followed the practice of other officers in signing both certificates on his December pay voucher at a time when he had not as yet accumulated sufficient flying time to entitle him to flight pay although by the end of the month he had fulfilled the requirement therefor. He further stated that accused was eligible for recommendation for the Air Medal because of the total noncombat, operational flying time he had to his credit (R. 25; Def. Ex. F).

During the month of January 1945, accused accumulated four hours and 35 minutes of flying time and for the month of February 1945 he accumulated a total of ten hours and 15 minutes (Def. Exs. G, H).

After his rights had been fully explained to him, accused elected to testify under oath. He testified that at Amchitka where he had previously been stationed it was the practice not to file monthly pay vouchers on which flight pay was claimed until the requisite amount of flight time had been accumulated but that at Shemya, his present station, the personnel department urged that all pay vouchers be signed and filed with the finance department by the 15th of the month on the assumption that sufficient flying time would have been accumulated by the end of the month although it might not have been at the time the voucher was filed. Accused followed the local practice in filing his December pay voucher. His actions and intentions were then expressed by accused in the following language, viz:

> "We signed the voucher and when the end of the month came around everyone went down to get paid and I was in a quandry as I had already signed a false statement. I didn't know what to do if I was brought up I would be brought up on the grounds of making a false statement. If I collected the pay it would take two months to make the time up and nothing would be said about it. Consequently, I made up the time and thus have made that pay valid and I don't owe the government anything now."

Accused denied any knowledge of the changes made by Lieutenant Talbott in the three AAF Forms No. 1. He had no recollection of being informed about the changes by Sergeant Anzek inasmuch as the sergeant had probably spoken to him at a busy time and accused had replied without comprehending the purport of the sergeant's remarks. Accused signed all of the AAF Forms No. 5 as a routine matter and without glancing at his own because he knew he had but 40 minutes of flight time to his credit for the month of December 1944 and therefore had no reason to examine his own record. He had served in the Alaskan Theater for over 23 months and had accumulated a total of more than 1,000 hours of flying time (R. 26).

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AUG 14 1946

Accused freely admitted that he received flight pay of approximately $95 for the month of December 1944 and that when he received it he knew his claim therefor was false and that he was not entitled to it (R. 29, 30).

5. At the inception of the trial, the court permitted the prosecution to amend the Specification of Charge I and "specification 2, charge I" by deleting therefrom "Captain R. E. Ewing, Finance Officer, Fort Richardson, Alaska" and substituting therefor "P. J. Ashenbrenner, Major, Finance Department" (R. 6). It is quite apparent that the mention of "specification 2, charge I" was inadvertent and that the prosecution meant Specification 2 of Charge II inasmuch as there was only one Specification under Charge I and the only Specification to which the desired amendment could apply was Specification 2 of Charge II. Even though it be held that the requested amendment failed as a matter of law to affect the original language of Specification 2 of Charge II, there is no fatal variance between the proof and the original allegations of that Specification inasmuch as, notwithstanding the misnomer of the finance officer, the Specification was otherwise sufficiently detailed to identify the particular offense of which accused was charged and to advise him fully thereof (MCM, 1928, par. 87b, p. 74).

Although the court found accused guilty of Specification 2 of Charge II, it failed after its original deliberation to announce any finding as to the Charge itself. The court was subsequently reconvened and in revision proceedings after voting in appropriate manner it returned a finding of guilty of Charge II. Since there had been an original finding of guilty of Specification 2 of Charge II, the proceedings in revision and the action of the court taken therein were both proper and legal under the provisions of Article of War 40.

In our consideration of the facts of this case, it should be observed that the accused was found not guilty of officially certifying, with the intent to defraud, to the correctness of the entries for December 1944 which appeared on accused's AAF Form No. 5 (Chg. II, Spec. 1) and not guilty of knowingly and willfully failing to investigate the reported alterations made on the three AAF Forms No. 1 by Lieutenant Talbott (Chg. III, Spec.). Therefore, we are solely concerned with accused's conduct in filing his pay voucher for December 1944 and in accepting payment thereunder.

It is apparent from the summarization of the prosecution's evidence set forth above that the prosecution failed to establish beyond a reasonable doubt the falsity of accused's claim for flight pay. It introduced no evidence to show that the three flight entries made by Lieutenant Talbott on the three AAF Forms No. 1 were false. Apparently, the theory of the prosecution's case was that those flight entries referred to the air journey made by Lieutenant Talbott and

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Sergeant Griffin from APO 942 to APO 980, a flight in which accused did not participate. However, that fact was not proven by direct evidence nor can it be determined from any examination of the documentary evidence. But, Lieutenant Talbott's actions in altering flight forms to add the name of another officer as a participant in the flights arouses grave suspicion as to the truthfulness of the altered entries and is sufficient to demonstrate the probability of commission of the alleged offense. Accused's own testimony given at the trial confirms the suspicion and conclusively establishes his guilt. He fully admitted that his pay voucher for December 1944 contained a false statement of fact inasmuch as he was not entitled as of 31 December 1944 to the flight pay that he claimed thereon and that at the end of the month of December he accepted flight pay of $95.84 on the basis of the misrepresentations contained in his pay voucher.

Even assuming that it was the practice in accused's organization to file pay vouchers by the middle of the month claiming flight pay to which in fact the claimant might not as yet be entitled, such matters constitute no defense to accused's conduct. Although filed early in the month, the pay voucher was dated the last day of that month and as of that day it constituted a binding statement by accused. Not only was the instant statement false as of 31 December 1944 and known by accused to be false but furthermore, instead of correcting the situation, accused knowingly accepted pay thereunder to which he was not entitled. Although a strict administrative practice as to signing and filing pay vouchers might have constituted a deterrent to such fraudulent conduct, the existence of a loose administrative practice, assuming such existed, served as no legal excuse therefor.

Accused's contention is correct that as events subsequently turned out the United States suffered no actual loss because of his conduct. Considering the total flying time accused accumulated during December 1944 and January and February 1945, he in fact by 1 March 1945 became entitled retroactively to flight pay for the month of December 1944 under the provisions of E.O. 9195, 7 July 1942 (See par. 2, AR 35-1480, 10 Oct 1942). It is there provided that if any flying personnel are "in the air a total of at least twelve hours" during any three consecutive months, such personnel are entitled to flight pay for each of the three months. Although this fact constitutes an extenuating circumstance, it does not serve as a legal defense. It is legally equivalent only to the eventual restoration of funds appropriated by an embezzler or thief. As the situation existed on 31 December 1944, accused was not then entitled to flight pay for that month and his claim for such pay was false and known by him so to be and he defrauded the United States when he accepted that pay. The evidence sustains the findings of guilty of the Specification of Charge I and Specification 2, Charge II.

6. All of the eleven members of the general ~~court martial signed~~ and a recommendation for clemency which is attached to the record of trial and in which they state that, considering accused's prior unblemished record in the military service, the evidence as to his character and value to the service, and the loose practice existing among officers at his station relative to submission of pay vouchers, it is their recommendation that he "be afforded an opportunity to remove the stigma which he has placed upon himself by retaining him in the military service. It is thought that his efforts will meet with success, and that the military establishment will benefit by these efforts, as well as by his future usefulness as a highly technically trained officer in his capacity as a Pilot."

7. Accused is 26 years of age. He attended Brooklyn College, Brooklyn, New York, from September 1935 to January 1936. Thereafter he was employed by his father's company to sell and install weather-stripping until February 1941 when he was inducted into the military service. After completing the requisite course in pilot training at the Lubbock Army Flying School, Lubbock, Texas, he was commissioned a second lieutenant on 13 December 1942. On 11 December 1943 he was promoted to first lieutenant.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 94 and is mandatory upon conviction of a violation of Article of War 95.

Thomas M. Kelly, Judge Advocate

William H. Gambrell, Judge Advocate

Robert E. Trevethan, Judge Advocate

Classification
Changed - Downgraded
AUG 14 1946
By ALBERT M.

SPJGH-CM 278972 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 11 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 First Lieutenant Robert S. Fleischman (0-667504), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of presenting a false claim against the United States, in violation of Article of War 94 (Chg. I, Spec.) and of obtaining by false pretenses the sum of $95.84 from the United States, in violation of Article of War 95 (Chg. II, Spec. 2). He was sentenced to dismissal and a fine of $250. 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. About the middle of December 1944, accused filed his December pay and allowance voucher on which he made claim for flying pay for that month, certifying that his claim was true and correct and that he had participated in the requisite number of flights to entitle him to such pay pursuant to the requirements of Executive Order No. 9195, 7 July 1942, when in fact neither at the time he filed the voucher nor by the end of the month of December had he participated in the required number of flights so as to entitle him to the claimed flying pay (Chg. I, Spec.). Thereafter, when payment was made on this voucher, accused accepted flying pay for the month of December 1944, in the amount of $95.84 to which he was not entitled (Chg. II, Spec. 2).

I recommend that the sentence be confirmed but that the execution of the dismissal be suspended during good behavior 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 such recommendation 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 execution of dismissal suspended. GCMO 257, 19 June 1945).

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

SPJGQ-CM 279014

UNITED STATES v. Captain MICHAEL H. BYARS (0-659096), Air Corps.	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Moore Field, Mission, Texas, 31 March 1945. Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Captain Michael H. Byars, Air Corps, was, at Moore Field, Mission, Texas, on or about 15 March 1945 disorderly in station.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction, by general court-martial, adjudged 27 February 1945, for being disorderly in a public place. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

At Moore Field, Mission, Texas, at about 11:30 or 11:45 p.m. on 15 March 1945, Private first class Flores, Military Policeman on Guard Patrol duty (R. 6), saw an officer and a WAC enter Bachelor Officers Quarters T-270, notified the Officer of the Day, and accompanied that officer in searching the rooms with a flashlight (R. 7). This witness

did not look into the rooms (R. 8). He saw no violence in connection with the officer and the WAC entering the building. They had been standing in the street, talking, a few minutes before (R. 9, 11). There were lights in the hall, but none in the rooms (R. 12).

First Lieutenant Quade, Officer of the Day, searched Building T-270 at about 2345 on 15 March 1945, upon the stated information from Private first class Flores (R. 13). Flashing his flashlight into one of the rooms, he found the accused and WAC Osborne (R. 13, 14, 15). In a brief glance by his flashlight, he saw only that two people were on the bed, lying there (R. 14) stretched out side by side (R. 36). He saw one pair of bare legs. It appeared that the other party was dressed (R. 34). He could see that the two were dressed (R. 36). There were only two people in the room (R. 14). He closed the door and waited 30 to 35 seconds, then knocked on the door and told the occupants of the room to come out (R. 14, 34, 36). In a matter of seconds (R. 34), the accused showed his face at the door, shut the door again, and asked who the witness was and what he wanted (R. 14, 34). In about five or six minutes, the accused and then the WAC, Private Osborne, came out, fully dressed in uniform (R. 15, 35). There were other officers in the building, asleep, some of whom awoke and some remained asleep (R. 15).

Private (then Corporal) Georgia P. Osborne (R. 16), Women's Army Corps, was about to go on duty as Observer at the Base Weather Station. At about 2330, she saw the accused, who was in a car with Captain Fowler parked in front of the WAC Orderly Room (R. 16). She did not know how they happened to be there (R. 39). Being offered a ride to the Weather Station (R. 39, 16), she got in the car (R. 16) to go to work (R. 20). Instead, they went to Officers' Barracks T-270, where Captain Fowler said his light was on (R. 20, 16). She did not know either officer (R. 18, 21), but they told her their names (R. 20, 37) the accused giving his first name (R. 20) or nickname, by which she called him (R. 39). In front of the Officers' Barracks, the witness and the accused got out of the car and Captain Fowler left, saying he was going "to Alice and goodby" (R. 20). Corporal Osborne and the accused went into the building, although she told him that she could not go in (R. 17). She did not want to go in, but cannot remember how she got into the building, or down the hall or up the stairs (R. 18, 19, 20). She could not remember whether she struggled or was forced (R. 19, 21). She saw a man shaving (R. 17, 21). She did not scream (R. 19). As far as she knows, accused took her wrist (R. 21). The witness and the accused went into the southeast room upstairs, where she believed he turned off the lights. There was a noise, and she went into the room across the hall, as she did not want to be found in that place (R. 17). She hid behind the door. She did not see whether anyone was sleeping in that room (R. 19). She went back into the southeast room, where she remembers being on the bed, trying to get up. She has the impression that she was picked up and put there (R. 17). She struggled, and did everything

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NAVY DEPARTMENT

but bite, trying to leave the room. She was lying down on the bed, and the accused was on top of her, holding her there. He tried to lift her dress (R. 18, 38). No sexual intercourse occurred (R. 18). After the Officer of the Day flashed his light into the room, accused told her to be still and then they could leave (R. 37).

The witness, Private Osborne, is 32 years old, married since 1938 (R. 21). She denied having met the accused previously at any place, including Amarillo, Texas (R. 18), or Tulsa, Oklahoma (R. 40). She had stated originally to the investigating officer that she had known the accused before, but that was an untruth told as "an altruism", which she later corrected. The same statement was also false in regard to her being forced to enter the building, but she did not believe she was "willing to at all" and does not remember how she got in (R. 38). After the incident at the Officers Barracks, the accused called her by telephone, asked her maiden name, and asked whether she had ever lived in Tulsa, Oklahoma (R. 37, 40). He later asked her to marry him (R. 39).

4. The accused testified (R. 23-33). He arrived at Moore Field three days before 15 March 1945. At previous stations, officers were permitted to "date" WACs, and he had seen them do so, from Lieutenant Colonels down, at Daytona Beach, Florida. Also, officers were permitted to entertain ladies in their quarters at Randolph Field and at Greenville, Texas, in tar-paper buildings (R. 23). He knew of no regulations against such practices, though he knew there were Army Regulations against officers associating with enlisted personnel (R. 26, 30). He did not call it dating her to meet her and walk to work with her (R. 31). A date should involve movies, coke, or going somewhere, and last an hour (R. 32). He had intended to get permission from the WAC Commandant to see Corporal Osborne (R. 30). He met Corporal Georgia Osborne in 1942 in Amarillo, Texas (R. 23, 27), and had seen her a few times there and at Tulsa, Oklahoma. She lived at McLean, Texas, and later at Tulsa for about a year before she joined the WACs, about a year ago. She was unhappily married, and has divorce proceedings pending (R. 23). Accused met her in hotels (R. 27) and did not go home with her, because she was married, so did not know anything about her family. Her maiden name was Wilson (R. 29). He knew how old she was (R. 30). His relations with her were not intimate, but "on the up and up" (R. 32). Accused did not want it brought out that he had seen her since she was married (R. 24) and neither did she (R. 30). He had received a letter from her in February and had answered it. At Moore Field, he had seen her two or three times and had arranged to meet her in front of the WAC orderly room at 11:30 the night of March 15, and walk to the Weather Station with her before she went on duty at 12 (midnight). His classmate and friend, Captain Fowler, was leaving the station, and accused had been with him through the evening, talking and helping Captain Fowler pack, and had had two bottles of beer and two drinks of Bourbon (R. 24, 27). Accused got Captain Fowler to take him to meet Corporal Osborne in Captain Fowler's car, and she

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got in the car with them. They started to the Weather Station, but Captain Fowler had to send a telegram and dropped the accused and Corporal Osborne at the Officers' Barracks so accused could check on Captain Fowler's room and turn out the light (R. 24). Accused's own quarters were in the hutment area, half a mile away (R. 26). Captain Fowler went on to send his telegram before the telegraph office closed, as it was about 2335. Corporal Osborne did not want to wait outside while the accused went into the barracks, so she went in with him (R. 24). They were going to be there only three or four minutes to check the room and turn out the lights then walk together to the Weather Station (R. 24, 30, 31). He did not think about the situation if they should be found there with the lights out (R. 31). He did not realize he was breaking any regulations (R. 26). They went inside, through the lighted hall, past the bathroom, where an officer was shaving, and up to Captain Fowler's room. He made a quick check of the room, saw that nothing was left behind, turned out the lights, and they started to leave. He heard a car outside (R. 24). Looking out the window, he saw the military police, and told Corporal Osborne. She said she must not be caught there. He told her to step in the room across the hall while he saw what was being done. She did so, and hid behind some clothing. He saw the military police leaving, and told her to come out. An officer occupying the room was awakening. Corporal Osborne came out frightened and trembling. Accused heard and saw the military police returning, evidently to search the building. They wanted to get out, but the Officer of the Day was coming up the stairs, so they went back into Captain Fowler's room. Corporal Osborne was on the point of hysteria, so accused had her sit down on the bed while he tried to calm her by putting his arm around her and smoothing her hair (R. 25). He was afraid, she would try going out the window (R. 31). The Officer of the Day flashed his light into the room, told them to come out, then stepped into the hall and closed the door. Accused told Corporal Osborne to stay in the room while he tried to keep her from being brought into the matter. He went out and talked to the Officer of the Day in the hall, explaining to him and asking whether a report would have to be made. He said yes. One of them opened the door and Corporal Osborne stepped out. The Sergeant of the Guard had arrived, and took charge of her. The whole affair, from WAC day room to the arrival of the Officer of the Day, took only about 20 minutes (R. 25). Corporal Osborne has been "busted" to the grade of Private (R. 25). Accused has asked Private Osborne to marry him (R. 30).

5. The evidence clearly establishes that, at Moore Field, Mission, Texas, on 15 March 1945, about fifteen minutes before midnight, the accused officer took an enlisted woman into Bachelor Officers' Barracks, and that the two were occupying a bed in a dark bedroom there when the Officer of the Day terminated their activities with his flashlight. That constitutes a disorder, to the prejudice of good order and military discipline, and sustains the Specification and the Charge, that accused was disorderly in station in violation of Article of War 96, regardless of the existence or knowledge by the accused of any regulations specifically prohibiting such conduct (CM 242152, Hooey, 27 B.R. 5, 9).

The Specification was defective in failing to allege the particular conduct relied upon as constituting the offense, rather than the mere conclusion that the accused was disorderly, but it is apparent from the record that the accused and his counsel were fully informed and in nowise misled, nor was objection made nor greater particularity requested. The substantial rights of the accused were not injuriously affected. (MCM 1928, par. 87b, p. 74. CM 250368, Anderson, 33 BR 83, 88).

The evidence is undisputed as to the essential facts of the offense, above stated, and also that no sexual intercourse occurred. Otherwise, there is much conflict, but the conflict is over collateral matters immaterial to the determination of guilt in the case. The accused asserts his innocent intentions and swears that the woman, with whom he was well acquainted, voluntarily went with him into the building rather than stand outside while he turned out the lights in a recently vacated room and looked to see whether a departing fellow-officer had left anything, that the intention was to be there only a few minutes, and that their presence in the dark room, seated upon the bed, was due to panic upon her part at the approach of the guard, which he sought to ameliorate with gallant ministrations. She testified that she did not know him before that night, that she entered the building unwillingly, and that he was holding her down in the bed and was on top of her, trying to lift her dress. The Officer of the Day, by flashlight in the dark room, discovered the two lying in the bed. They were dressed, except for such state of deshabile as may be inferred from that officer's observation of "one pair of bare legs", unattributed to their individual owner and not further particularized.

Concerning the detail of the transaction and its attendant circumstances, the testimony of the woman is little, if any, more convincing than that of the accused, but the substance of the case, as heretofore observed, is not in those details and embellishments. The undisputed facts are ample, and the fully creditable testimony of the Officer of the Day alone would sustain the findings, without reference to the testimony of the woman.

6. The accused officer is 24 years of age, single, a native and resident of Tennessee. After graduation from high school in 1936, he had about two years of college education in 1940 and 1941 at University of Tennessee Junior College, Murray State Teachers College, and Memphis State Teachers College, in Tennessee. His War Department records reveal no civilian occupation except that of student. He entered the service in 1941 as an Aviation Cadet and was commissioned second lieutenant, Air Corps, upon graduation at Kelly Field, Texas, 29 April 1942. He was promoted to the grade of first lieutenant 19 December 1942 and to that of captain 18 October 1943. He received excellent ratings as Flight Commander and as Instructor at Majors Army Air Field, Greenville, Texas. He was convicted by a general court martial at Randolph Field, Texas, on 27 February 1945, on plea of guilty, of disorderly conduct

in uniform at a public hotel at Del Rio, Texas, on 24 January 1945, and sentenced to restriction to his post for three months and forfeiture of $100 of his pay per month for five 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 of guilty and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 96.

(sick in quarters), Judge Advocate.

Herbert B. Frederick, Judge Advocate.

A. E. Fiero, Jr., Judge Advocate.

SPJGQ - CM 279014 1st Ind

JUN 20 1945

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

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 Michael H. Byars (0-659096), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the Specification and Charge, being disorderly in station, in violation of Article of War 96. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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 and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

At Moore Field, Mission, Texas, at about 11:45 p.m. on the night of 15 March 1945, the accused officer took an enlisted woman of the Women's Army Corps into Bachelor Officers' Barracks. There the two were occupying a bed in a dark bedroom, a few minutes later, when the Officer of the Day terminated their activities with his flashlight. The accused testified that they entered the building only for the innocent purpose of ascertaining whether a fellow officer leaving the station had left anything in his room and to turn out the light left burning in that room, and that their presence in the room, seated upon the bed, was due to panic upon the woman's part at the sudden approach of the guard, which panic the accused sought to quiet by putting his arm around her and smoothing her hair. The woman testified that the accused placed himself on top of her, held her down on the bed, and tried to lift her dress, all against her will. The Officer of the Day found them lying in the bed, dressed, but with the bare legs of one of them exposed. The woman was 32 years old and married to someone other than the accused. The accused testified that he had known her for several years. She testified that she first met him at 11:30 that night, entering an automobile with him and another officer at accused's invitation. No sexual intercourse occurred. The accused was, at the time of the present offense, under sentence of restriction to his post for three months and forfeitures of $100 a month for five months, adjudged 27 February 1945 by a previous general court-martial upon his conviction for being disorderly in uniform in a hotel at Del Rio, Texas.

I recommend that the sentence be confirmed, but that the forfeitures imposed be remitted, and that the execution of that portion of the sentence adjudging dismissal 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
1 - Record of trial
2 - Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted and dismissal suspended during good behavior. G.C.M.O. 275, 5 July 1945).

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

7 MAY 1945

SPJGV-CM 279088

UNITED STATES v. Second Lieutenant LAWRENCE J. HACKING, JR. (O-886251), Air Corps.	)	SIXTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Sheridan, Illinois, 16 March 1945. Dismissal, total forfeitures and confinement for three (3) 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 61st Article of War.

Specification: In that Second Lieutenant Lawrence J. Hacking, Jr., Air Corps, attached to 200th Army Air Force Base Unit, Colorado Springs, Colorado, did, without proper leave, absent himself from his command at Colorado Springs, Colorado, from about 26 November 1944 to about 24 December 1944.

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

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that Second Lieutenant Lawrence J. Hacking, Jr., Air Corps, did, at Chicago, Illinois, on or about 4 December 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Stevens Hotel, a certain check, in words and figures as follows, to wit:

Chicago, Ill. Dec. 4 1944 No.

2-8 BANK OF MONTREAL 2-8
Chicago

Pay to the order of The Stevens Hotel $ 30.00

Thirty and no/100 DOLLARS

Lawrence J. Hacking Jr.
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and by means thereof, did fraudently obtain from the Stevens Hotel United States currency in the amount of $30.00, he the said Second Lieutenant Lawrence J. Hacking, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Montreal for the payment of said check.

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

Specification 1: (Finding of not guilty).

Specification 2: In that Second Lieutenant Lawrence J. Hacking, Jr., Air Corps, having obtained lodgings, food and other accommodations of the value of about $109.02 from the Stevens Hotel in Chicago, Illinois, did at Chicago, Illinois, on or about 15 December 1944, upon his departure from the said Stevens Hotel, with intent to defraud the Avenue Hotel Corporation, owner of the said Stevens Hotel, wrongfully fail to pay for said lodgings, food and other accommodations so obtained by him.

Specification 3: In that Second Lieutenant Lawrence J. Hacking, Jr., Air Corps, having obtained lodgings, food and other accommodations of the value of about $165.06 from the Bismarck Hotel in Chicago, Illinois, did at Chicago, Illinois, on or about 20 December 1944, upon his departure from the said Bismarck Hotel, with intent to defraud the Bismarck Hotel Company, owner of the said Bismarck Hotel, wrongfully fail to pay for said lodgings, food and other accommodations so obtained by him.

Accused pleaded not guilty to all the Charges and Specifications, and was found guilty of all the Charges and Specifications except Specification 1 of Charge III, of which he was found not guilty. No evidence of previous convictions was introduced. He was sentenced to dismissal, total for-

feitures, and confinement at hard labor for seven years. The reviewing authority disapproved the finding of guilty of Specification 1 of Charge II, and approved the sentence, but reduced the period of confinement to three years, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, in support of the Charges and Specifications of which accused was found guilty and as to which the findings of guilty were not disapproved by the reviewing authority may be briefly summarized as follows:

Accused, after due warning of his rights (R. 93, 94) made and signed a statement in writing (Pros. Ex. 21) on 24 December 1944, to Lieutenant James J. Cowhey, CMP, at Military Police headquarters in Chicago. He stated therein that he left Peterson Field, Colorado Springs, Colorado, on seven days leave of absence on the evening of 17 November 1944. He traveled by commercial air transport to Chicago, en route to Providence, Rhode Island. The flight from Chicago, scheduled at hours 0415 on 19 November, was cancelled because of inclement weather, and it was impossible to arrange travel by air for several days. Accused decided to spend his leave in Chicago, advised his parents to that effect, and obtained a cash refund on his plane ticket. After spending two nights in other hotels, accused registered at the Stevens Hotel on 20 November. On the same day, he opened a checking account at the Bank of Montreal, where he deposited a total of $220.00 (Pros. Ex. 21), giving his address as "A.A.F., Scott Field, Illinois" (Pros. Ex. 9). He remained at the Stevens until Sunday, 26 November, when he paid his bill, and moved to the Blackstone Hotel. During all this time in Chicago, accused was drinking constantly, and eating "not more than once daily, if that" (Pros. Ex. 21). At the Blackstone, his address was given as Scott Field, Illinois (Pros. Ex. 19). At the Blackstone, he realized that he was absent without leave, but being worried and depressed, he put off his return from day to day and continued to drink in order to stave off the mental depression, which he felt was sure to follow when he stopped drinking. He sent two telegrams to his commanding officer, in each of which he stated that he would return immediately. He meant these statements when he made them (Pros. Ex. 21).

On 3 December, he checked out of the Blackstone, after making arrangements to pay his bill later, and returned to the Stevens. On 7 December, he moved into the room of a woman, with whom he had become acquainted in Chicago. He stayed there eight days, because his credit became bad when a check for $30.00, which he had cashed, was returned. His suitcase and belongings were left in the room which he had occupied previously. During this eight days, the woman "paid all the bills". On 15 December, accused registered at the Bismarck Hotel, where the same girl lived with him until 20 December. She was in bed in his room when he left. He then registered at the La Salle Hotel, paying one day's rent in advance. He stayed there two days, following which he spent a

night and a day in the lobby of the Morrison Hotel. About hours 2400, 23 December he went to the officers' club in Chicago, where he was apprehended by the military police (Pros. Ex. 21).

Accused's status was changed from leave to AWOL by entries on the morning report of 200th AAF Base Unit, Section D (Pros. Exs. 1, 2). It was stipulated that accused was returned to military control on 24 December in proper uniform (R. 11).

By 2 December 1944, the balance on deposit in accused's checking account at the Bank of Montreal had been reduced to $14.65 (Pros. Ex. 9), by checks which he had written and by service charges (Pros. Exs. 10, 11, 12, 13, 14, 15, 16, 17). No deposits were made to his credit thereafter. On 4 December 1944, at accused's request (R. 42), Lloyd A. Gulley, assistant credit manager at the Stevens placed his O.K. on a check bearing that date, drawn against his account in the Bank of Montreal for $30 (Pros. Ex. 7), which the cashier cashed (R. 49). This check was returned by the bank. Thereupon Gulley called accused to his office (R. 44), and asked for further identification. Accused said that he would go and get his furlough papers, which were in his room (R. 45). He did not come back, and Gulley did not see him again until the trial (R. 45). His account at the Stevens was unpaid on 9 December. His indebtedness to the hotel then amounted to $109.02 (R. 53, 57, 58; Pros. Ex. 8). The account was paid in full prior to the trial, in installments of $68 on 5 February 1945 and $41.02 on 15 February (R. 58, 59).

Between 15 and 20 December 1944, accused became indebted to the Bismarck Hotel for food, lodgings and other accommodations, amounting to $165.06. On 18 December, Paul Schmidt, the assistant manager went to accused's room (R. 20) and called his attention to the heavy charges which had accumulated. Such charges were unusual for so short a period (R. 22). Accused exhibited his identification card, and stated that he would check out and pay the bill the next day (R. 23). He did not do so. Schmidt and the credit manager went to accused's room. Accused was not there. A watch was placed on the room. Accused did not return. The hotel checked him out and resumed possession of the room on 21 December 1944. Charges were made for occupancy on 19 and 20 December, as accused had left his baggage in the room (R. 24, 27; Pros. Exs. 4A, 4B, 4C).

4. After due warning by the law member as to his rights (R. 108-109), accused was sworn as a witness and testified that he enlisted in the Royal Canadian Air Force on 14 November 1941. After 17 months of training, he was commissioned a pilot officer on 30 April 1943 (R. 111, Def. Ex. 1). In the summer of 1941, he had been rejected by both the United States Navy and by the Army Air Corps, because of faulty vision (Def. Ex. 5; Incl. 14). He was sent overseas by the R.C.A.F., arriving in England in May 1943. There, after further training, he served with the Coastal Patrol Squadron until his transfer to the American Forces, 1 December 1943. On 1 December 1943, he was appointed a second lieutenant,

Army of the United States, assigned to the Air Corps, classified as a pilot and placed on extended active duty (Def. Exs. 3, 4). He was sent to Northern England to await transportation, and late in January 1944 was returned to the United States, for pilot instruction. Shortly after his return, he was grounded (R. 118), because of poor eyesight (Def. Ex. 5, Incl. 8), and remained at Harding Field, Louisiana, awaiting reclassification for a ground job, until around 1 August, when he absented himself without leave for five days. He was restricted to the field for seven days, and sent to a psychiatrist. Accused suggested to the latter that he would like to resign, expecting that he would be inducted into the ranks (R. 119). He reiterated his desire to resign, when asked about the matter the next day, and shortly afterward the necessary papers were prepared and on 12 August 1944 he signed a resignation "for the good of the service" (Def. Ex. 5). Soon afterward he was placed in the hospital under the care of a psychiatrist for acute alcoholism. After leaving the hospital, he was ordered to Colorado Springs, where he was awaiting final approval in Washington of his resignation (R. 120). His leave began on 18 November, but he left the night before with permission so to do. The leave expired on Saturday, 25 November, but he had been told it would be "quite all right" if he did not report until Monday, as there was never anyone present on Sunday.

When he opened the account with the Bank of Montreal, accused took up the matter of obtaining about $100, due him as pay from the Royal Canadian Air Force, which in England made payments through the London branch (R. 123) of the Bank of Montreal. It was agreed that the Chicago branch would take the matter up with the London branch of such bank (R. 129). Accused appreciated that he could not draw checks against this money, until it had actually been credited to the Bank of Montreal in Chicago (R. 134).

After leaving Gulley in the office at the Stevens Hotel on 9 December, he went to his room (R. 125). He remained there 15 or 20 minutes, and then went to the room of another party, leaving his belongings behind. He intended to make the check good (R. 130). He was surprised that it had been returned, but he had not been keeping a very close check of the account (R. 131). He never went back to his room. Accused did not leave the other party's room for one week (R. 135).

He gave his address as Scott Field, because he intended to report there, after he had been absent without leave, for a certain period of time (R. 128). He gave Scott Field to the Bank of Montreal on 20 November as his address, because he intended going there, before going back to Colorado Springs.

On 14 March, accused paid $30 on account to the Bismarck Hotel (R. 139).

Accused was happy in his service in the Royal Canadian Air Force. He became despondent when grounded in this country after transfer to

the Air Corps of the Army of the United States, and was left with nothing much to do while being held for reassignment to a ground position.

It was stipulated that on 28 November he advised his commanding officer that he had been delayed by bad weather and would be a few days late in returning (R. 121). Ten days later he sent another such telegram (R. 144).

5. Although accused pleaded not guilty, his own testimony clearly demonstrates his guilt of the offenses of which he was found guilty, and as to which the reviewing authority permitted the findings of guilty to stand. Accused may not unreasonably have felt that he had just ground for complaint because of his transfer from the Royal Canadian Air Force, which had regarded him as physically qualified for pilot service, into the Army of the United States, which soon determined that he was physically disqualified for flight training and grounded him shortly after his transfer. Nevertheless, his dissatisfaction, however understandable, furnished no justification for the long period of overindulgence in liquor into which accused sank, or for his failure to return to duty during the period of his 29 days absence without leave, after expiration of the seven-day leave. The record of trial discloses no reasonable excuse for accused's conduct in passing a check for $30, when he knew that the funds remaining in his checking account were substantially less than the amount of the check, and in running up bills at two hotels, which he was unable to pay, from which hotels he surreptitiously departed without going through the formality of checking out.

Accused was placed on notice that the balance to his account in the Bank of Montreal had been reduced to less than $25, when the Blackstone Hotel advised him that his check for that amount had been returned by the bank. He knew that he had made no deposit thereafter. Yet on the next day, he presented his check for $30, drawn on the same account, to the Stevens Hotel and procured it to be cashed. His conduct, after such check was returned, in going into seclusion in the room of a female friend, which room he did not leave for eight days, would appear to be strong evidence of consciousness of guilt. A depositor is properly chargeable with knowledge as to the status of his bank account (CM 202601, Sperti, 6 B.R. 171, 214).

As to conduct of this nature, it has been well said:

> "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. Such conduct is not only a reflection on the individual and a violation of civil law if committed with wrongful intent, but is service-discrediting as well. Frequently checks are cashed not because of the assurance derived from the implied representation

attached to the check so much as the faith created by the uniform. The individual may be satisfied by the exculpation which flows from an explanation rooted in carelessness or neglect. The hurt to the credit and reputation of the Army is not so easily removed" (CM 249232, Norren, 32 B.R. 95, 102-103).

Procuring the cashing of a check without funds on deposit for its payment is conduct unbecoming an officer and a gentleman, in violation of Article of War 95 (CM 249006, Vergara, 32 BR 5, 13-14; CM 249232, Norren, 32 BR 95, 102-103; CM 240347, Beserosky, 26 BR 33, 39).

The civil courts have held that the obtaining merely of board and lodging, without payment therefor, is not an obtaining of merchandise or property by false pretenses (State v. Black, 75 Wis. 490), although there is authority to the contrary (State v. Snyder, 66 Ind. 203). To supply any defect, in this respect, in the common law, statutes have been enacted in many states, under which it is made an offense to obtain food, lodging or accommodation at an inn or hotel without paying therefor, with intent to defraud, or to abscond without paying the charges (32 C.J. 573, 28 Am. Jur. 649). Some statutes make it an offense for a guest secretly or surreptitiously to remove his baggage from a hotel without paying or satisfying the charges (Hutchinson v. Davis, 58 Ill. App. 358; State v. Engle, 156 Ind. 339, 58 N.E. 698; State v. Hill, 166 N.C. 298, 81 S.E. 408; Reg. V. Hollingsworth, 2 Can. Cr. Cas. 291). Such legislation was enacted because keepers of hotels are peculiarly subject to being victimized by dishonest guests. The nature of the business ordinarily makes impossible any real inquiry into the financial resources of a guest, who usually makes no express affirmation of his ability to make payment for the food and accommodations furnished. The statute of Illinois is not here applicable to the offenses alleged against accused under Specifications 2 and 3 of Charge III, and does not operate to make such acts "crimes and offenses not capital", within the meaning of Article of War 96 (MCM 152c). It seems clear, however, that accused's wrongful conduct was of such nature as to bring discredit upon the military service. Acts inherently dishonest and obnoxious to a penal statute of the state wherein committed, when done by a member of the military establishment, tend to bring the personnel of the Army into disrepute and to reflect discredit upon the military service.

In CM 232882, Koford, 19 B.R. 229, the accused had been found guilty of dishonorably failing and neglecting to pay indebtedness incurred at a hotel for three days' room rent and for telephone and other service charges. There as in this case, the accused left without notice to any hotel employee of his departure, and without paying his hotel bill. In the opinion in that case, it was said:

"When a person registers as a transient at a hotel, credit is not extended to him in the ordinary sense. The hotel management merely grants him the courtesy of deferring

payment for his accommodations until the time of his departure. In accordance with what is known to be an almost universal custom, such a guest tacitly represents that he is financially able to pay for his lodging and will do so at the proper time. In the instant case, when he became a guest at the Hotel Texas, accused may be considered to have made such representations. They proved to be false. His action in surreptitiously leaving the hotel without paying his bill was deliberately evasive and deceitful. He failed to keep his subsequent promise to pay his bill within a subsequent period of time. In the opinion of the Board of Review, the course of conduct of accused with reference to his hotel bill was below the minimum standard to be expected of an officer and constituted a violation of the 95th Article of War" (CM 232882, Koford, 19 B.R. 229, 242).

Since conduct to the discredit of the military service in violation of the 96th Article of War is an offense lesser than and included in the offense of conduct unbecoming an officer and gentleman denounced by the 95th Article of War, the vital principle expressed in the language above quoted seems decisive of the question presented by the findings of guilty of Charge III and of Specifications 2 and 3 thereunder. Accused's conduct toward the Stevens Hotel and the Bismarck Hotel was tainted by deceit, evasion and false promises, which were implicit in his acts. By leaving his baggage when departing, he may have thought to evade the penalties imposed for the defrauding of an innkeeper by the Illinois Criminal Code. However, that may be, technicalities of the local civil law do not control the determination of the character of his conduct, when it is measured by the standards of the military code. He was properly found guilty of Specifications 2 and 3 of Charge II.

6. The accused will be 26 years of age on 10 May 1945. He was born in Medford, Massachusetts. He was appointed a second lieutenant in the Army of the United States on 1 December 1943 and entered upon extended active duty in the Air Corps in the European Theater of Operations on 2 December 1943. He served in the Royal Canadian Air Force from 14 November 1941 to 30 November 1943, and was commissioned a pilot officer. In the Royal Canadian Air Force, he completed 1 year in training schools and 210 hours flying time.

7. The court was legally constituted and had jurisdiction of the subject matter and of the person of the accused. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of a violation of Article of War 95, and a sentence to dismissal, total forfeitures and to confinement at hard labor is authorized upon conviction of violations of the 61st and 96th Articles of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGV-CM 279088 1st Ind

Hq ASF, JAGO, Washington 25, D.C. JUN 11 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 Lawrence J. Hacking, Jr. (0-886251), Air Corps.

2. This officer was found gilty by general court-martial of absenting himself without leave from his command for a period of 29 days, in violation of Article of War 61, of unlawfully making and uttering a check, with intent to defraud, knowing that he did not have and not intending that he should have funds in the bank for its payment, and thereby obtaining $30, in violation of Article of War 95, and under two Specifications of fraudulently obtaining from two hotels and failing to pay for, lodgings, food and accommodations, amounting as to one hotel to $109.02, and as to the other to $165.06. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for seven years. The reviewing authority approved the sentence but reduced the period of confinement to three 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 foregoing 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.

This officer, after being rejected as physically disqualified for pilot training by both the United States Army and Navy, enlisted on 14 November 1941 in the Royal Canadian Air Force, wherein on 30 April 1943 he was commissioned a pilot officer, and served in Great Britain with the Coastal Patrol Squadron. In December 1943, he was commissioned a second lieutenant, Air Corps, AUS, ordered to extended active duty, rated as a pilot and ordered to the United States for further training. Upon reaching the United States he was grounded as physically unfit for flying duty. He became despondent and began to drink excessively. On 12 August 1944, he submitted his resignation for the good of the service. While action was pending on the resignation, he left his station at Colorado Springs, Colorado, on seven days leave, and was en route to Providence, Rhode Island, when bad weather grounded the commercial air transport at

Chicago. After two days of waiting, his passage was cancelled and the cost refunded. He remained in Chicago, and opened a bank account in the Bank of Montreal. On 3 December 1944, a week after the expiration of his leave he checked out of the Blackstone Hotel. He then knew, as the result of the dishonor of a check written previously, that his bank account was insufficient for the payment of a check in the amount of $30. Nevertheless he registered at the Stevens Hotel, induced it to cash his check for $30, which was returned by the bank unpaid, and ran up an account of $109.02, which he was unable to pay. He surreptitiously departed from this hotel, leaving his baggage, and registered at the Bismarck Hotel, where he ran up an account of $165.06. He secretly departed from that hotel, without the formality of checking out. He was satisfied in the Royal Canadian Air Force and was never in trouble while serving therein.

I recommend that the sentence as approved and modified 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. 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 Rec of Trial
2 Form of Action

(Sentence as approved by reviewing authority confirmed, but forfeitures remitted. Sentence as modified executed. G.C.M.O. 235, 19 June 1945).

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

7 MAY 1945

SPJGV-CM 279102

UNITED STATES v. First Lieutenant ALLEN M. FULLER (0-915205), Air Corps.	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Sheppard Field, Wichita Falls, Texas, 26 and 30 March 1945. Dismissal.

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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that First Lieutenant Allen M. Fuller, Air Corps, Squadron B, 3706th Army Air Forces Base Unit, was, at Wichita Falls, Texas, drunk and disorderly in uniform in a public place, to wit: 1104 - 9th Street.

He pleaded not guilty to the Charge, but guilty of a violation of the 96th Article of War, and guilty of the Specification, except the words, "and disorderly" and "in a public place". He was found guilty of the Specification, not guilty of the Charge 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.

3. Evidence.
a. For the Prosecution.

On the morning of 16 March 1945 accused was arrested by two night patrolmen of the City Police Department, Wichita Falls, Texas. The two officers were patrolling near the 1100 block on 9th Street and noticed a car parked with someone in the car. It was about three o'clock in the morning (R. 9). The headlights of the car were off (R. 14). Their investigation disclosed that the car was occupied by accused and a colored girl. Accused had his blouse off (R. 40) and was sitting by the steering wheel.

He had his trousers unbuttoned, unbuckled and lying open (R. 9). The colored girl had her pants off and was endeavoring to hide them when the door to the car was opened. Both occupants appeared to be drunk. The accused at first refused to follow the policemen but finally was made to come to the police station and was turned over to the Provost Marshal (R. 9).

The policemen, when they first saw the car, did not know who was in it as the car was splashed with mud and it was impossible to see through the windows. Only when the flashlight was placed on the occupants could it be seen that it was a member of the armed forces and a girl (R. 11). The door of the automobile was locked (R. 11) and not opened until accused was ordered to do so. The accused at first refused to go to the police station (R. 12, 13). The policemen testified that they did not bring him to the station because he was drunk or disorderly, but because he had a colored girl in his car (R. 14). This negro girl testified that she met accused at about two o'clock A.M. (R. 20). She was walking home, and accused stopped his car and offered her a ride to her house (R. 21). They rode for a short while and then stopped in front of her home. Accused inquired whether she was married, where her husband was and if she had any children. Following that there was a discussion about intercourse between white and colored people (R. 21) and accused inquired whether or not she had a venereal disease. She answered in the negative and, believing he was a medical officer and would examine her, pulled off her panties. Accused put his hands on her knee but did not examine her (R. 21). Accused asked the girl if she wanted a drink and offered one. They had several drinks of whiskey together, about four (R. 21, 29). Accused after awhile asked the girl to leave but she wanted more drinks and did not go. She asked accused to escort her over to the house because the alley was dark and she was afraid (R. 25) and when accused refused she stated she knew a place where nobody would bother them (R. 25) as she wanted to get more drinks (R. 26). Accused never made an advance of any kind (R. 27).

b. For the defense.

Accused, after being duly warned, took the stand under oath on his own behalf and testified that recently he had a break with his wife and she took their baby with her; that he was broken up and almost lost his mind. He could not stand it much longer and he got drunk and stayed drunk two or three days. On this particular night he had been at the officers' club late and had gone down town to drive some people home. He stopped at a restaurant and had some more whiskey. He wanted to see an acquaintance near 9th Street. As he turned the corner at 9th and Ohio Streets he let the window down in order to see (R. 36). He stopped the car and the colored girl got in the car before he recognized her as a negress; that he did not want any argument with her and as he was going up her way he drove her to the place where she said she lived; that she had been drinking and asked him for a drink of whiskey. The girl suggested a drive to the outskirts of

town where no one would see them or ask what they were doing. Accused answered that it was late and time for him to go back home (R. 37). She then took her pants off and offered to have sexual intercourse with accused, but he refused. The girl promised to go if she would get another drink. Accused tried his best to get her to go but was afraid to force her to leave since she was drunk and might have created a scene (R. 38). He never touched her nor did he have any intercourse with her (R. 39). Accused asked the girl to get out of the car so that he could go home as he was very drunk and tired. He did not want to be rough and order her out because he was afraid of any altercation with any colored woman on the street at night (R. 30). The girl stated she wanted to smoke a cigarette and both smoked. Then she leaned over his lap and with her hand grabbed his privates. Accused told her that he did not desire to be with a colored woman and that he only wanted to go home. To get rid of her he promised to see her the following night (Ex. 1, p. 25). Then a beam of flashlight suddenly flooded the car and he heard loud shouting to get out of the car. Notwithstanding his protest the policeman brought him to the police station (Ex. 1). Accused denied having had intercourse with the colored girl or even of having touched her (R. 39).

4. There is no doubt that accused was drunk. He so pleaded and the evidence is compelling regardless of his plea. However, accused denies that he was disorderly in a public place, or disorderly at all. The evidence shows that accused was found by two policemen seated in his parked automobile, on a street in the City of Wichita Falls, Texas. He was drunk. His blouse was off, his trousers were unbuttoned, unbuckled and lying open. On the seat with him was a negro girl, trying to hide her pants, which she had taken off some time before. They had been together in the car for about twenty minutes, and had about four drinks of whiskey each. The door to the car was locked and only after some hesitation it was opened by accused. Black's Law Dictionary defines disorderly conduct as:

> "A term of loose and indefinite meaning (except as defined in statutes), but signifying generally any behavior that is contrary to law, and more particularly such as tends to disturb the public peace or decorum, scandalize the community, or shock the public sense of morality".

Can it be argued, under the facts and circumstances in evidence, that accused was not disorderly? Although accused and his drinking companion were in a parked automobile and could not easily be seen from outside due to splashes of mud which covered the window of the car, the

fact remains that he was on a public street of a city exposed to the investigating curiosity of the policemen who discovered him and of any other passerby. A public street in a town or city is a public place (CM 247391, Jeffrey).

In Texas where this offense occurred it is an offense punishable by fine for a person to get drunk in a public place (Article 477, Penal Code of Texas). A public street is a public place (Article 475, Penal Code of Texas; King v. Brown, 100 Texas 109; 94 S.W. 328). Places which are declared by the statutes to be public are to be regarded as public as a matter of law (Elsberry v. The State, 41 Texas 159).

Accused was therefore drunk and disorderly in a public place. That his conduct was such as to bring discredit upon the military service in violation of Article of War 96 is so obvious as to need no comment.

5. There are two errors in the record of trial which need comment. The first was the acceptance in evidence of the investigating officer's report. The investigating officer was called on the witness stand by the prosecution. He testified that at the investigation accused made a statement regarding the facts in the case. The court gave permission to the witness to refresh his memory by reading the transcript of the report of investigation. Defense insisted that the entire transcript of the investigation should be introduced in evidence and the law member admitted it as Exhibit #1. This was in error. The report of an investigating officer is not competent evidence of the facts contained therein (MCM, 1928, par. 117). It contained statements of persons not before the court which were clearly hearsay. However, the admissions made by accused at the investigation after he was duly warned of his rights are admissible in evidence and have full probative value. Therefore, only that part of the report of the investigation containing the statement made by accused (pp. 24, 25, 26 of Ex. #1) was admissible in evidence. In any event, no harm was done the accused, since it was at the accused's behest that the transcript was admitted.

The second error was that the accused was found guilty of a Specification which failed to state the date of the offense. Accused did not object to being tried under the Specification as written and at no time raised the issue as to its insufficiency. Prosecution produced ample evidence as to the time and date of the offense committed and accused pleaded guilty to the Specification with certain exceptions. The failure of the Specification to allege the date of the offense was not raised by the accused. It does not appear from the record that accused at any time was in doubt as to the date or the time of the offense for which he

was tried. This failure to so allege the date of the offense did not injuriously affect the substantial rights of accused within the meaning of Article of War 37. CM 228527, Wall; CM 229526, Van Winkle; CM 242082, Reid.

6. The records of the War Department show accused is 34 years of age; that he was born in Atlanta, Georgia, and is a resident of Washington, D. C.; that he is married and has one child. He has an Ll.B Degree from the Columbus University, School of Law, Washington, D. C. In civilian life he was a clerk for the Railroad Retirement Board, U. S. Government, Washington, D. C. He was appointed a temporary second lieutenant, A.C., in the Army of the United States 17 August 1942 and promoted to first lieutenant on 25 October 1944.

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 finding of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGV-CM 279102 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 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 Allen M. Fuller (0-915205), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in uniform in a public place, 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. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence.

Accused was arrested by two policemen of Wichita Falls, Texas. He was found drunk in an automobile parked in a public street of that city, at 3:00 a.m. He had his blouse off, his trousers were unbuttoned, unbuckled and lying open. A colored girl, also drunk, was found seated next to him. When they were arrested she was trying to hide her pants, which she had taken off. The door to the car was locked and only after some hesitation it was opened by accused.

After the Board of Review had written its opinion in this case, by letter dated 3 May, the accused forwarded to the Secretary of War a statement of the chief witness against him, one Mary Owen, which indicates that most of her testimony at the court-martial trial was perjury. Her present statement would indicate that she inflicted herself upon the accused, and that his predicament was due, in a large measure, to her conduct. There was also forwarded a sworn statement of a physician, an Investigator, and two nurses of The Public Health Department of Wichita Falls, Texas, which state that Mary Owen is suffering from mental hallucinations and is a manic depressive, not responsible for her thoughts, actions and deeds. These papers are attached to the record.

Under these circumstances, I believe the best interests of justice would be served if the sentence be confirmed but the execution thereof suspended during good behavior. I therefore so recommend.

4. Consideration has been given to a letter from Major Robert R. Mariner, AC, Sheppard Field, Wichita Falls, Texas, with inclosures, dated 7 June 1945.

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 Ltr fr Accused dated 3 May 1945 w/3 Incls
4 Ltr fr Maj. Mariner, dated 7 June 1945 w/2 Incls

(Sentence confirmed but execution suspended during good behavior. G.C.M.O. 268, 3 July 1945).

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

8 MAY 1945

SPJGV-CM 279231

UNITED STATES	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Mitchel Field, New York, 3 April 1945. Dismissal.
Second Lieutenant ROBERT A. PACKARD (0-578793), Air Corps.	)	

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates

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

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

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

Specification: In that Second Lieutenant Robert A. Packard, Air Corps, was, enroute between Tampa, Florida, and Columbia, South Carolina, on or about 26 January 1945, in a public place, to wit, Seaboard Airline Train Number 32, disorderly while in uniform.

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

Specification: In that Second Lieutenant Robert A. Packard, Air Corps, having received a lawful order from First Lieutenant Albert I. DeFriez, Medical Corps, to return to his train compartment, the said First Lieutenant Albert I. DeFriez being in the execution of his office, did, on Seaboard Airline Train Number 32, enroute between Tampa, Florida, and Columbia, South Carolina, on or about 26 January 1945, fail to obey the same.

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

Specification: In that Second Lieutenant Robert A. Packard, Air Corps, having received a lawful order from First Lieutenant Albert I. DeFriez, Medical Corps, to refrain from drinking

intoxicating beverages on the train, the said First Lieutenant Albert I. DeFriez being in the execution of his office, did, on Seaboard Airline Train Number 32, enroute between Tampa, Florida, and Columbia, South Carolina, on or about 26 January 1945, fail to obey the same.

The accused pleaded not guilty to, and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three (3) years. The reviewing authority approved the sentence but remitted the confinement and forfeitures, and forwarded the record of trial for action under Article of War 48.

3. On the morning of 25 January 1945, at about 9:30 a.m. (R. 11), the accused boarded a Seaboard Airline train, the "Silver Meteor", enroute to New York. He was a patient who, by competent order, was assigned on the previous day to the AAF Regional Station Hospital, Mitchel Field, New York, for further observation and treatment. A Lieutenant DeFriez was ordered to accompany the accused and another patient. This lieutenant was with the accused when they boarded the train at Tampa, Florida, the point of embarkation for the hospital (R. 8-9; Ex. 1).

Lieutenant DeFriez testified that when they got to the drawing room they were to occupy, he told the two patients that he did not wish either of them to leave the railroad coach (R. 12). When asked by the accused about a club car, Lieutenant DeFriez stated that there would be no drinking on the trip, and that the patients were subject to hospital regulations (R. 12, 23, 74); that he would appreciate the patients not drinking; and that he would have to report to Colonel Roberts (Commanding Officer at Drew Field) any misconduct (R. 13).

At about 12:45 hours, Lieutenant DeFriez went to the dining car for lunch. Shortly thereafter he saw the accused headed toward the rear of the car. He followed and found the accused seated with some enlisted men. He saw no signs of drinking and was offered some coffee by the accused, which he accepted. He thereupon sat down and chatted with the group of men (R. 14).

Lieutenant DeFriez left and joined his other patient for about 1½ hours. When he left, the accused, addressing everyone in the car, expressed his opinion of medical officers in general and referred to Lieutenant DeFriez as a "prick" (R. 47). He continued to drink until

Lieutenant DeFriez returned to the club car, about an hour and a half later (R. 14, 47). Upon his return to the car where the accused was, the attitude of the accused had changed. He seemed to be annoyed at the presence of Lieutenant DeFriez and made fun of him (R. 14-15). Soon the accused began to make lewd and insulting remarks. His tone was loud and his face flushed as if he had been drinking (R. 15, 46). After Lieutenant DeFriez left the car, the accused who had been drinking whiskey from a bottle (although not when Lieutenant DeFriez was present) and sharing it with enlisted men "both Army and Navy", continued in a boisterous voice to insult medical officers in general and Lieutenant DeFriez in particular (R. 46-47). Lieutenant DeFriez suggested that it was time to go back to the stateroom to which the accused stated that he would go to bed when he so desired (R. 15). After about 1½ hours, during which time the accused belittled Lieutenant DeFriez, he (the accused) got up and left the car in which they were sitting. Lieutenant DeFriez followed shortly thereafter. At this time Lieutenant DeFriez said:

> "I made it clear that I was ordering him to go to the drawing room, and I asked him if he was disobeying my orders, and he said, 'Yes I do, and I don't think you have any right to give me any orders'." (R. 17).

Whereupon Lieutenant DeFriez explained that accused was still a patient in a hospital under his (Lieutenant DeFriez's) care and he had the right to give him orders, to which the accused didn't seem to agree.

Further, on page 32 of the record of trial, the Lieutenant testified that after telling the accused to go back to the compartment, and the accused refused, Lieutenant DeFriez said, "You disobey my orders?", to which the accused replied "I do" (R. 32).

On cross-examination Lieutenant DeFriez further testified that the accused knew who he was, although they had never met and that the accused knew he, Lieutenant DeFriez, was in charge of the accused for the trip by asking Lieutenant DeFriez for permission to stop at the Tampa Terrace Hotel before the trip started (R. 37).

Lieutenant Ripley testified that when the accused entered the car in which he was sitting, he was loud and boisterous in manner. He further testified that he saw the accused drink whiskey from a bottle he had brought into the car; and that he saw this shared with enlisted personnel. He knew it was whiskey, for the accused offered him a drink and he smelled whiskey in the bottle. The accused used obscene language and told dirty jokes to the occupants of the car as a whole. Lieutenant DeFriez explained

to accused that he was still a patient of the hospital and under his orders, but finally consented to let him go to the diner. However, they then got into an argument as to who was to go first and, while standing in a day coach where they were overheard by many passengers, the accused used the words "shit" and "bull shit" and told Lieutenant DeFriez that he could make out a report and "jam it up Colonel Roberts' ass" (R. 17, 18, 63). During this discussion which lasted about 15 minutes, First Lieutenant Peter B.Hogan, who was sitting several seats away from the place where the accused and Lieutenant DeFriez were standing, suggested that they go out to the platform or to the men's room and out of public hearing. The accused told Lieutenant Hogan to sit down, speak when he was spoken to, and not to get into a conversation which was none of his business. Almost the entire discussion, including the obscene language used by the accused, had been heard by Lieutenant Hogan and several soldiers and their wives, as well as by some civilians, since the car was full (R. 18, 31, 64, 66, 67). During this time the accused drank several times from his bottle (R. 46-47). He ridiculed and humiliated Lieutenant DeFriez in front of the occupants of the entire car (R. 51). At a later time, Lieutenant Ripley said Lieutenant DeFriez reentered the car and said to Lieutenant Packard, "Stop drinking" and Lieutenant Packard said, "Is that an order?" and Lieutenant DeFriez said, "Yes, that is an order. I want you to stop drinking and go back to the compartment". Lieutenant Packard said, "If and when" he went back it would be when he "got damn good and ready" (R. 48). But after this direct order was given to stop drinking, Lieutenant Ripley could not recall if the accused took any drinks following that order (R. 59-60). However, Private Wallis, who was the third member of the party, testified that Lieutenant DeFriez did "tell us that we weren't drinking on the trip" (R. 74), and that it was an order "given in a nice way" (R. 75). This was when the trip started.

Lieutenant Peter B. Hogan testified that, at 5 p.m. on the day in question, the accused offered him a drink several times (R. 63). He heard the accused use obscene language, and heard an "argument" between the accused and Lieutenant DeFriez about not returning to their compartment in an orderly manner (R. 63-64). During this time, there were enlisted men and civilians present, some of whom were ladies and children. Lieutenant Hogan got hold of two MP's on the train and returned with them. These MP's asked Lieutenant Packard to proceed to his compartment, but he refused. Lieutenant Hogan then went into the diner.

Major Russel, the investigating officer, was called as a witness and testified, under oath, that the accused made a statement (R. 79). This statement was admitted in Prosecution's Exhibit No. 2. In this

statement the accused admitted that he knew Lieutenant DeFriez was in charge of him (the accused); that he took along and had with him a bottle of whiskey; that he "asked Lt. DeFriez, and he said 'no drinking'". Later in his statement, however, he denied being given a direct command. He also denied being disorderly.

When the train arrived at Columbia, South Carolina, the accused, at the request of Lieutenant DeFriez, was put off the train (R. 18-20, 64, 65).

4. For the defense.

The accused took in the stand in his own defense. He said he hurt his arm at Barksdale Field (R. 86) and later was transferred to the hospital at Drew Field in July 1944 where, at his own election he was operated on. The operation, which was performed in August 1944, necessitated removing a bone from his right leg and grafting it on to his left arm (R. 86, 87, 88). In November, while getting out of a bathtub, he cracked the cast on his arm on the edge of the tub and dislodged the bone graft. Colonel Roberts, the Base Surgeon, accused him of having injured his arm while drunk, but that was untrue and his ward surgeon had told the Colonel that there was no evidence that he had been drunk. Nevertheless, he was deprived of pass privileges and had to remain in the hospital. His ward surgeon tried to arrange it so he could work in the office of the Provost Marshal at Drew Field, but was not successful. However, the ward surgeon finally did arrange his transfer to Mitchel Field (R. 88, 89, 90, 91).

When he had been informed that he was being sent to Mitchel Field, he was shown a copy of the order and told that Lieutenant DeFriez was going along as a medical attendant, although it was not the usual custom to have a medical officer accompany another officer on such a trip (R.92). Lieutenant DeFriez told him, when they boarded the train, that there would be no drinking, but when he asked to see the orders Lieutenant DeFriez qualified this by saying there would be no drinking in the compartment (R. 94). Lieutenant DeFriez had followed him into a hotel in Tampa, when he went to get a package, and followed him whenever he left the train compartment, as a result of which he jokingly referred to Lieutenant DeFriez as "Dick Tracy" (R. 93, 94-95). Lieutenant DeFriez had laughed about it at first, but eventually became surly, saying that he had orders to keep an eye on him and to see that he did not get into trouble (R. 95). In the club car, he had given a bottle to the porter and made arrangements to have his drinks poured into a coffee cup, because he did not want to show his bottle in a public place. The bottle

which Lieutenant Ripley saw was one which was being passed around by an enlisted man (R. 95-96). The only obscenity he may have used while in the club car were such words as "hell" and "damn" which he might have said unconsciously because only military personnel were present (R. 97). All of the orders given by Lieutenant DeFriez were suggestions which he did not construe as orders (R. 97, 98). Finally, the nervous tension became so great that he snapped and said some things which he should not have said and which he does not remember. Having been in the hospital for so many months, and having been under such a mental strain, he thought he was being persecuted by Lieutenant DeFriez and lost control of himself (R. 98). But on cross-examination he admitted (R. 110) he understood that Lieutenant DeFriez was in charge of the detail and responsible for his (the accused's) actions.

5. The first question that arises is whether the conduct of the accused was disorderly under all the circumstances and whether such disorder amounted to an offense under the 95th Article of War. The testimony clearly establishes that the accused used foul and obscene language in a loud voice; that he referred to a superior officer, in the presence of a coach full of passengers, military and civilian, some of whom were women, as a "prick"; drank publicly with enlisted men, argued with a superior about obeying an order. Black's Law Dictionary defines disorderly conduct as:

> " ---signifying generally any behavior that is contrary to law, and more particularly such as tends to disturb the peace or decorum, scandalize the community or shock the public sense of morality."

We feel that there can be little question that the evidence as outlined herein clearly establishes that the actions of the accused constituted disorderly conduct. The next question is whether such conduct is of such a nature as to violate Article of War 95. The test appears in par. 151, Manual for Courts-Martial, 1928:

> "The conduct contemplated is action or behavior ----- in dishonoring or disgracing the individual personally as a gentleman ------".

Whether the accused's conduct meets that test in any given case must be decided anew in each case. The Board feels that no gentleman acts as the accused acted in the instant case, in a crowded train and in the presence of women. See CM 235753, Cannon, also CM 235573, Hutchinson. In view of the fact that the accused was not charged with, nor proven to

be drunk, his conspicuous disorderly conduct is even more reprehensible. Although the accused took the stand, he did not actually deny having used foul language or said obscene things. He testified, "I don't deny them, but I don't remember them" (R. 101).

It is the opinion of the Board that the evidence amply supports the finding of guilty of Charge I and its Specification.

6. Under Charge II, the accused is charged with failure to obey an order to return to his compartment on a train while en route between Tampa, Florida, and Columbia, South Carolina, given by Lieutenant DeFriez. There are two elements to this offense concerning which some question was raised by the evidence. The first of these was whether an order was actually issued by Lieutenant DeFriez to the accused "to return to his compartment". The accused testified that it was not an order, but a "suggestion" made by the officer in whose charge the accused was at the time (R. 97). Lieutenant DeFriez says it was a positive definite order (R. 17). The actual words may have left some doubt in the accused's mind, if nothing further had been said. The actual words used were "Come on, let's go back to the drawing room". But, Lieutenant DeFriez followed this up by making it clear that it was an order and asking the accused "if he was disobeying my orders" and the accused said he was disobeying them. He raised a question as to whether Lieutenant DeFriez had the right to give any orders (R. 17). This raises the second point as to this Specification, namely, did Lieutenant DeFriez have the right to give the accused orders; in other words, was he in the execution of his office? Prosecution's Exhibit 1 is a copy of the order detailing Lieutenant DeFriez to accompany the accused. The accused knew that Lieutenant DeFriez was in charge of detail. The accused said in his statement that he was told before he left on the trip that "Lieutenant DeFriez is in charge of you" (Ex. 2). Under these facts there cannot be any question that all the elements of the offense were alleged and proved. The accused's subsequent testimony that he did not believe that he was given an order, in view of the evidence herein detailed, is unworthy of consideration.

The same applies to the Additional Charge which alleges failure to obey an order not to drink on the train. That the order was given is not only testified to by the man who gave it, but as well by Private Charles E. Wallis, who heard it given, and recognized it as an order.

7. War Department records show the accused to be 31 years of age at the present time. He has served as an enlisted man from 7 April 1942 to 23 January 1943 when he went to Officer Candidate School. He was

commissioned a second lieutenant on 16 April 1943 after graduating from the AAF Officer Candidate School at Miami, Florida. In civil life he was a detective.

8. The court was legally constituted. Although some hearsay was admitted no errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charges and Specifications and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

SPJGV-CM 279231 1st Ind

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

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 Robert A. Packard (0-578793), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of disorderly conduct in uniform in a public place, a railroad passenger train, in violation of Article of War 95 and under two Specifications of failing to obey the lawful orders of his superior officer (1) to return to his compartment, and (2) to refrain from drinking intoxicants while on the train, in violation of Article of War 96. He was sentenced to dismissal, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence, but remitted the forfeitures and confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence is summarized in detail 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 of the sentence.

Accused was a patient en route to the regional station hospital at Mitchel Field, New York, under the care of First Lieutenant Albert I. DeFriez, Medical Corps, pursuant to competent orders. When they boarded the train at Tampa on the morning of 25 January 1945, the Medical officer ordered accused and the other patient in his care not to leave the car in which their drawing room was situated. Shortly after going to lunch, Lieutenant DeFriez saw that accused was on his way to the club car, and followed him. After remaining in the club car a short time, the medical officer left and remained with his other patient for about an hour and a half. After his departure, accused addressed his fellow passengers, including several enlisted men, in the club car. His remarks indicated an unfavorable opinion of medical officers as a whole. He referred to Lieutenant DeFriez in vulgar terms. He drank whiskey with the enlisted men. When Lieutenant DeFriez returned to the club car, accused

berated him in lewd and insulting language. Accused stated that Lieutenant DeFriez had no right to give him orders, and that he would not obey him. Civilians, including women and children were present. Finally, a line officer intervened, and at Columbia, South Carolina, accused was removed from the train and turned over to the military police. A week before the commission of the related offenses, the accused was reprimanded and ordered to forfeit $75 of his pay under Article of War 104 by the commanding general of the 3rd Bomber Command for intoxication and disorderly conduct.

I recommend that the sentence as approved by the reviewing authority be confirmed and ordered executed.

4. Consideration has been given to a letter from accused dated 14 May 1945, requesting clemency.

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
1 Rec of Trial
2 Form of Action
3 Ltr fr accused dated 14 May 1945

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 248, 19 June 1945).

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

SPJGH-CM 279241

17 MAY 1945

UNITED STATES	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	Trial by G.C.M., convened at Midland Army Air Field, Midland, Texas, 30 March 1945. Dismissal and total forfeitures.
First Lieutenant LESTER D. BIOT (0-729703), 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: In that First Lieutenant Lester D. Biot, Air Corps, did, without proper leave, absent himself from his station at Midland Army Air Field, Midland, Texas, from about 15 February 1945 to about 16 February 1945.

CHARGE II: Violation of the 69th Article of War
(Nolle prosequi entered by direction of the appointing authority).

Specification: (Nolle prosequi entered by direction of the appointing authority).

CHARGE III: Violation of the 96th Article of War

Specification 1: (Nolle prosequi entered by direction of the appointing authority).

Specification 2: In that First Lieutenant Lester D. Biot, Air Corps, did, on or about 14 February 1945, at Midland, Texas, wrongfully occupy a room in the Crawford Hotel with a woman not his wife, to wit: Ruby Jean Bell.

Specification 3: In that First Lieutenant Lester D. Biot, Air Corps, having been restricted to the limits of his post did, at Midland Army Air Field, Midland, Texas, on or about 31 January 1945, break said restriction by going to Odessa, Texas.

Specification 4: In that First Lieutenant Lester D. Biot, Air Corps, having been restricted to the limits of his post did, at Midland Army Air Field, Midland, Texas, on or about 1 February 1945, break said restriction by going to Odessa, Texas.

Specification 5: In that First Lieutenant Lester D. Biot, Air Corps, having been restricted to the limits of his post did, at Midland Army Air Field, Midland, Texas, on or about 3 February 1945, break said restriction by going to Pyote, Texas.

Specification 6: In that First Lieutenant Lester D. Biot, Air Corps, having been restricted to the limits of his post did, at Midland Army Air Field, Midland, Texas, on or about 5 February 1945, break said restriction by going to Odessa, Texas.

Specification 7: In that First Lieutenant Lester D. Biot, Air Corps, having been restricted to the limits of his quarters, did, on or about 17 February 1945, break said restriction by going to the Officers' Club, Midland Army Air Field, Midland, Texas.

He pleaded guilty to the Specification of Charge I and Charge I, not guilty to all other Specifications and Charges and was found guilty of all Specifications and Charges upon which he was tried. No evidence of any previous convictions was considered. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. On 29 January 1945, accused's commanding officer, acting under Article of War 104, restricted accused to the limits of the Midland Army Air Field for the period of one week, "commencing on the date you receive this notice." Accused acknowledged the receipt of the notice referred to on 31 January 1945 (R. 6; Pros. Ex. 1). On 31 January 1945 accused, a married man, called on Miss Ruby Jean Bell at her home in Odessa, Texas,

and attended a theater with her about 7 o'clock that evening. Accused also visited Miss Bell on 1, 3 and 5 February 1945 in Odessa and, on one of these occasions, 3 February, escorted her to the Officers' Club in Pyote, Texas (R. 7, 15, 25; Pros. Exs. 2, 5). At about 10 p.m. on 14 February accused registered in his own name at the Crawford Hotel and was assigned a room which he and Miss Bell occupied overnight (R. 9, 10, 20, 29; Pros. Exs. 3, 6). The following day, 15 February 1945, the couple went to Eastland, Texas. Accused started for Eastland about 9 or 10 a.m. on the 15th and did not return to his station until 6:15 a.m., 16 February 1945 (R. 9, 10, 29; Pros. Ex. 6). Accused did not have permission to be absent from duty on either 15 or 16 February (R. 26, 27).

Major Pat R. Warren, Air Corps, Provost Marshal of Midland Army Air Field, testified that on 16 February 1945 he ordered his assistant, First Lieutenant Joseph P. Franecki, Air Corps, Assistant Provost Marshal at Midland, to place accused in arrest in quarters. The witness stated that he had "the power by the Commanding Officer to place them in quarters but don't have the power to release them." He was unable to say, however, whether the commanding officer knew at the time of his action in placing accused in arrest, although he did confirm it later (R. 32, 33). Lieutenant Franecki testified that by direction of Major Warren he ordered accused into arrest in quarters on 16 February 1945. On 17 February Lieutenant Franecki repeated these orders to accused in the presence of the officer of the day (R. 32, 33, 34). Shortly thereafter accused was seen at the Officers' Club (R. 35).

4. Accused, after being advised of his rights, testified in his own behalf. He stated that he was married in Topeka, Kansas. A child was born of this marriage before accused left for overseas. After completing 31 missions as a bombardier for which he was awarded the Distinguished Flying Cross and the Air Medal he returned to the United States about 17 November 1944. He was hospitalized for a short time at Mitchel Field and was thereafter assigned to Midland. Accused started to drink after he entered the Army and drank heavily when overseas, particularly after some of his comrades failed to return from a mission. His wife refused to live with him on his return from overseas because of his drinking and threatened to institute divorce proceedings. She is aware of his present difficulties but is willing to be reconciled to accused if he will stop drinking. He knew Miss Bell about a month and a half before the night when he went to the Crawford Hotel with her. He admitted that the conduct for which he was on trial was unbecoming an officer of the United States Army (R. 38-40).

Technical Sergeant William Forrester, Squadron C, 2528th Base Unit, Midland Army Air Field, Midland, Texas, testified that he has known accused "since he was an infant" and that he was "like a big brother" to accused. Accused never drank until he entered the Army. He was an "honest" (sic) student in school and a good church member. Witness would "stake my life on his reputation."

5. a. The Specification of Charge I and Charge I:

This Specification alleged that accused was absent without leave from 15 February 1945 to 16 February 1945. Accused's plea of guilty, his admitted absence from his station during the 15th, and the fact that his absence was unauthorized are ample to sustain the findings of guilty of this Specification and the Charge.

b. Specification 2 of Charge III:

This Specification alleges that accused wrongfully occupied a room in the Crawford Hotel with a woman not his wife. The uncontradicted evidence shows that accused registered at the Crawford Hotel about 10 p.m. on 14 February 1945; that he was assigned a room there; that he and Miss Bell, who was not his wife, occupied this room overnight. Such conduct constituted a violation of Article of War 96. The record is legally sufficient to support the finding of guilty of this Specification.

c. Specifications 3, 4, 5 and 6 of Charge III:

These Specifications allege that accused, having been restricted to the limits of his post, did break this restriction on 31 January 1945, 1 February 1945, 3 February 1945, and 5 February 1945, respectively. The evidence shows that accused's commanding officer, acting under Article of War 104, restricted accused to the limits of his post effective the day accused received notice of the imposition of the punishment. Accused acknowledged receipt of this notice on 31 January 1945. The evidence further shows that accused on the dates alleged left the post and visited a nearby town for the purpose of calling on Miss Bell. As to Specifications 4, 5 and 6 involving breach of restriction on 1, 3 and 5 February 1945, respectively, the record is legally sufficient to support the findings of guilty. There is no evidence as to the exact time when accused received the communication imposing a restriction on him, which by its terms was not effective until such receipt. Lacking such evidence we must assume that it was received sometime during the day it was acknowledged, viz, 31 January 1945. The evidence shows that accused attended a theater in a nearby community at 7 p.m. on 31 January but it does not reveal whether this was before or after the receipt of notice of restriction by accused. It is possible that accused acknowledged the receipt of this notice before he left the post for the theater. It is equally possible that he did it after he returned that evening, if he did return. It was incumbent on the prosecution to prove the commission of the offense alleged beyond a reasonable doubt and if the record fails in any particular in this respect we have not the power, much less the duty, to choose whatever speculation is most favorable to the prosecution and, on that basis, sustain a finding of guilty. Accordingly, the record is legally insufficient to support the finding of guilty of Specification 3.

d. Specification 7 of Charge III:

The Specification alleges that accused was restricted to his quarters and broke this restriction on 17 February 1945 by visiting the Officers' Club. The evidence shows that Major Warren, Provost Marshal at Midland Army Air Field, acting through his assistant, Lieutenant Franecki, placed or purported to place accused in arrest of quarters on 16 February 1945 and that accused on 17 February 1945 visited the Officers' Club. Breach of restriction has been held to be a lesser included offense of breach of arrest inasmuch as restriction is one of the elements involved in arrest (CM 271594, Pritchard, 4 Bull. JAG 11). Since breach of restriction is lesser included of breach of arrest it is quite obvious that breach of arrest cannot be a lesser included offense of breach of restriction. Accordingly, if the evidence established that accused's offense was that of breach of arrest, he could not be found guilty thereof under this Specification.

However, it is apparent from the evidence that accused's arrest was not legal. He was not arrested by the commanding officer acting through Major Warren but was arrested by Major Warren who purported to act upon the basis of a general delegation of authority so to do from the commanding officer. The authority of a commanding officer to arrest cannot be delegated. Since the delegation of authority was illegal and of no effect, the arrest was likewise illegal. Proof of breach of illegal arrest will not sustain a conviction of breach of arrest (CM 269690, Williams; MCM, 1928, par. 139a).

We are thus brought to the final question of whether the acts of Major Warren, though not an arrest, constituted a valid administrative restriction of accused. The answer is in the negative. The Judge Advocate General's Office has recognized that, although arrest or confinement may not be necessary, it may be desirable, as an administrative measure or precaution, that an accused be required to remain within a specified area in order to have him available during an investigation of charges against him or to prevent a prompt recurrence of the conduct for which he is under charges (SPJGJ 1943/18606, 5 Oct 1943). Under such circumstances this office has expressed the opinion that a commanding officer may administratively restrict an accused to a specified area of a military command, stating further however that an "officer restricted continuously to his quarters or a soldier similarly restricted to his barracks is in fact under arrest, and the designation of the restraint as restriction would have no effect" (SPJGJ 1943/18606, 5 Oct 1943; SPJGJ 1942/5170, 5 Nov 1942). The foregoing proposition that restriction of an officer to his quarters is in fact an arrest receives support from Article of War 69 wherein it is provided that "Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by

proper authority." Accordingly, it may well be that, considering the limits designated, Major Warren's conduct in arresting accused and restricting him to his quarters could not legally be interpreted to constitute a restriction of accused as distinguished from an arrest. However, we do not rest our opinion upon that but rather upon the following grounds.

The opinion of this office set forth in the preceding paragraph hereof stating that authority to impose administrative restriction reposes in commanding officers has been affirmed in recent opinions of the Boards of Review (CM 263480, Griffith; CM 261432, Corcoran; NATO 701, Nelson). Our research has revealed no opinion holding that any lesser authority than a commanding officer possesses such authority. On the contrary, in CM 259778, Avery, the facts revealed that the accused, a commissioned officer, was informed by the executive officer of his organization that the commanding officer had ordered accused to be administratively restricted and accused was handed a written order of the commanding officer so stating. The Board of Review, in holding the administrative restriction to have been validly imposed by accused's commanding officer, remarked however that it did not appear that authority so to restrict accused resided in the executive officer. Furthermore, as is shown by the authorities cited above, administrative restriction, although a lesser restraint than arrest or confinement, is similar to them in its design to limit geographically the activities of an accused. It is a power that should be reserved to no lesser authority than that possessing the power to arrest. Accordingly, it is our opinion that the power administratively to restrict an officer resides only in a commanding officer as a function of his command power. Inasmuch as Major Warren was not accused's commanding officer he had no authority to impose administrative restriction upon accused and his acts cannot be so construed. For the foregoing reasons the finding of guilty of this Specification cannot be sustained.

6. There is contained in the record of trial a request for clemency by accused in the form of a letter to the reviewing authority, Accused there states that up to the time he left for duty overseas he had two years of honorable service. On his return to this country domestic trouble led to heavier drinking and this, plus the fact that his training stressed technical proficiency rather than discipline is responsible for his present predicament. The letter closed with the statement that accused "would appreciate any punishment accorded me other than the disgrace of dismissal" and promised that "if leniency is shown me in this respect and I am allowed to continue to serve my country, I will endeavor to do so with honor." Inclosed with this letter was a statement of accused's combat record which showed that he participated in 31 actual combat operational missions and was credited with four more, that he was awarded the Air Medal with three Oak Leaf Clusters and the Distinguished Flying Cross; and that he performed his duty in an excellent manner.

7. The records of the War Department show that accused is 25 years of age. He is described therein as single but the record of trial

shows that he is married and the father of a child. He worked as a draftsman for two years and attended the Georgia School of Technology for 1½ years until he enlisted as an aviation cadet on 3 February 1942. On 5 September 1942 he was commissioned a second lieutenant, Air Corps Reserve and on 3 July 1944 was promoted to first lieutenant, Army of the United States. On 4 May 1944 accused was reprimanded under Article of War 104 for breach of restriction from 2400 hours, 11 April 1944 to 0815 hours, 12 April 1944. There is included in the record of trial, although not in accused's 201 file, a communication dated 29 January 1945 imposing disciplinary punishment under Article of War 104 on accused for failure to repair on six different occasions between 5 January and 13 January 1945 at the fixed time to the properly appointed place for duty as a student. For these delinquencies accused was reprimanded and restricted to the post for one week. He was awarded the Air Medal with three Oak Leaf Clusters and the Distinguished Flying Cross for participation as a bombardier in combat operations against Germany and German occupied territory.

8. The court was legally constituted and had jurisdiction of the accused and the subject matter. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Specifications 3 and 7 of Charge III but legally sufficient to support all other findings of guilty and the sentence 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. Jaffy, Judge Advocate

William H. Gambrell, Jr., Judge Advocate

Robert E. Trueblood, Judge Advocate

SPJGH-CM 279241 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUN 13 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 First Lieutenant Lester D. Biot (0-729703), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave for a period of one day in violation of Article of War 61 (Spec. of Charge I); wrongfully occupying a hotel room with a woman not his wife (Spec. 2 of Charge III) and breach of restriction on five separate occasions (Specs. 3-7 of Charge III), in violation of Article of War 96. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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 Specifications 3 and 7 of Charge III (alleging breach of restriction); legally sufficient to support all other findings of guilty; and legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion. On 29 January 1945, accused's commanding officer, acting under Article of War 104, restricted accused to the limits of the Midland Army Air Field, Midland, Texas, for one week, effective 31 January 1945. On 1, 3 and 5 February accused broke this restriction and visited Odessa, Texas, for the purpose of meeting a young woman. On one of these occasions - 3 February - he escorted her to the Officers' Club in Pyote, Texas. On 14 February accused, who is married, registered in his own name at the Crawford Hotel, Midland, Texas, and he and this same young woman, who is not his wife, occupied a room there overnight. The next day, 15 February, the couple took a trip to Eastland, Texas. Accused returned to his station at 6:15 a.m. on 16 February. He did not have permission to be absent therefrom on either 15 or 16 February.

I recommend that the sentence be confirmed but that the execution of the dismissal be suspended during good behavior, that the total forfeitures be reduced to a forfeiture of pay of $50 per month for six months, and that the sentence as thus modified be carried into execution.

4. Consideration has been given to a letter from accused requesting clemency in which there is inclosed a statement of accused's combat record

showing that he participated in 31 combat operational missions and was credited with four more; that he was awarded the Air Medal with three Oak Leaf Clusters and the Distinguished Flying Cross; and that he performed his duty in an excellent manner.

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

Myron C. Cramer.

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part. Sentence confirmed but dismissal suspended, total forfeitures reduced to forfeiture of $50. pay per month for six months. GCMO 264, 3 July 1945).

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

SPJGK - CM 279252

17 MAY 1945

UNITED STATES v. Second Lieutenant JAMES A. HEACOCK (O-580809), Air Corps.	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Sheppard Field, Texas, 4 and 9 April 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. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant James A. Heacock, Air Corps, 78th Army Air Forces Base Unit (Army Airways Communication System Overseas Screening, Processing and Replacement Center) did, at Sheppard Field, Texas, on or about 6 March 1945, with intent to defraud, wrongfully and unlawfully make and utter to the First National Bank of Wichita Falls, Texas, a National Banking Corporation, a certain check, in words and figures as follows, to-wit:

"Harlingen, Texas, Mar 6 1945 No. _____
THE FIRST NATIONAL BANK 88-2039
of Harlingen, Texas 11-SA

Pay to Cash ---------- OR ORDER $50.00

Fifty & no/100 ---------- DOLLARS

For _____ /s/ J. A. HEACOCK
78 AAF BU 0-580809"

and by means thereof, did fraudulently obtain from the said First National Bank of Wichita Falls, Texas, a National Banking Corporation, $50.00 in good and lawful money of the United States of America, he, the said Second Lieutenant

James A. Heacock, Air Corps, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Harlingen, Texas, for the payment of said check.

Specifications 2 and 3 are identical with Specification 1 except as to date, amount, and the person or institution defrauded. These differences were as follows:

Specification	Date	Amount	Person defrauded
2	14 March 1945	$50	First National Bank of Wichita Falls, Texas
3	13 March 1945	$100	Sergeant H. B. Leer.

He pleaded guilty to and was found guilty of the Charge and its Specifications. No evidence was introduced of any previous conviction. He was sentenced to be 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. Relying upon the accused's plea of guilty the prosecution introduced no evidence (R. 8).

4. The accused was advised by the court that he had the option to be sworn and testify on his own behalf, to make an unsworn statement, or to remain silent. He elected to be sworn and he testified in substance as follows:

He has been in the Army about four years and one month, having been commissioned an officer on 23 July 1943. He is 25-10/12 years of age and married. He is a graduate of the University of Michigan with a degree of Bachelor of Science in Metallurgical Engineering (R. 9). His only previous difficulty in the Army involved an absence without leave for a day and a half due to a misunderstanding, for which he was punished under Article of War 104. He received several commendations and his character ratings have been "excellent" (R. 10). There were introduced in evidence three letters from prominent persons living in the accused's home town of Birmingham, Michigan (the Mayor, Superintendent of Schools, and a Minister of the Gospel), who had known the accused for many years and vouched for his good character and reputation (R. 11-13). Accused was unable to explain his conduct in issuing the checks made the basis of the charge. In this connection he stated: "I guess I got a pretty bad attitude at that time and went to pieces." He repaid the checks on 6 April 1945 (R. 10,15). He has had a checking account with the bank upon which the checks were drawn for about one and one-half years.

5. The accused's plea of guilty and his implied admission of the

commission of the offenses charged while testifying under oath on his own behalf amply and legally support the findings of guilty of the Charge and its Specifications.

6. War Department records show the accused to be 25-10/12 years of age. The record of trial shows him to be married. He graduated from high school and the University of Michigan. He was employed as a machinist for about three years, when, on 6 March 1941, he enlisted in the service and served as an enlisted man, reaching the grade of Staff Sergeant, until 24 July 1943, when he was commissioned second lieutenant, Air Corps, AUS.

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 Article of War 96.

Irving A. Zom, Judge Advocate.

Carl A. Seplum, Judge Advocate.

Thomas W. Mayo, Judge Advocate.

SPJGK - CM 279252 1st Ind.

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

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 James A. Heacock (0-580809), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of fraudulently issuing three checks totaling $200 drawn on a checking account in which he did not have sufficient funds for their payment (three specifications) in violation of Article of War 96. 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 the sentence and to warrant confirmation thereof.

During a period of one week the accused officer obtained $200 by means of three of his checks which were dishonored when presented for payment to the bank upon which they were drawn, for insufficient funds. He redeemed the checks within 30 days after their issuance. He pleaded guilty to the Charge and the three specifications and could give no explanation of his conduct. The Staff Judge Advocate in his review states that since the trial of the accused the issuance by the accused of three additional dishonored checks totaling $225.00 have been brought to his attention. Accused's conduct warrants dismissal. I recommend that the sentence be confirmed but that the forfeitures be remitted and 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 confirmed but forfeitures remitted. G.C.M.O. 238, 19 June 1945).

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

SPJGH-CM 279267

3 MAY 1945

UNITED STATES v. Private ORVILLE McKINNEY (6996362), Army Air Forces Unassigned, attached Squadron K, 3705th Army Air Forces Base Unit.	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Lowry Field, Denver, Colorado, 8, 14 and 30 March 1945. Dishonorable discharge and confinement for life. Penitentiary.

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

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

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

CHARGE I: Violation of the 92d Article of War

Specification: In that Private Orville McKinney, Army Air Forces Unassigned, Attached Squadron K, 3705th Army Air Forces Base Unit (Technical School), did, at Denver, Colorado, on or about 8 February 1945, forcibly and feloniously, against her will, have carnal knowledge of Gladys Romanes.

CHARGE II: Violation of the 93d Article of War

Specification: In that Private Orville McKinney, * * *, did, at Denver, Colorado, on or about 8 February 1945, by force commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Gladys Romanes per os and per anus.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced.

He was sentenced to dishonorable discharge, total forfeitures and confinement for life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The prosecution introduced the following evidence to prove commission of the offenses alleged in the Charges and Specifications. Around 5:30 p.m. on 8 February 1945, following an afternoon of shopping, Mrs. Katherine Voigt and Mrs. Gladys Romanes, the prosecutrix, visited the cocktail lounge of the Hotel Albany in Denver, Colorado, where they were soon joined by Mr. Voigt. Mrs. Romanes was divorced and was living temporarily with the Voigts. Eventually accused and a civilian with whom he was drinking became engaged in conversation with the Voigt party (R. 12, 13, 24, 26). After drinking and conversing for awhile the Voigts and Mrs. Romanes found their cigarettes were exhausted and decided to return to the Voigt home. Accused then stated he could replenish the supply of cigarettes. Thereafter he and the civilian were invited to accompany the Voigts and Mrs. Romanes to their home for a drink. Around 9 p.m., soon after they arrived at the Voigt home, accused and Mrs. Romanes who were both sober left in her automobile to obtain cigarettes. En route they stopped at the Yucca night club where they consumed a drink or two and danced for awhile (R. 13, 19, 27, 29). Thereafter, about 10 p.m., they drove to accused's barracks apparently at Lowry Field where he procured some cigarettes and then returned to the city, accused driving the automobile because of Mrs. Romanes' unfamiliarity with the city and its environs. When they reached the city they stopped at a drinking establishment where Mrs. Romanes consumed two drinks and accused had one. During the entire evening up to this point, accused had conducted himself in a gentlemanly manner (R. 14, 15, 28). He was not intoxicated and during the entire evening Mrs. Romanes had consumed not more than six drinks (R. 20, 21).

After leaving the last establishment sometime around midnight accused drove the automobile to a sparsely settled section of the city where he stopped it. He then, to use Mrs. Romanes' language, promptly "exposed himself and wanted me to take him by mouth." When Mrs. Romanes vehemently refused so to do, accused immediately commenced to beat her about the face with his clenched fists, and then moving to a position in front of her he began to strangle her and forced her head under his opened overcoat and compelled her to receive his penis into her mouth (R. 15-17, 22). Thereafter, still clutching her throat and striking her, he forced her to kneel in the automobile and then he inserted his penis inside her rectum (R. 15, 16). Although Mrs. Romanes was only 5 feet 1 inch in height, weighed but 105 pounds and was not in a strong physical condition because of two serious operations she had undergone within the previous eleven months, she fought to resist accused and did manage to strike him one glancing blow across the face (R. 15, 17).

After completing the acts described above accused ordered Mrs. Romanes to crawl into the rear seat of the automobile, threatening to kill her if she failed to comply. There he had intercourse with her in the normal manner following which he compelled her to kneel and again inserted his penis into her rectum. After the conclusion of these acts which took place over approximately an hour and a half, accused told Mrs. Romanes to bring her young daughter to see him the following evening and then drove the automobile to another section of the city where he left Mrs. Romanes who then drove on to the Voigt home (R. 16).

She arrived at the Voigt home about 2 a.m., 9 February 1945. She was crying and complained to Mrs. Voigt that accused was a beast and had beaten her terribly. When she arose later that morning she was extremely weak and was bleeding rectally. Her face and neck were swollen and bruised, one eye was blackened and her nose was injured (R. 18, 19, 28).

Mrs. Romanes was examined by Major John H. Pribble, Medical Corps, at the Station Hospital, Lowry Field, on 10 February 1945. She was found to have bruises about the eyes and jaws and a bruise on her upper right arm. Her ribs and abdomen were sore and painful and her rectum was badly torn. The rectal tear was about one and a half inch long and at least equally deep. The tear extended through the internal and external rectal muscles which serve as valves to prevent the bowel content from flowing uncontrolled from the body. Fecal matter was present on her underclothing. It was Major Pribble's prognosis that if surgery could repair these torn muscles so that they might function normally without weakness and if no infection resulted, she would have a fair chance of recovery. If the rectal muscles were weak after such surgery, she would be "incapacitated for life." Presumably he meant she would have no control over her bowel movement (R. 35-38; Pros. Exs. B, C, D, E). X-rays of Mrs. Romanes were also taken on 10 February 1945 and revealed that two of her ribs and her nose were fractured (R. 19, 41, 42).

On 12 February 1945, after accused had been fully advised by the investigating officer of his rights to remain silent, he related his meeting with Mrs. Romanes and the Voigts, the drive to the Voigt home and then the trip to and from his barracks with Mrs. Romanes during which they stopped at several bars for drinks. He remembered nothing after the visits to the bars on the return trip from his barracks (R. 31, 32, 34).

4. After accused had been fully advised of his rights as a witness, he elected to make an unsworn statement to the court. He informed the court of the meeting with Mrs. Romanes and the Voigts at the bar of the Albany Hotel, of his invitation and visit to the Voigt home, of the drive with Mrs. Romanes to his barracks for cigarettes and of stops made during it to purchase several drinks and to deliver a couple to whom they

had offered transportation. He remembered nothing after leaving a bar at which they stopped while en route from his barracks to the Voigt home (R. 43).

5. At the inception of the trial defense counsel advised the court that he had reason to suspect the sanity of accused inasmuch as accused's uncle was confined in an insane asylum when twelve years of age where he died about eighteen years later. Further accused's brother had spent two years in a similar asylum from which he was released approximately four years ago (R. 5). As a result, accused was transferred to the Regional Hospital, Buckley Field, Denver, Colorado, for observation by the medical authorities. He was there examined by Captain Leo Rangell, Chief of Psychiatric Services of that hospital, for a period of four or five days commencing 14 March 1945. Captain Rangell testified that in his opinion accused was sane and knew the difference between right and wrong on 8 February 1945 when he committed the offenses with which he was charged, and that he was sane when examined and able intelligently to cooperate in his own defense (R. 6-8; Pros. Exs. F1-F4).

6. Extensive comment on this case is unnecessary. The evidence clearly establishes commission by accused of the alleged offenses. The unimpeached testimony of Mrs. Romanes and her pitiful physical condition after accused concluded his attacks conclusively demonstrates that she did not consent to his vicious, perverted assaults, but that he accomplished his fearful designs only after subjecting her to a terrible beating and after threatening her very life. The essential elements of rape were established by proof of accused's introduction of his organ into the private parts of Mrs. Romanes without her consent. The acts of sodomy were established by the proof of accused's sexual connection with her mouth and rectum. Sodomy consists of sexual connection, by rectum or mouth, by a man with a human being or brute animal (MCM, 1928, par. 149k).

There is no evidence of insanity on the part of accused. Indeed, his sanity was established by competent, unrefuted medical testimony. The evidence fully sustains all findings of guilty.

7. Accused is 29 years of age. He enlisted in the military service on 13 October 1939 for three years and has served continuously since then. While serving overseas with the VIII Bomber Command, he was tried by general court-martial on 29 July 1943 and was convicted of assault with intent to commit rape and was sentenced to dishonorable discharge, total forfeitures and confinement for five years. On 16 June 1944, the unexecuted portion of the sentence was suspended and the accused returned to duty.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial

rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of a violation of the 92d Article of War for the offense of rape. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement under Section 22-2801, District of Columbia Code.

Thomas M. Foley, Judge Advocate

William H. Hamblrill, Judge Advocate

Robert C. Trueblood, Judge Advocate

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

SPJGV
CM 279316

UNITED STATES	)	NEW ORLEANS PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at Camp Plauche, New Orleans, Louisiana, 4 and 12 April 1945. Dismissal.
First Lieutenant CHARLES M. HALL (0-1947250), Transportation Corps.	)	

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates

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

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

Charge: Violation of the 61st Article of War.

Specification: In that First Lieutenant Charles M. Hall, Company D, Third Battalion, First Regiment, Army Service Forces Training Center, Camp Plauche, Louisiana, did without proper leave, absent himself from his organization at Camp Plauche, Louisiana from about 8 March 1945 to about 16 March 1945.

Additional Charge I: Violation of the 61st Article of War.

Specification: In that First Lieutenant Charles M. Hall, Company D, Third Battalion, First Regiment, Army Service Forces Training Center, Camp Plauche, New Orleans, Louisiana, did without proper leave, absent himself from his organization and station at Camp Plauche, New Orleans, Louisiana, from about 26 March 1945, to about 29 March 1945.

Additional Charge II: Violation of the 69th Article of War.

Specification: In that First Lieutenant Charles M. Hall, Company D, Third Battalion, First Regiment, Army Service Forces Training Center, Camp Plauche, New Orleans, Louisiana, having been duly placed in arrest at Camp Plauche, New Orleans, Louisiana, on or about 17 March 1945, did, at Camp Plauche, New Orleans, Louisiana, on or about 26 March 1945, break his said arrest before he was set at liberty by proper authority.

He pleaded guilty to, and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. Evidence.

On 7 March 1945 the accused, Lieutenant C. M. Hall, on duty at Camp Plauche, Louisiana, left camp with permission of his Commanding Officer (R. 15, Pros. Exh. 2). He was due back for reveille on March 8, 1945 (Pros. Exh. 2). Lieutenant Hall went to town (New Orleans, Louisiana) and did not return to camp until March 16, 1945 (seven days). When he returned, he surrendered to the Company Duty Officer (R. 15-16). An extract copy of the Morning Report was offered in evidence (Pros. Exh. 1) which shows the accused absent without leave for that period. Upon accused's return he was taken to the Provost Marshal, Major F. H. Claridge, who, on 17 March 1945 placed him in arrest in quarters (R. 6-9), specifically designating the particular barracks, with the right to go to the Mess Hall and return. For any other deviation, the accused needed to get permission (R. 6). On March 25 Lieutenant Hall informed Lieutenant Hazelhurst, who served a copy of the charges on the accused, that he was getting tired of sitting in his little room (R. 12). He was informed by Lieutenant Hazelhurst that the latter saw no reason why he should not be tried that week.

On 26 March 1945 the accused broke his restriction and again went absent without leave. He left his barracks and Camp Plauche (Pros. Exh. 3) and remained away until March 29, 1945 when he returned voluntarily and was placed in confinement (R. 7, Pros. Exh. 3). During his absence the accused's quarters were checked repeatedly by Major Claridge (R. 6-7), First Lieutenant Gernsbacher (R. 19) and Lieutenant McCain, but the accused was never found in his quarters until March 29, 1945.

As part of the prosecution's case, there was offered in evidence (Pros. Exh. 2) a statement made by the accused, that when he went to town he "went on a binge." He started drinking and kept on drinking, and couldn't stop. He felt as if he suffered a nervous breakdown.

The accused did not take the stand, electing to remain silent; nor was there any evidence offered on his behalf (R. 22-23).

4. The accused pleaded guilty to all the Charges and Specifications. The Trial Judge Advocate nevertheless proceeded to prove both absences without leave as well as the breach of arrest. Extract copies of the Morning Report (Exs. 1 and 3) were introduced in evidence and made out a prima facie case as to the Charge and Additional Charges. In addition to this evidence, there was also the evidence of Major Claridge and others who couldn't find the accused in his barracks at a time when he should have been there, and to which he was restricted.

5. As to the breach of arrest (Additional Charge II) only one question presents itself, and that is the question of whether the arrest was proper. Major Claridge testified that he was the Director of Intelligence and Internal Security at Camp Plauche and that he personally placed the accused in arrest in quarters. It is this arrest that was alleged to have been breached. When asked on cross-examination (R. 7) where he obtained the authority, he stated that he first obtained the authority from Colonel Hoagland before placing the accused in arrest. When asked "who is Colonel Hoagland" the witness said that Colonel Hoagland was the Executive Officer, Camp Plauche.

The accused himself acknowledged, not only by his plea of guilty, but in his statement (Exh. 2) that he was placed in arrest. Although the burden is upon the prosecution of proving that an arrest is legal, there is a presumption that an arrest is legal, unless the contrary is proved (CM 199307). With such a presumption, plus the fact that the accused pleaded guilty, and also admitted in a statement (Exh. 2) that he was placed in arrest, the mere fact that Colonel Hoagland was described as "Executive Officer" does not overcome such presumption, in our opinion.

When Major Claridge was asked "who is Colonel Hoagland?" it is perfectly natural that he would give Colonel Hoagland's permanent assignment. This does not rule out the likelihood that Colonel Hoagland was Acting Commanding Officer of Camp Plauche for the time being, or that he had acted by the authority of the commanding officer of the camp in making the arrest. This would seem to follow from the fact that the Major did not place the accused under arrest, until he asked for the specific authority to do so. In any event the evidence presented is not inconsistent with the plea of guilty or with the presumption of a legal arrest to affect either.

6. War Department records show the accused is now 43 years of age. He enlisted in the Regular Army in February of 1923 and served until 1929. In 1930 he again enlisted and served a three year period. These nine years were served in the Hawaiian Department. He was inducted in November 1942 as an enlisted man. He was commissioned a second lieutenant in the Army of the United States on March 15, 1944, entering on active duty at once and promoted to first lieutenant on 15 September 1944. His character rating is excellent.

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 of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 61 or 69.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

SPJGV-CM 279316 1st Ind

Hq ASF, JAGO, Washington, 25, D.C. JUN 11 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 First Lieutenant Charles M. Hall (O-1947250), Transportation Corps.

2. This officer was found guilty by general court-martial of absenting himself without leave from his organization during two periods totalling 11 days, in violation of Article of War 61, and of breach of arrest in violation of Article of War 69. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence will be found in the foregoing 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, and to warrant confirmation of the sentence.

The accused pleaded guilty to all the Specifications and Charges. On 7 March 1945 he left Camp Plauche, Louisiana, with permission to be absent until reveille on the following morning. He did not return until 16 March. Then he was placed in arrest in quarters, with permission to go to and from the mess hall. On 26 March, accused violated the terms of his arrest and again absented himself without leave. He remained away until 29 March, on which day he returned voluntarily.

I recommend that the sentence 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

MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incls
1 Rec of trial
2 Form of Action

(Sentence confirmed. G.C.M.O. 236, 19June 1945).

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

SPJGN-CM 279336

UNITED STATES	)	FOURTH ARMY
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, 9-10 April 1945. Dismissal, total forfeitures and confinement for two (2) years.
First Lieutenant WILLIAM C. HUESTON, Jr. (0-333301), Infantry.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that First Lieutenant William C. Hueston Jr, 372d Infantry, did without proper leave absent himself from his organization and station at Fort Huachuca, Arizona from about 14 January 1945 to about 21 January 1945.

Specification 2: In that First Lieutenant William C. Hueston Jr, 372d Infantry, did without proper leave absent himself from his organization and station at Fort Huachuca, Arizona from about 28 January 1945 to about 3 February 1945.

ADDITIONAL CHARGE: Violation of the 96th Article of War. (Motion for finding of not guilty sustained, R. 40).

Specification 1: (Motion for finding of not guilty sustained, R. 39).

Specification 2: (Motion for finding of not guilty sustained, R. 39).

Specification 3: (Motion for finding of not guilty sustained, R. 39).

The accused pleaded not guilty to both Charges and the Specifications thereunder. He was found guilty of the Charge and its Specifications. A motion at the close of the evidence for the prosecution for findings of not guilty as to the Additional Charge and its Specifications was sustained by the court. After evidence of a previous conviction of absence without leave for six days was received, the accused 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 a period of two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that by orders dated 5 January 1945 the accused was relieved from temporary duty at The Infantry School, Fort Benning, Georgia, and instructed to proceed to Fort Huachuca, Arizona, and there rejoin his organization, the 372nd Infantry (R. 9; Pros. Ex. 1). On 10 January 1945, pursuant to the aforesaid orders, he departed the company to which he had been attached at Fort Benning (R. 9; Pros. Ex. 2). According to Captain John E. Westerfield, Executive Officer to the Director of Supply and Acting Transportation Officer at Fort Huachuca, the maximum travel time by rail from Fort Benning to Fort Huachuca was three days (R. 10-12).

The morning report of Company L, 372nd Infantry, shows that the accused was carried in an "AWOL" status from 14 January 1945 to 21 January 1945 and again from 28 January 1945 to 3 February 1945. He was carried as being on ordinary leave from 21 January 1945 to 28 January 1945 (R. 12, 13; Pros. Exs. 3, 4, 5).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to make a sworn statement. He testified that he was commissioned a Second Lieutenant in the Infantry on 30 August 1934 and was promoted to the rank of First Lieutenant on 19 October 1938. He applied for active duty in 1941 and each year thereafter but was rejected because of physical disabilities. However, on 29 June 1944, he was called to active duty and ordered to report to Fort Benning, Georgia (R. 42, 43). About 12 July 1944 he was assigned to the 372nd Infantry Regiment where he served as Executive Officer of "K" Company and also worked with "Major Sandridge". He requested a second tour of duty at the Infantry School and reported to Fort Benning on 5 September 1944

(R. 43, 44). His class was to finish its course on 15 January 1945 but by orders dated 5 January 1945 the accused was relieved from duty at Fort Benning and instructed to proceed to his organization at Fort Huachuca. He received these orders on 8 January 1945 and that day wired the Commanding Officer of the 372nd Infantry requesting twenty days leave to be spent in Washington. The accused was notified by telegram, received 9 January 1945, that seven days leave of absence, effective 21 January 1945, had been granted (R. 45, 46; Def. Ex. A). Between 9 January and 21 January he did not report to Fort Huachuca (R. 46). On 10 January 1945 the accused went to Washington although he was given no "delay en route to Washington" (R. 46). The telegram stated the effective date of leave as 21 January 1944 but he "thought" he was on leave between 14 January and 21 January (R. 47). Asked by a member of the court how he arrived at this conclusion, the accused answered, "In view of the fact that I had sent the telegram to Colonel Gourdin requesting twenty days in Washington, he wired this back and it will dovetail as to the exact twenty days" (R. 47). He further explained that it would hardly be logical to require him to travel from Fort Benning to Fort Huachuca and then return to Washington with only seven days leave which would not even provide sufficient traveling time (R. 47, 48). He did not communicate with his organization in an effort to clarify the matter and "had nothing official to go upon other than * * * the assumption that the time dovetailed". He knew that Regimental Special Orders must specify the number of days granted for a leave of absence (R. 48).

5. Specification 1 of the Charge alleges that the accused "did without proper leave absent himself from his organization and station at Fort Huachuca, Arizona from about 14 January 1945 to about 21 January 1945". Specification 2 alleges an additional period of unauthorized absence from 28 January 1945 to 3 February 1945. Both Specifications were laid under the 61st Article of War.

The evidence for the prosecution shows that accused was absent without leave as alleged. The accused in his testimony admitted his absence from military duty for the entire period from 10 January 1945 to 3 February 1945. In determining what portion of this absence was unauthorized he was apparently given credit for four days in which to travel from Fort Benning to Fort Huachuca. The initial unauthorized absence was therefore alleged as 14 January. Credit was also allowed from 21 January to 28 January for the seven days leave theretofore granted. The accused, according to his own testimony, understood the message which granted him seven days leave beginning 21 January. The fact that he fancied himself on leave on the tenuous theory that the termination of the leave as granted "dovetailed" with the period of leave requested and the fact that it seemed "logical" for him to be on leave obviously did not justify the absence for which no actual authority existed. Even if the request for twenty days leave had been granted the accused was still four days late in returning to military duty. The evidence is legally sufficient to sustain the findings of guilty.

6. The accused is about 32 years of age and is married. After completing high school he attended Howard University in Washington, D. C., for eight years. He received an A.B. degree in 1934 and an LL.B. degree in 1938. He was business manager of the Washington Eagle for several years and was employed by W.P.A., as Library Researcher, from July 1936 to December 1936. He entered upon the private practice of the law in December 1939. He received ROTC training at Howard University and was commissioned a Second Lieutenant of Infantry in the Army of the United States on 13 June 1935. He was promoted to the rank of First Lieutenant on 19 October 1938 and, because of a heart condition, was transferred to the Inactive Reserve on 23 December 1938. He was subsequently found physically qualified for active service and entered on active duty on 29 June 1944.

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 Article of War 61.

Abner E. Lipscomb, Judge Advocate.

Robert J. Clamor, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 279336 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War SEP 1 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 William C. Hueston, Jr. (O-333301), Infantry.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave for a period of 14 days from his organization and station, in violation of Article of War 61. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct, for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. 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 thereof.

The accused, while a member of the 372nd Infantry Regiment, stationed at Fort Huachuca, Arizona, went on temporary duty to the Infantry School, at Fort Benning, Georgia. It was expected that he would complete his training course at Fort Benning during the latter part of January 1945. He received orders, however, on 8 January 1945 which relieved him from duty at Fort Benning and instructed him to rejoin his regiment at Fort Huachuca. That same day he wired his regimental commanding officer requesting 20 days leave. Apparently upon the assumption that the accused was not to leave Fort Benning until about 21 January 1945, he was notified by his commanding officer at Fort Huachuca that seven days leave, effective 21 January 1945, had been granted. The accused made no effort to clarify the situation with his regimental commander or to have the time of his leave moved forward so as to immediately follow his departure from Fort Benning. On 10 January 1945 he went to Washington, D. C. and did not return to his organization at Fort Huachuca until 3 February 1945. When a determination was made as to what part of his absence was unauthorized, the accused was allowed credit for four days travel time from Fort Benning to Fort Huachuca and for the seven day period of leave theretofore granted.

The accused has one previous conviction for absence without leave which occurred at Fort Benning just a month prior to the absence of which he here stands convicted. Notwithstanding his educational

advantages, his professional background and his service since 1935 as a Reserve Officer, this accused does not appreciate the responsibilities incident to commissioned service and is not worthy to be retained as an officer in the Army of the United States. I recommend 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 letters from Honorable Homer E. Capehart, United States Senator, Mr. Anton Lloyd, Dr. William C. McNeill, Mr. James C. Arnold, Mr. William C. Hueston, Sr., recommending clemency in behalf of the accused, and to the remarks of Attorney Jesse O. Dedmon, Jr., appearing before the Board of Review as individual counsel for the accused.

5. While the review of this case was pending, special civilian counsel requested that the accused be given a retrial in order to determine his mental accountability for the offenses charged. In response to this request I recommended to the reviewing authority that the accused be given an examination by a board of medical officers in order to determine the accused's mental accountability. The report of the board shows that the accused is not only sane but that he is an individual of superior intelligence.

6. 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

7 Incls
Incl 1 - Record of trial
Incl 2 - Form of action
Incl 3 - Ltr. fr. Hon. Capehart
Incl 4 - Ltr. fr. Mr. Lloyd
Incl 5 - Ltr. fr. Dr. McNeill
Incl 6 - Ltr. fr. Mr. Arnold
Incl 7 - Ltr. fr. Mr. Hueston, Sr.

(Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 435, 21 Sept. 1945).

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

SPJGQ - CM 279345

UNITED STATES v. Second Lieutenant KENNETH M. JACOBSEN (0-1018104), Cavalry.	THE CAVALRY SCHOOL Trial by G.C.M., convened at Fort Riley, Kansas, 16 April 1945. Dismissal.

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Kenneth M. Jacobsen, Cavalry, attached unassigned Cavalry Replacement Pool, Cavalry Replacement Training Center, Fort Riley, Kansas, did, at Fort Riley, Kansas, on or about 28 March 1945, with intent to deceive Lieutenant Colonel Gus A. Schattenberg, Cavalry, his Commanding Officer, officially state to the said Lieutenant Colonel Gus A. Schattenberg, that he had been at the dental clinic and had had a tooth fixed, which statement was known by the said Second Lieutenant Kenneth M. Jacobsen, to be untrue.

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

3. The evidence for the prosecution shows that on 28 March 1945 the accused was a student in an officers' pack class under the command of Lieutenant Colonel Gus A. Schattenberg, at the Cavalry Replacement Training Center, Fort Riley, Kansas. It was reported to Lieutenant Colonel Schattenberg that the accused, without receiving official permission to be absent, failed to go on a ten mile foot march taken by

the pack class on the morning of 28 March. At about 12:30 p.m. on 28 March, the accused went to the quarters of Lieutenant Colonel Schattenberg to request permission to ride on the days when foot marches were scheduled. During their conversation Lieutenant Colonel Schattenberg asked accused "as to where he was that morning and why he did not make the foot march." Lieutenant Colonel Schattenberg testified that he "felt it was my right prerogative to know where Lieutenant Jacobsen had been that morning." Accused replied "that he had been to the Dental Clinic and had a tooth fixed." When requested to repeat the precise conversation which transpired, Lieutenant Colonel Schattenberg testified:

> "As best I remember, I asked Lieutenant Jacobsen, I said, 'Jake, why weren't you on the foot march this morning?' 'Well, sir, I went up to the Dental Clinic and had a tooth fixed.' 'Is that where you were?' 'Yes, sir. That is where I was.' He said, 'When I fell into rank, Lieutenant Coleman called to me and said, "Say, Jake, aren't you going to hold that appointment at the Dental Clinic this morning?"

Lieutenant Colonel Schattenberg testified further that it was not necessary for an officer in the pack course "to show a slip that he had a dental appointment to be excused from the class. If there was a case of a man having an appointment, he would go and take care of it" (R. 6-9).

Major Alfred G. Habenicht, Dental Corps, who was in charge of the Dental Clinic, and official custodian of the records kept there, testified that he did not recall seeing the accused during the morning of 28 March, and that according to the records of the clinic the accused had no appointment on that date and had no work performed. The records did show that at 3:45 p.m. accused came in and had an examination made, but did not have any work to be done. Any <u>work performed</u> at the clinic is reflected in the records (R. 9-10).

On 29 March the accused signed a written statement before the Staff Judge Advocate, who first informed accused that "he could remain silent and such silence would not be prejudicial to him, that any statement he made could be used against him and he did not have to answer any incriminating questions" (R. 11-12). In the statement, which was received in evidence without objection, the accused said that he had joined the formation for the march and had marched about half a block when he decided, after being reminded by an officer classmate, to go to see a dentist because of a receding of the gums from one of his teeth. He went to the Dental Clinic just before 9:00 a.m., and finding it "full" he went to get a cup of coffee. He then came back to the clinic, which was still crowded, and stayed about ten minutes. While there he asked "someone in a white frock" about his teeth and was told to come back for an appointment at some later time. He then got a horse and went for a ride with two other

officers. He came back around noon and found that the class had returned from the march. After "chow" he went to see Lieutenant Colonel Schattenberg and asked permission to ride instead of walk on hikes and "packing". When Lieutenant Colonel Schattenberg asked him why he did not go on the ten mile march, accused replied that he "had gone to the Dental Clinic to have a tooth fixed or that I had a tooth fixed, I don't recall which." When Lieutenant Colonel Schattenberg subsequently came to accused's barracks to see him, accused

> "then admitted to the colonel that I had lied to him, that I had not had a tooth fixed, but said that I had been at the Dental Clinic, which I had. When I told the colonel that I had had a tooth fixed, I intended to deceive the colonel as to the reason why I didn't go on the ten mile march. I had not in fact had a tooth fixed at the Dental Clinic. I did not want to go on the hike and I was looking for an excuse to avoid it and used the tooth proposition as the excuse, because marching on hard pavement hurts my feet.
>
> "I wish to further state that around 1630 I went to the Dental Clinic and had my teeth checked and the dentist said there was nothing wrong with them other than a recision of the gums and there was no cavity." (R. 12; Pros. Ex. 1).

4. After having his rights explained to him, accused elected to be sworn as a witness (R. 12-13). He testified that after marching about half a block with the pack class he decided to go to the Dental Clinic and have his teeth checked. He was liable to receive overseas orders at any time, and it was not necessary to show an appointment to be excused to go to the Dental Clinic. He had filled a dental appointment and had his teeth fixed a week before this occasion. He arrived at the clinic shortly before 9:00 a.m., and finding it crowded, he went to the main Post Exchange for a cup of coffee. He then returned to the clinic between 9:00 and 10:00 a.m. and asked a person "in a white robe whom I took to be a dentist * * * what could be wrong with my tooth because I just had them fixed a few days ago." Accused explained the trouble he had, and was advised "to change the direction of brushing my teeth and brush downwards instead of a circular manner." He was also advised to make an appointment or come back in the afternoon. He then left the clinic and went for a ride. Between 12:00 and 1:00 p.m. he went to Lieutenant Colonel Schattenberg's barracks to ask permission for himself and several other officers "to ride instead of pack when we went on marches." Lieutenant Colonel Schattenberg asked "where I had been that morning," and accused "told him I had been to the Dental Clinic and to the best of my knowledge, I don't know whether I said I had a tooth fixed or to have a tooth fixed and afterwards I had gone riding." He did not consider that Lieutenant Colonel Schattenberg was acting in an official capacity during the conversation, although he knew that he should give true answers to questions by his superior officers. By his extrajudicial admission that he

intended to deceive Lieutenant Colonel Schattenberg, he meant that he had intended to deceive as to the real reason he missed the march, which was that he went to the clinic during working hours to have his teeth taken care of because he did not like marches. When he received the advice as to how to take care of the particular tooth, he considered the tooth "had been taken care of." He might have told Lieutenant Colonel Schattenberg that he had a tooth fixed rather than a check-up, but "if he had asked me exactly what had been wrong, I believe I would have told him." Accused thought that his statements to Lieutenant Colonel Schattenberg concerning his visit to the clinic and his ride with two other officers constituted a complete explanation as to what he had done all morning. At approximately 4:00 p.m. he went to the Dental Clinic, and Captain Brown made a thorough check of his teeth. On this occasion he went to a girl at a desk and asked for an appointment. He did not go to the desk that morning because there was a line waiting to get to the desk, and he was told he would be there for another hour (R. 13-20).

For the defense, Captain Byron F. Brown, Dental Corps, testified that he examined accused at about 4:00 p.m. on 28 March at the Dental Clinic. Accused had received treatment during the previous week in the form of a large, deep-seated filling, and came in to see about this tooth, around which he had a receding of the gum. It was possible that the tooth was hurting him. It was quite common for officers to come into the clinic and speak to dental officers without a record being made of it. A change in the method of brushing was sometimes prescribed as treatment for a receding gum (R. 21-22).

By stipulation it was agreed that First Lieutenant Robert T. Guenther, if present, would testify that he saw accused at the Dental Clinic between 8:30 and 10:00 a.m. on either 28 or 29 March, on whichever of those days there was a demonstration of low flying planes in the vicinity of the Cavalry Replacement Training Center (R. 23; Def. Ex. 1).

Also by stipulation it was agreed that Captain Robert P. Boal, Operations Officer, Marshall Field, Fort Riley, Kansas, if present, would testify that on the morning and afternoon of 28 March, two missions of strafing and bombing exercises were flown near the Cavalry Replacement Training Center. No missions were flown on 29 March in that area by any other planes (R. 23; Def. Ex. 2).

Captain Paul R. Fennig testified that he had known the accused about eight months. Accused did a good job for the witness as train quartermaster and mess officer on a troop train on one occasion, and Captain Fennig had never "seen anything out of line" or heard any "ill report" as to the accused. In talking with other people the witness concluded that accused was apparently "well liked throughout the organization" (R. 22-23).

An unsworn statement made by accused, read in evidence by his counsel, shows that out of eight efficiency ratings received by accused as an officer, the first was "very satisfactory" and the other seven were "excellent." He had an average of 84% in the officers' pack course at Fort Riley, and was rated "excellent" on the 96th Armored Division maneuvers held in Arkansas in October and November 1944 (R. 23-24; Def. Ex. 3).

5. The testimony of accused's commanding officer shows that on 28 March 1945, when he inquired of accused as to why he did not go on a march held during the morning of the same day, the accused replied, as alleged in the Specification, that he had been to the dental clinic and had a tooth fixed. The accused, in his testimony and in his written statement which was introduced in evidence by the prosecution, was not positive whether he told his commanding officer that he went to the clinic and had a tooth fixed, or that he went to the clinic to have a tooth fixed.

The accused testified, and his statement shows, that he actually made two trips to the clinic on the morning of 28 March with the intention of having his teeth examined or checked. It was established that he did have a receding of the gums around a tooth which had been filled the previous week. According to accused's statement he asked "someone in a white frock" about his teeth and was told to come back at a later time. According to his testimony he talked with a person "he took to be a dentist" who advised him to change the direction of brushing his teeth. There is also evidence that a fellow officer saw accused in the Dental Clinic during the morning of 28 March, about the same approximate time that accused testified he was there. The only competent evidence refuting the fact of accused's presence at the clinic is the testimony of the officer in charge that the clinical records did not show his presence at the clinic, and that the witness did not recall seeing accused in the clinic, during the morning of 28 March. However, it was shown to be a common occurrence for officers to consult dentists informally at the clinic, without any record being made, and accused's testimony indicates a likelihood that no record of his morning visits normally would have been made because he did not register properly for an appointment.

The weight of the evidence shows that the accused actually did go to the clinic intending to have his tooth examined, or "to have a tooth fixed." If he had an examination of the tooth made, and obtained advice as to the care of it, as he testified, he actually "had a tooth fixed" within the construction of the term "fixed" as used in common parlance. Furthermore, as a practical matter, although going to the clinic to have a tooth fixed is not technically the same as going to the clinic and having a tooth fixed, the difference,

insofar as the falsity of a material part of accused's statement is involved, is relatively insignificant and inconsequential, and comes within the principle de minimis non curat lex. The testimony of accused's commanding officer indicates that in making his inquiry of accused, he was primarily interested in the whereabouts of accused during the march, rather than in the details of any treatment which accused might have received at the Dental Clinic. Although the accused admits he intended to deceive his commanding officer, it appears from both his statement and his testimony that he intended to make a true statement as to his activities during the march, and to deceive only as to his real reason for failing to go on the march, which was that marching hurt his feet and that he did not want to go on the march. But he was not on trial for that deception. Since the accused's statement, even if made in the exact language claimed by Lieutenant Colonel Schattenberg, correctly described accused's whereabouts and was inaccurate only with regard to the relatively insignificant detail of the nature of the dental service received, we are of the opinion that the findings of guilty of the Specification and the Charge cannot be sustained (See CM 247302, Compton, 30 BR 305, 311; MCM 1928, par. 149i).

6. War Department records show that the accused is 31 years of age, is married and has no children. A letter accompanying the record of trial indicates that he has a child. He is a high school graduate. He worked from 1937 to 1940 as a kitchen helper in a United States Marine Hospital. Afterwards he worked for more than a year as an assembly man and machine operator for an electrical manufacturing company, and for six months as a pipefitter and pipefitter's helper for the Army Transport Service. Accused served from 1930 to 1937 in the Washington National Guard, and from 1937 to 1940 in the California National Guard. From March 1941 to December 1942 he served in the California State Guard, and was called to active duty on 7 December 1941. He was commissioned a second lieutenant in the California State Guard on 22 August 1941, and received promotions to first lieutenant on 23 December 1941 and to captain on 1 October 1942. He resigned on 10 December 1942 and was inducted into the Army on 12 December 1942, where he served as an enlisted man until 21 August 1943, at which time he was commissioned a second lieutenant in the Army of the United States upon graduation from The Armored School at Fort Knox, Kentucky.

7. For the reasons stated, it is the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings or the sentence.

Fletcher R. Andrews, Judge Advocate

Herbert B. Frederick, Judge Advocate

_____, Judge Advocate

SPJGQ - CM 279345 1st Ind

30 MAY 1945

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

TO: Commanding General
The Cavalry School
Fort Riley, Kansas

1. In the case of Second Lieutenant Kenneth M. Jacobsen (0-1018104), Cavalry, I concur in the foregoing opinion of the Board of Review holding the record of trial legally insufficient to support the finding of guilty and the sentence, and for the reasons stated I recommend that the finding 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 orders in this case are forwarded to this office, together with the record of trial, they should be accompanied by the foregoing opinion and this indorsement. For convenience of reference please place the file number of the record in brackets at the end of the published orders, as follows:

(CM 279345).

Myron C. Cramer

1 Incl
Record of trial

MYRON C. CRAMER
Major General
The Judge Advocate General

MAY 31 1945 AM

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

11 MAY 1945

SPJGV-CM 279359

UNITED STATES v. First Lieutenant ROLAND E. BIGGERSTAFF (0-1581525), Quartermaster Corps.	)	SIXTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Sheridan, Illinois, 19 March 1945. Dismissal, total forfeitures and confinement for three (3) 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 94th Article of War.

Specification: In that First Lieutenant Ronald E. Biggerstaff, Quartermaster Corps, 1614th Service Command Unit, Camp Ellis, Illinois, did, at Camp Ellis, Illinois on or about 5 October 1944 knowingly and willfully misappropriate one Chevrolet automobile engine assembly, value about two hundred seventy dollars ($270.00), property of the United States furnished and intended for the military service thereof.

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

Specification: In that First Lieutenant Ronald E. Biggerstaff, Quartermaster Corps, 1614th Service Command Unit, Camp Ellis, Illinois, did, at Camp Ellis, Illinois on or about 5 October 1944 wrongfully, knowingly and unlawfully order and cause the following named enlisted men under his command, Master Sergeant Ralph H. Briggs, Sergeant Donald Castagnero, Sergeant Henry J. Wojoiechowski, and Technician Fourth Grade Burnett F. Lockhart to install one Chevrolet automobile engine assembly, property of the United States

furnished and intended for the military service thereof, in a privately owned automobile of Mrs. Mae Biggerstaff.

He pleaded not guilty to and was found guilty of all the Specifications and Charges. No evidence of previous convictions was offered. He was sentenced to dismissal, total forfeitures and confinement at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A synoptic statement of the evidence on behalf of the prosecution is as follows:

Accused was officer in charge of the Motor Mechanics and Motor Operations School at Camp Ellis, Illinois. On 11 October 1944, Mae Markham Biggerstaff, his wife, applied to the Secretary of State of Illinois for a Certificate of Title for a Chevrolet sedan, model 1940, engine number 2972376, acquired on 29 September 1944 (Pros. Ex. 3). Her state license number was Illinois 1069986.

About 21 January 1945 the number of the engine in such sedan, bearing 1944 Illinois license plates numbered 1069986 (R. 104), was checked by Major Benjamin F. Dies, Provost Marshal at Camp Ellis, in the presence of accused. The outside engine number appeared to be 2972376 (R. 102, 103). When the valve cover plate was removed, the secret engine number was found to be BA 598685 (R. 104). Major Dies then told accused that he had a communication from the service command concerning the presence of a Government engine in accused's car, and that on the day before he had checked an old engine in the rear of Building 1252, and that the two motor numbers therein did not coincide, one being AG 79693, while the secret number was 2972376. Accused stated that, if there was a Government motor in his car, he knew nothing about it. With Mrs. Biggerstaff's permission, the engine (Pros. Ex. 4) was removed from the car and was admitted in evidence (R. 124). The other motor (Pros. Ex. 5) was also admitted in evidence (R. 125).

George L. Michael, automotive adviser for the War Department, had gained experience in the detection for law enforcing agencies of changed automobile numbers, by participation in about 24 previous such cases. About 1 February 1945, at Major Dies' request, he examined the engine in a Chevrolet sedan, license No. 1069986 (R. 117, 118). At that time the figures of the visible number stamped on the motor were shallow. Such figures were not of the standard Chevrolet size (R. 118). The outside number was different from the secret number (R. 120). The original outside or visible number had been eradicated and a different number stamped on the motor. This witness had examined hundreds of Chevrolet engines (R. 119) and had invariably found that the secret and visible

numbers were identical.

Master Sergeant Ralph H. Briggs was the senior noncommissioned officer under accused's command, at the Motor Mechanics and the Motor Operation's School. About 1 October 1944, accused discussed (R. 88, 89) with him the exchange of a Ford for a Chevrolet. Briggs examined the Chevrolet, which needed repairs to the engine (R. 93). The trade was made, and about 1 October, accused began driving the Chevrolet (R. 89). Accused said to Briggs, "Maybe it would be possible to requisition a new engine." (R. 90).

About 2 October, accused told Castagnero, who was on duty at the school and whom accused had known since 1943 (R. 8, 9), that he wanted a requisition to be prepared for a Chevrolet engine to be installed in his sedan. Castagnero said that no passenger engines were available. A truck engine with a few changes will fit a passenger car (R. 44). Sergeant Castagnero made out a requisition (Pros. Ex. 1), entered his initials and signed accused's name thereon, and stamped it "Posted" (R.12, 15). Castagnero took the requisition to Warehouse 1 (R. 16), where it was checked by the automotive parts section and given a code number. "Stock No. 608847, Engine assembly" meant a Chevrolet engine, owned by the United States and intended for the military service (R. 52, 53). Part of the assembly was obtained in Warehouse 1 and the larger units were secured from Lloyd Sathoff (R. 16, 62, 83) in Warehouse 2 (R. 16, 56) with a buck slip (Pros. Ex. 2) issued by Private First Class Christine Roark (R. 55, 56) on the same day (R. 61). Sergeant Castagnero attached the buck slip to the retained copy of the requisition (R. 17, 58).

The engine was in a crate, marked "Engine Assembly intended for government use, United States property", or words to that effect (R. 21, 22). Sergeant Castagnero took it to the motor school maintenance shop and placed it in the stall next to the office in Building 1644 (R. 23). It was the only engine there. About 5 October, after the crate had been removed, it was taken by Sergeant Castagnero to Building 1949. There Sergeants Briggs, Lockhart and Wojoiechowski were waiting (R. 28). The four sergeants removed the old engine from accused's Chevrolet (R. 29-30, 74-75, 91, 92), and installed the new engine assembly. It took seven hours to do this work (R. 31, 92). The doors of the building were kept closed (R. 34, 75). Accused was in and out of the building two or three times while the substitution of engines was being made (R. 31-32, 74, 92-93). He did not say much, but from time to time asked "how things were going" (R. 32), and said he "wanted the car finished so that he could pick up his wife that afternoon" (R. 75), and that he "wanted them to hurry up with the job as he needed the automobile" (R. 92-93). When the change was completed, accused drove the car away. After that he drove it to work every day (R. 33-34).

Briggs (R. 91, 92) and Lockhart (R. 71, 72), both testified that orders were given to them by accused on 1 October to make the substitution of engines.

The old engine, which was removed from the Chevrolet sedan, was placed on an old wrecker, which was left in the rear of Building 452 (R. 94). It was on an old wrecker behind building 1252, when Major Dies saw it (R. 105).

According to Castagnero, he had previously requisitioned truck engines for passenger cars. He could not recall any previous specific transaction (R. 43). Lockhart had changed the engines in his own car at Camp Ellis (R. 82), and had done the same thing for another officer before accused took command at the Motor School (R. 86). He had seen truck motors in Government passenger cars at the camp (R. 83).

The court judicially noticed that the value of the engine assembly was shown as $270 in the Ordnance Master Parts Book, a War Department publication (R. 121).

4. Accused's defense was a general denial of guilt, supported by substantial evidence of his previous excellent reputation and of his excellent military record.

After due explanation (R. 144) of his rights in the premises, accused was sworn and testified that on 26 April 1943, he was placed in charge of the training team of the Motor Training Branch and on 15 June 1944 was assigned as officer in charge of the Motor Vehicle Operators and Mechanics School (R. 145), and was in command of from 16 to 30 men (R. 146). About 29 September 1944, he was asked to look over a Chevrolet car which Colonel Edgar considered buying, from Lieutenant Wescott (R. 148). With Sergeant Briggs he checked the car. There was a knock in the engine (R. 146). Accused regarded the car as worth the money, and expressed the opinion that his wife would trade her Ford for it, if the colonel preferred a Ford. Sergeant Briggs thought the Chevrolet was not mechanically defective and offered to buy it (R. 147). The trade was made about 7 October (R. 148). Accused was not certain, but he believed that on the morning of 5 October he was with a convoy. He did not drive an automobile to Building 1644 on 5 or 6 October (R. 149). In the usual course, requisitions were made out by Sergeant Castagnero, who was authorized to sign and did sign accused's name thereon as well as his own. Accused did not order Castagnero to requisition an engine for accused's car, and did not request him so to do (R. 150). He did not order Briggs, Castagnero, Lockhart and Wojoiechowski on 5 October 1944 to change an engine in a Chevrolet (R. 151). He was never in Building 1644 when the sergeants were changing engines. He had previously moved out of

such building, and his office in October was in Building 1647 (R. 152). He had seen a Chevrolet engine in a wrecker outside Building 1252, but did not know where it came from (R. 152). The only time that he ever looked at it, was when he accompanied Major Dies, at the time the numbers were checked. When his wife got the Chevrolet, he did not notice that this visible number on the motor had been changed, and had no knowledge of any tampering with the numbers (R. 153). Accused pointed out that if he had ordered the engines changed, he surely would not have left the old engine where Major Dies could find it, but that he would have disposed of it or at least had the numbers changed (R. 154).

On cross-examination, accused insisted that, regardless of the date 29 September 1944 on the bill of sale from Lieutenant Wescott, he continued to drive the Ford, and did not drive the Chevrolet until at least a week later, and that he was not using the Chevrolet prior to 5 October (R. 154). The three sergeants were mistaken in their testimony (R. 155). He never saw the four sergeants together in Building 1949, and never saw them working on a Chevrolet. After the Chevrolet was acquired, it was driven between 4000 and 5000 miles. About two weeks after acquiring it, the knock in the motor disappeared after he adjusted the carburetor (R. 158).

First Lieutenant Max E. Crandall was requested by Colonel Edgar late in September or early in October 1944 to inquire of accused whether he would exchange his Ford for a Chevrolet, in the event that Colonel Edgar bought the latter (R. 138). His recollection was that the transaction to exchange of the cars was closed on 29 September, but that accused did not get possession then, because Lieutenant Wescott wanted to drive it to Iowa City before making delivery (R. 139-140, 142), and accused wanted to drive the Ford to Galesburg on the week end following Lieutenant Wescott's return from Iowa City (R. 140, 142), although the witness was not certain about the dates.

Colonel Raymond H. Bishop, camp executive officer, had been Director of Training prior to November 1944 (R. 128-9), and accused had worked under his direct supervision for five months (R. 129, 130). Accused had done well in a difficult job. Witness rated the service of accused as "Excellent", during the period between 16 June and 19 October 1944 (Def. Ex. 1, R. 131). Colonel Bishop considered accused's performance of duty as only slightly below "Superior". Accused's bore an excellent reputation (R. 133).

Major Louis J. Krakoff had known accused since about 10 May 1943. About 10 December 1943, this witness had written a letter of commendation of accused's excellent service. In his opinion, accused's reputation was beyond reproach.

5. The offense charged against accused under Charge I was misappropriation of an automobile engine, the property of the United States and intended for the military service. That offense is denounced by the ninth paragraph of Article of War 94, which in pertinent part makes punishable anyone subject to military law:

> "Who * * * knowingly and willfully misappropriates *** any * * * property of the United States furnished or intended for the military service thereof * * *."

Article of War 94 in part substantially reenacts provisions of Article of War 60, Code of 1874. In discussing the last mentioned Article, Winthrop states:

> "The knowing and wilfull, (i.e. intentional) misappropriation of public property, specified in Paragraph 9, may be defined to be the assuming to one's self, or assigning to another, of the ownership of such property, where the same is not entrusted to the party in a fiduciary capacity and the act is therefore not an embezzlement. Thus the offense is committed where an officer appropriates materials known to belong to the United States, or the labor of government employees, in erecting a building or constructing a carriage. The appropriation, however, need not be for the party's own benefit, but may be resorted to for a friend or for the accommodation of a person interested with the officer in some business, etc."

The gist of the offense has been held to be the application of Government property to an unauthorized or wrongful purpose. In CM 243287, Poole, 27 BR 321 it was held that an accused might properly be found guilty of misappropriation of property, whether he was originally in lawful possession thereof, or obtained it by trespass. The Board of Review then said:

> "It is believed that Congress desired to provide less restricted offenses, along with larceny and embezzlement, to cover those cases where a person subject to military law makes wrongful and unauthorized use of Government property devoted to the military service, without regard to whether such person obtained control of the property rightfully or wrongfully" (Op. c.c. 325).

The earlier holdings of the Board of Review that an accused may not properly be convicted of misappropriation upon evidence which would be

sufficient to warrant finding him guilty of larceny or embezzlement have been overruled (CM 243287, Poole, 27 B.R.321, 325-326).

From these authorities, we conclude that it is immaterial whether accused could legally have been found guilty of larceny or embezzlement, or whether the ownership of the car, in which the engine was installed, was in accused or in his wife. If the engine in question was actually diverted through the machinations of the accused from the purpose for which it was intended, and placed in the possession of accused's wife, then in law accused was guilty of the misappropriation of the engine and subject to the penalties imposed by Article of War 94.

No one can reasonably doubt that a Government engine in fact was installed in Mrs. Biggerstaff's car. No attempt to deny that fact was made by accused. He did, however, most vigorously assert that the installation of the engine was made (1) without his knowledge, and (2) before his wife acquired possession of the Chevrolet.

There can be no question that the engine was drawn from the warehouse on 2 October 1944 (Pros. Ex. 2). It is equally certain that on 11 October 1944, accused's wife made application under oath to the Secretary of State of Illinois for transfer of her license to, and for a Certificate of Title to, the Chevrolet car, and in such application stated under oath that title thereto was acquired on 29 September 1944 (Pros. Ex. 3). Accused admitted, as he could not well avoid doing, that the deal to acquire the car was closed on 29 September. He claimed, however, that actual possession was not obtained until a later date, because Wescott wanted to drive to Iowa City the next week end, and accused's wife wanted to drive the Ford to Galesburg on the following week end. The first Sunday after 29 September 1944 was 1 October 1944, and if possession of the Chevrolet was acquired after the next subsequent week end, the earliest date upon which Mrs. Biggerstaff could have had delivery would have been Monday, 9 October 1944. If Mrs. Biggerstaff did not receive delivery of the Chevrolet until then, it would appear to be neither impossible nor improbable that the change of engines was effected prior to delivery of the car to her. However, the only corroboration of accused's testimony as to the alleged interval of about 10 days between the conveyance of title to and actual delivery of possession of the car is that furnished by the testimony of Lieutenant Crandall, but he admitted that he was uncertain about the dates (R.142). It seems strange that no effort was made by either the prosecution or defense to procure testimony or depositions on this important point from either Colonel Edgar or Lieutenant Wescott.

The fact, if it were a fact, that Wescott retained possession of the Chevrolet would not necessarily make impossible the truth of the

testimony of Briggs, Castagnero and Lockhart, since the truth of their testimony that accused directed that the new motor be drawn from the Ordnance warehouse, and that it be installed in the Chevrolet car, would not be affected by the possibility that the substitution of engines was actually made before and not after the time of actual change of possession of the Chevrolet. Title to the car was in Mae Biggerstaff after 29 September, and it would be an unlawful misappropriation of an engine belonging to the Government, for accused to produce and induce the installation thereof in her car, whether before or after the keys to the car were turned over to her and she actually began to drive it.

It was brought out at the trial by the questions of defense counsel that Government engines have been installed in other private cars at Camp Ellis. This may be so, but such fact if true neither justifies nor excuses the accused. The multiplication of offenses does not produce the right, and it can operate neither to transform crime into lawful conduct, nor to excuse the consequences of wrongdoing as to him who is caught while enjoying the fruits of crime.

If, as he testified, accused did not direct the substitution of the motors and knew nothing about it until Major Dies discovered the Government motor, with an altered visible number, in his wife's car, then of course he is not guilty of any offense, but to accept accused's testimony as true necessarily involves a determination that Castagnero, Briggs and Lockhart committed perjury. These three witnesses were not impeached. No motive on their part for bearing false witness against the accused is apparent. There is nothing in the record to suggest any such motive. Accused had a great personal interest in the outcome of the trial. The three sergeants had no such interest. So far as appears from the record, they were disinterested witnesses. The court saw and heard the witnesses, and could observe their appearance, manner, demeanor and conduct while under interrogation on the witness stand. It could judge of the candor, frankness and apparent truthfulness of the witnesses. We can do none of those things. For these reasons, the court was in a much better position than we are to judge of the credibility of the witnesses. The conclusions reached by the court are presumptively correct. We can find no substantial basis for disagreement with its conclusions. For us to do so on this record would be arbitrary. We conclude that the evidence proves beyond a reasonable doubt accused's guilt of Charge I and its Specification.

What has been said, in effect impels us to the same conclusion as to the findings of guilty of Charge II and its Specification. An

officer's commission authorizes him to give lawful orders to those of inferior rank under his command. When accused ordered the four sergeants to place a Government engine in a privately-owned automobile, his orders were unlawful. To give such orders was conduct to the prejudice of good order and military discipline, and constituted a military offense, similar to the specific examples given by Winthrop in his Military Law and Precedents, pp. 726-8. For example, it has been held to be such an offense to order guards to enforce prison discipline by beating prisoners, and to be such an offense even for an officer junior to the officer giving the unlawful order not to refuse to obey it (Dig. Op. JAG 1912-40, sec. 454 (10)).

6. Accused was 37 years of age on 12 March 1945. He was born in Belle Prairie, Illinois. He is a high school graduate, studied accounting in a business school, and was employed by a large public utility company first as a clerk and then as an accountant for 14 years. He was inducted into the Army on 26 February 1942. On 23 December 1942 he was appointed a second lieutenant, AUS, and assigned to the Quartermaster Corps, after successfully completing the course at the Quartermaster Officer Candidate School, Fort Francis E. Warren, Wyoming. His efficiency as an officer was rated by eight different superiors during the period of his commissioned service prior to 1 January 1945. His ratings have been: very satisfactory, covering periods totaling 5½ months, excellent covering periods totaling 12½ months, and superior covering one period of 1½ months. Before entering the military service, he was a member of the United States Naval Reserve from 18 March 1927 to 27 March 1931.

7. The court was legally constituted and had jurisdiction of the subject matter and of the person of the accused. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal, total forfeitures and confinement at hard labor for three years is authorized upon conviction of violations of the 94th and 96th Articles of War.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

SPJGV-CM 279359 1st Ind. JUN 11 1945

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

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 First Lieutenant Roland E. Biggerstaff (0-1581525), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of: (1) misappropriating one Chevrolet automobile engine assembly, value about $270, property of the United States furnished for the military service, and (2) of unlawfully ordering four enlisted men under his command to install such engine in a privately-owned automobile, belonging to Mrs. Mae Biggerstaff, his wife, 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 three 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. 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 thereof. I concur in that opinion.

Accused was in charge of the Motor Mechanics and Motor Operators School at Camp Ellis, Illinois. Three enlisted men who served under accused's command at that school testified that pursuant to orders given by accused, on 2 October 1944, they installed a new Chevrolet automobile engine in an automobile, which belonged to accused's wife. The engine belonged to the United States, and was furnished for the military service. It was drawn from the Ordnance warehouse upon a requisition, to which accused's name was signed by one of these three enlisted men. In January 1945, when an investigation was made, the engine was removed from the car by the investigating officer. It was then found that the visible engine number had been crudely altered to correspond with that of the engine which was previously in Mrs. Biggerstaff's car. The secret number had not been changed, and was that of the engine which was issued on the requisition. Accused testified that he did not know anything about the change of engines in the car, and denied that he had directed the enlisted men to remove the old engine and to substitute the engine owned by the Government. He testified that, although his wife acquired title to the car from another officer at the same station on

29 September 1944, it was not delivered into her possession until 10 days later. The unimpeached and positive testimony of the three soldiers that accused ordered them to install the motor is regarded as sufficient to outweigh the explanation made by accused, and to prove accused's guilt beyond a reasonable doubt.

I recommend that the sentence be confirmed but that the forfeitures be remitted, that the sentence as thus modified be ordered executed, and that the United States Disciplinary Barracks at Fort Leavenworth, Kansas, be designated as the place of confinement.

4. Consideration has been given to a letter from the Honorable Scott W. Lucas, transmitting a letter from Honorable W. S. Jewell, County Judge of Fulton County, Illinois, recommending clemency in behalf of the accused; also to a letter from the accused dated 11 May 1945 requesting clemency.

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 Action
3 Ltr of May 2/45 fr Sen Lucas
4 Ltr fr accused dated 11 May/45

(Sentence confirmed but forfeitures remitted. G.C.M. O. 232, 19 June 1945)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGH-CM 279360

9 MAY 1945

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at Fairmont Army Air Field, Geneva, Nebraska, 2 April 1945. Dismissal.
Second Lieutenant HARRY B. JACOBSON (0-2048347), Medical Administrative Corps.	

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

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

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

CHARGE I: Violation of the 61st Article of War

Specification: In that Second Lieutenant Harry B. Jacobson, MAC, 241st Army Air Forces Base Unit, Squadron M, did, without proper leave, absent himself from his station at Fairmont Army Air Field, Geneva, Nebraska, from about 3 February 1945 to about 5 March 1945.

CHARGE II: Violation of the 96th Article of War

Specification 1: In that Second Lieutenant Harry B. Jacobson, * * *, did, at Omaha, Nebraska, on or about 18 January 1945, with intent to deceive, wrongfully and unlawfully make and utter to Hill Hotel, Omaha, Nebraska, a certain check in words and figures as follows, to wit:

Rapid City, S. Dak., Jan 18, 1945 No.___

Main Office
FIRST NATIONAL BANK OF THE BLACK HILLS

Pay To The
Order Of Hill Hotel Co. $15.00

Fifteen and ----------No/DOLLARS
/00

/s/ Lt. H. B. Jacobson
0-2048347

Indorsed on back: Hill Hotel Company

and by means thereof, did fraudulently obtain from said Hill Hotel, Omaha, Nebraska, $15.00, lawful money of the United States, he, the said Second Lieutenant Harry B. Jacobson, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of the Black Hills, Rapid City, South Dakota for the payment of said check.

Specification 2: Same allegations as Specification 1 except check uttered on or about 19 January 1945.

Specification 3: Same allegations as Specification 1 except check drawn on First National Bank, Denver, Colorado, and uttered on or about 5 February 1945, to Hotel Fontenelle, in the amount of $25.

Specification 4: Same allegations as Specification 1 except check drawn on The Rapid City National Bank, Rapid City, South Dakota, and uttered on or about 14 September 1944, to B. L. Harris, in the amount of $10.

Specification 5: Same allegations as Specification 1 except check uttered on or about 14 November 1944, to Art Koch.

Accused pleaded guilty to Charge I and its Specification, not guilty to Charge II and its Specifications and was found guilty of all Charges and Specifications. Evidence of a previous conviction for one day's absence without leave was introduced. He was sentenced to dismissal, total forfeitures and confinement for three years. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced the following evidence to prove commission of the following offenses.

a. Charge I and its Specification:

The accused absented himself without leave from his station at Fairmont Army Air Field, Geneva, Nebraska, on 3 February 1945, and remained absent until 5 March 1945, when he surrendered to military control at Kansas City, Missouri (R. 8; Pros. Exs. 1, 2).

b. Charge II, Specifications 1 to 5, inclusive:

By depositions and by other relevant documentary evidence all properly admitted at the trial, it was established that accused uttered the following described five checks signed with his name as maker for which he received the consideration shown below, viz (R. 8; Pros. Exs. 3, 5, 7, 9, 11):

Spec. of Charge	Date Check Issued	Amount	Payee	Consideration For Check	Drawee Bank
1	18 Jan 45	$15	Hill Hotel Corp	Cash	First Natl Bank of the Black Hills
2	19 Jan 45	$15	" "	"	" " " "
3	5 Feb 45	$25	Hotel Fontenelle	Hotel bill & cash	First Natl Bank, Denver, Colo.
4	14 Sep 44	$10	B L Harris	Cash	Rapid City Natl Bank
5	14 Nov 44	$15	Art Koch	Cash	First Natl Bank of the Black Hills

After passing through customary banking channels all of these checks were returned unpaid to the respective payees thereof. Payment had been refused by each of the drawee banks because accused had no account therein. None of these checks have been redeemed by the accused (R. 8; Pros. Exs. 3-9 inclusive).

After being warned of his rights by the investigating officer appointed to examine into these Charges and Specifications, accused voluntarily stated to him that on or about 18 January 1945 he visited Omaha, Nebraska, became intoxicated and "must have given" the Hill Hotel two checks for $15 (Chg. II, Specs. 1, 2) inasmuch as he recognized the handwriting and signatures thereon as his own but he had no recollection of so doing because of his intoxicated condition. Similarly he recognized his penmanship on the check for $25 given to the Hotel Fontenelle (Chg. II, Spec. 3) but because he was intoxicated at the time he had no recollection of having uttered it. He admitted that at no time during the period from

14 September 1944 to 5 March 1945 did he have an account or any bank credit with any of the three banks on which the above-mentioned five checks were drawn. He further stated that he visited the city of Omaha on 2 February 1945, became intoxicated and so remained for several days and then, recovering from the effects of his insobriety, he realized he was absent without leave. Thereafter he resumed his drinking, wandered to the cities of Des Moines, Iowa, Chicago, Illinois, and to Kansas City, Missouri, where he sobered up and surrendered himself to military authorities (R. 8; Pros. Ex. 10).

4. For the defense Major Guy M. Walters, Medical Corps, testified that he examined accused for a period of two or three days during the first part of March 1945 and found him to be a chronic alcoholic, i.e. a periodic drinker who drinks continuously for a period of days or even weeks (R. 9). On cross-examination he testified that it was possible for a person to do certain things while under the influence of liquor and know what he is doing at the time but thereafter indulge excessively in alcoholic liquor and have no recollection of his previous conduct (R. 10).

After accused had been advised of his rights he elected to make an unsworn statement through counsel. Defense counsel stated that an ever increasing overindulgence in alcoholic liquor was the basic cause of accused's difficulties and when intoxicated he failed to realize what he was doing. Accused did have a general, hazy recollection of writing some checks but he did not remember how many or under what circumstances. He is married and has two children. Because of his present difficulty his allotment of pay has been discontinued and, although he has received a small amount of pay, it has been insufficient both to care for the needs of his family and to permit him to redeem these worthless checks.

5. The evidence of the prosecution fully establishes the alleged absence without leave and also that accused fraudulently made and uttered the five checks inasmuch as he did not then or thereafter have an account in any of the banks on which these checks were drawn. In his statement to the investigating officer and in his unsworn statement given at the trial he did not deny commission of any of the acts alleged but, indeed, admitted most all of them and sought only to excuse his conduct on the grounds of intoxication. Drunkenness is no excuse for a crime and is only a defense when it is so gross as to affect mental capacity to entertain the requisite intent to commit the act charged (MCM, 1928, par. 126b). However, it is apparent from accused's own testimony that his intoxication was not such that he was utterly oblivious of his acts at the time they were committed. Furthermore, the neat, legible penmanship on his checks is not what would be expected of one insensibly drunk. It has not been established by this record that accused was so intoxicated that he was unable to intend to write and utter the five worthless checks at the time

he did so. As for his absence without leave, specific intent is no element of the offense and proof of the act alone is sufficient to establish guilt (MCM, 1928, par. 126a). Accordingly, voluntary drunkenness would constitute no defense to this charge. The evidence sustains all findings of guilty.

6. Accused is 26 years of age, married and has two children. War Department records reveal that during the year 1939 he owned and operated a cleaning and pressing establishment and also was employed as sales manager of a new and used automobile agency. Thereafter he attended the University of Kansas City for two and a half years after which, apparently, he was employed for about six months as a guard at a powder plant. On 4 February 1943, he was inducted into the military service. After successfully completing the course at Medical Administrative Corps Officer Candidate School, Camp Barkeley, Texas, he was commissioned a second lieutenant on 15 September 1943. On 12 May 1944 he was found guilty by general court-martial of absenting himself without leave from 4 to 5 April 1944, and was sentenced to forfeitures of $100 per month for three months and to be reprimanded which sentence was approved and ordered executed by the reviewing authority.

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, 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 or of Article of War 96.

Thomas N. Taffy, Judge Advocate

William H. Gaubrell, Judge Advocate

Robert E. Trueblood, Judge Advocate

SPJGH-CM 279360 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 14 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 Second Lieutenant Harry B. Jacobson (0-2048347), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself from his station for thirty (30) days, in violation of Article of War 61 (Chg. I, Spec), and of fraudulently making and uttering five (5) worthless checks on which he obtained a total of $80, in violation of Article of War 96 (Chg. II, Specs. 1-5, incl.). He pleaded guilty to Charge I and its Specification. He was sentenced to dismissal, total forfeitures and confinement for three (3) years. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. 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. Accused absented himself without leave from his station at Fairmont Army Air Field, Geneva, Nebraska, from 3 February 1945 to 5 March 1945. He fraudulently made and uttered five worthless checks on 14 September 1944, 14 November 1944, 18 January 1945, 19 January 1945 and 5 February 1945, respectively, on which he obtained a total of $80, without having accounts or bank credits in any of the three banks on which these checks were drawn. The reviewing authority has advised this office that subsequent to the trial and while the record of trial was receiving statutory examination in this office, accused broke arrest and absented himself without leave for four days, having in his possession a pair of Government sun glasses which had previously been the subject of a report of survey.

I recommend that the sentence as approved by the reviewing authority, although inadequate, be confirmed and carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should such recommendation 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 reviewing authority confirmed. G.C.M.O. 270, 3 July 1945).

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

SPJGK - CM 279398

7 MAY 1945

UNITED STATES v. Private THOMAS C. RANDOLPH (36574716), 1455th Engineer Service Company, APO 100, c/o Postmaster, New York, New York.	NORTH ATLANTIC DIVISION AIR TRANSPORT COMMAND Trial by G.C.M., convened at APO 100, c/o Postmaster, New York, New York, 19-22 March 1945. Dishonorable discharge and confinement for life. Penitentiary.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Thomas C. Randolph, 1455th Engineer Service Company, did, at or near Praia, Terceira, Azores, on or about 13 February 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Madalena Goncalves Nunes.

He pleaded not guilty to and was found guilty of the Charge and the Specification. Evidence was introduced of a previous conviction by a summary court-martial of a violation of the 61st and the 96th Articles of War by being absent without leave for a period of 50 minutes and being disorderly in uniform in a public place, for which he was sentenced to be confined at hard labor for 14 days and to forfeit $20 of his pay. He was sentenced in the instant case to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution may be summarized as follows:

At the time of the commission of the alleged offense and at the time of the trial the accused was in the military service of the United States stationed near Praia, Azores (R. 12,148).

On 13 February 1945, at or about 1300 hours, accused and another soldier, Private Joseph F. Trendowicz, left their base and went to the nearby city of Praia, Azores (R. 8-9,13,16,19). They stopped at the tailor shop, and at several cafes where they dined and drank champagne. Accused was then "feeling pretty good" but "wasn't drunk" (R. 9,19). At about 1500 hours, on the way to the docks, they saw a little girl near the Cafe Rosa, and bought her some candy and cup cakes before proceeding on their way. This girl, identified as Maria Madalena Goncalves Nunes (hereinafter referred to as Maria), is 5-1/2 years of age, and on that day was wearing lipstick and rouge in celebration of Shrove Tuesday, known to the Portuguese as "dia da Entrudada" or "dia da carnaval" (R. 7,13,43,104-105, Ex. 2). About 1700 hours they were joined by two other soldiers, one of whom, named Private First Class Don F. Van Eeghen, went with accused to the Cafe Terezinha for some olives (R. 10,16). On the way, accused again saw Maria, and he took her with them to the cafe. There Van Eeghen changed some money while accused, who had placed Maria on a chair, fondled and caressed her, put his arms around her and kissed her (R. 16,21,24,26). Accused attempted to indicate to the waiter by gestures, and verbally requested permission to take the child to her home to sleep, but he could not be understood (R. 21-22). Van Eeghen left the cafe without accused, and shortly thereafter accused was seen leading Maria by the hand going in a southerly direction toward the beach of Praia. Maria was identified by six witnesses who knew her and saw her walking along with a soldier. None of the witnesses knew the accused and only one identified him as the soldier (R. 26-27, 28-39). The accused was wearing an overseas cap at the time (R. 38). They were last seen together (as it was getting dark) across from the theater on Rua Serpo Pinto, which overlooks the beach (R. 41). At about 2000 hours, Maria's father and brother, who had been searching for her since 1700 hours, found her at Poco Da Areia, an area close to the beach and near the vicinity of the theater where she was last seen with accused. She was covered with blood and crying, and did not recognize her father or brother. She asked them to take her to her parents' home, and as her father picked her up, blood from her vagina ran down her legs and dripped on his shoes. She had no panties on (R. 43-46). About the same time, accused was observed in the public square by a girl who was looking for Maria, and who had previously seen him leading the child by the hand. She noticed that he was hatless (R. 38-39). At approximately 2020, he entered the Cafe San Paolo, and ordered chicken and wine. The proprietor noticed that he wore no hat, and that the first thing he did on entering was to wash his hands. As accused waited for the chicken, he sat on a chair with his head in his hands, and his arm resting on an elbow. From time to time he brushed his trousers above his knees (R. 46-50). He was driven back to the field by "taxi" (a native horse-drawn wagon), arriving about 2100, and was still hatless (R. 49-51). Between 2100 and 2200 hours, he left his tent and went to the snack bar at "P&T", where he met some of the soldiers he had seen in town. He was wearing a garrison hat and his shoes were muddy (R. 58-59,68). To the four soldiers and within the hearing of an officer sitting at the same table he boasted that he had

intercourse with "a young girl in town tonight in Praia" and that he had "a difficult time due to the tightness of the young girl" (R. 55,57-58). He also stated that he did not take a prophylactic because "I didn't have to, this was something young and tight, in fact, it was so tight I had to use the oil from my pro kit" (R. 60); that he did not use a rubber contraceptive; that the act occurred "down on the beach in some caves" (R. 71); that he lost his overseas hat "in a cave down at the beach in Praia" (R. 61); and that it had cost him "nothing," and that he had left the girl "right there" (R. 64). Later, at his tent, he told his bunkmates that his "penis felt like it was on fire," that it "burned badly, was very raw," and on exhibition it appeared very red and "there was a little sand on it" (R. 61-62, 69,71). In describing his experience the accused told one of his tent mates that he "took off his pants and after he got through was looking for them and he found them by some caves" (R. 71).

A medical examination of the child Maria revealed that her sexual organs were swollen, that the hymen had been torn away from the walls to which it was attached, and that there was a tear of the organs two centimeters long and one centimeter deep, which showed the depth of the penetration, with dead male sperm therein. The medical examinations of the child and of the accused were made on 14 February 1945 by Medical Corps officers (R. 98). In the opinion of the examining doctor, a male penis had caused the injury from attempted intercourse, and that the force required to make this tear would cause abrasions to a penis similar to those found on accused's penis. Penetration had been effected to the extent of the tear (R. 98-99). These abrasions were ringlike or annular shaped, circling the entire head of the penis, which was bright red, and covered an area approximately two centimeters on one side and one and a half on the other (R. 96,98). The doctor stated that in his opinion the injury to the penis was recent and was caused by attempting to put it in a small opening, and being unable to do it completely. He was of opinion that the condition could not have resulted from normal sexual intercourse with a normal person (R. 96-97).

On 14 February 1945, the cave on the beach at Praia, near which accused and the child Maria were last seen together, was examined, and there were found therein a partly used tube containing white ointment from a prophylactic kit (R. 78, Ex. 3,4,5,13), a piece of sugar cane with spots thereon subsequently analyzed to be blood (R. 89,100,103), an overseas cap with serial number S-4644 (R. 18,Ex.18), and a child's pair of light blue panties (R. 86, Ex. 19). The panties were identified by Maria's mother as the ones she had put on Maria on the day of the offense, the only difference being that they were found torn at the bottom and sides (R. 104-105). The overseas cap belonged to a soldier in accused's outfit who had lost it at Christmas and who had departed for the United States on furlough on 6 January 1945 and had not returned to the base until 17 March 1945 (R. 90-93). An analysis, by the Benzidine test, of accused's clothing worn on the day of the offense revealed that spots on the tails of his shirt, cuff and sleeve of the left arm and right arm, on the fly of his drawers, and on the inside of his trousers, probably caused by blood. When the chemical

AUG 14 1945
BY ALBERT E. JOHNSON

was applied the spots turned blue indicating the presence of either blood or fresh vegatable or fruit juice. Both knees of the trousers were dirty and sandy and there was sand on his shoes (R. 79-85, 99-103, Exs. 6-17 incl.).

4. Accused, after being advised of his rights, elected to be sworn as a witness in his own behalf (R. 107-108). He testified that he had left the base with the soldier Trendowicz and arrived in Praia between 1230 and 1300 hours (R. 110). They went to the tailor shop and then to several cafes where they ate and drank wine (R. 108,110-116). About 1500 hours they saw a little girl in one of these cafes for whom they bought candy and cakes, and who remained behind when they left the cafe (R. 108-109,111). He could not "be sure" that the child Maria was the girl for whom he had purchased the candy, and at no time did he walk along the city streets leading a little girl by the hand (R. 132-133). He returned to the Royal Cafe between 1700 and 1730 where he met some of his friends, one of whom, Van Eeghan, went with him about 1745 hours to another restaurant for some olives and to change some money (R. 108,115-116). About 1800 he left Van Eeghan there and departed alone for the public square where he hired a taxi to drive him to the beach, after indicating to the driver that he wanted him to procure a prostitute for him (R. 108-109,117-119, 140). The taxi took him to the caves on the beach where he got out and waited near the fence while the driver went down to the caves and procured a prostitute for him (R. 108-109,118-119,124,136,141). They then drove to a nearby wine tavern where he had intercourse with the girl sometime after 1800 and the act lasted about twenty minutes (R.109,119,136, Ex. 22). During the act he felt his penis "burning," and he took a "pro" when he had finished. The girl did not bleed, and the girl was "tighter than most of the men are getting, tighter than what I have been getting," but he did not use any lubrication (R. 123). He was wearing an overseas cap when he drove out to the beach, but on his return to Praia about 2000 hours, his hat was missing and he could not remember where he had left it (R. 109,123-124,125,136). Exhibit 18 was not his hat, because his hat had no braid thereon (R.131). On his return to town he went to a cafe for chicken and took a taxi back to the field, arriving about 2100 hours (R. 125-126). He went to the snack bar at the Priorities & Traffic Building, but at no time mentioned to anyone that he had intercourse in a cave on the beach and lost his hat therein (R. 127,145). When he returned to his tent he did state to his bunkmates that he had intercourse on the beach and it "was a tight piece" (R. 127-128), but that he didn't exhibit his penis to show them the effect thereof (R. 128). The condition of his penis was caused by a rash for which he had been receiving medical treatment for over two (2) months (R. 137,153-154, Def. Ex. 1).

An adjournment for one day was granted upon request of defense counsel for the purpose of locating the taxi driver and prostitute who accused testified were with him between 1800 and 2000 hours (R. 136).

ALBERT W. JOHNSON
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When the court convened the following day, the defense produced for identification a taxi driver named Manuel da Terra, and a prostitute named Silvina de Jesus, whom accused positively identified as the persons who were with him (R. 137,138,142,148). A defense witness also identified the prostitute as the one with whom he and accused had relations on 9 February 1945, prior to the offense charged herein (R. 148-151).

5. In rebuttal, prosecution called as witnesses the "taxi" driver, Manuel da Terra, and the prostitute, Silvana de Jesus (R. 159,161). The "taxi" driver testified that on 13 February at about 1700 hours, he and several other drivers went to a nearby town to obtain some dancers for the festival; that he returned about 1900 hours at which time he stabled his horse and did not engage in any further business that night; that he was unable to identify accused, and at no time during the afternoon or evening of that day did he drive any soldier to the wine tavern shown in Exhibit 22. His testimony was corroborated by one of the drivers who had been with him (R. 161-162). The prostitute testified that on 13 February at 1400 she went to another town to see the festival dances, and returned to Praia at dusk; that she dressed and went to the theater which she left about midnight; that she did not know the accused and had not seen him at any time during the afternoon or evening of that day; that for a period of approximately eight days prior to 13 February she had no relations with any soldier, and even denied intercourse with accused on the 8th or 9th of February (R. 163-166). Prosecution also produced as a witness the owner of the wine tavern shown in Exhibit 22 (R. 166). He testified that he closed his tavern between 1800 and 1830 on 13 February and when he left the building he locked the doors and kept the key in his possession; that the doors were still locked on his arrival the following day; that he was unable to identify accused; and that at no time during the afternoon or evening of that day did any soldier and a woman enter his wine shop (R. 166-168).

6. The accused stands convicted of rape upon a 5-1/2 year old female child near an air base in the Azores. The commission of the act and the proof that the accused was the perpetrator rests entirely upon circumstantial evidence. Circumstantial evidence in order to convict must exclude all other rational hypotheses than that of guilt (CM 233766, 20 B.R. 121).

The evidence introduced by the prosecution clearly established beyond any reasonable doubt and to the exclusion of any other rational hypothesis that whatever injuries or abuses were suffered by the child in the instant case were inflicted or committed by the accused. Successive witnesses, who had no interest other than to speak the truth, positively identified the accused as the soldier who displayed extraordinary interest in the child when he first bought her cakes, when he later fondled her as she stood on a chair in a restaurant, and when he led her by the hand along the streets of Praia toward the caves on the beach about two hours before her father found her standing near that same place with blood streaming down

Classification cancelled
By ALBERT W. JOHNSON

her legs from her lacerated and torn vagina. The accused's subsequent boasting of his sexual activities in the presence of four or more other military personnel, the loss of his hat, the condition of his privates, and numerous other details, not only permit the fair inference that he inflicted the injury but also exclude any other reasonable conclusion. That the accused had sexual intercourse with the child may be and was legally and properly inferred from the nature of the injury as described by the medical officer, the presence of male sperm in the vagina of the child, the admission of the accused concerning his sexual activities at the time, and the condition of his privates shortly after the commission of the act. No other reasonable conclusion could be reached. It is unnecessary to review each and every circumstance shown by the prosecution's evidence. Suffice it to say that all of the circumstances formed a perfect mosaic of guilt on the part of the accused of enticing the child to the cave on the beach and there gratifying his lust by forcibly inserting his male sexual organ into her vagina. The condition of the child's vagina was mute but conclusive evidence of the force that he employed in effecting penetration.

The accused's explanation of his activities during the two hours in question was exploded as a completely false fabrication. Not only did the witnesses upon whom he based his alibi refute his story, but he was shown by numerous other witnesses to be unworthy of belief. Thus, he denied ever walking down the streets of Praia with the child. Six witnesses saw a soldier walking through the streets of Praia with the child whom they knew. One of them identified the accused. Circumstantial evidence also established the identity of the soldier as the accused. He denied that he made any remarks about having had sexual intercourse during his visit to "P&T". Four witnesses testified to the contrary. The soundness of the court's rejection of his protestations of innocence is fully supported by the evidence of record.

The remaining question for determination is whether the accused's acts as shown by the evidence constituted rape.

The Manual for Courts-Martial, paragraph 148b, provides:

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent.
>
> "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.
>
> "The offense may be committed on a female of any age.
>
> "Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent."

It is clear from the evidence that the female child was of such tender years that she was incapable of realizing the nature of the act and therefore incapable of giving consent.

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Date- AUG 14 1946
By GILBERT H. JOHNSON
arg.

Wharton's Criminal Law, Volume I, Section 702, provides:

"Acquiescence of an infant is not consent. The consent of a female of such tender years as to be unconscious of the nature of the act, or even her aiding the prisoner in the attempt, is no defense."

It was shown that the accused used sufficient force to cause a contact to be made between the genital organs of the accused and the child.

We, therefore, find the following elements of rape present: (1) unlawful carnal contact, (2) with a female, (3) by force, (4) without her consent. The only element unaccounted for is penetration. This was conclusively shown by the condition of the child's vagina. The presence of the sperm proved beyond reasonable doubt that the penetration was effected by the male organ.

The record of trial is, therefore, legally sufficient to support the findings of guilty.

7. War Department records show the accused to be 21 years of age. He completed 10 years of schooling. On 22 February 1943 he was inducted into the service at Detroit, Michigan. He testified that he is married.

8. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the finding and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 22, paragraph 2801, of the District of Columbia Code.

Amy E. Zon, Judge Advocate.

Earle Stephens, Judge Advocate.

Herman Meyer, Judge Advocate.

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

SPJGN-CM 279399

U N I T E D S T A T E S	)	45TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 45, 14 February 1945. To be shot to death with musketry.
Private ROBERT L. WILLIAMS (34162143), Company B, 180th 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 soldier named above and submits this, its opinion, to The Judge Advocate General.

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

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

Specification 1: In that Private Robert L. Williams, Company B, 180th Infantry, did, at or near Anzio, Italy, on or about 28 April, 1944, desert the service of the United States by absenting himself without proper leave from his company, with intent to avoid hazardous duty, to wit: return to the front lines for combat operations against elements of the German Armed forces, and did remain absent in desertion until he surrendered himself at or near Anzio, Italy, on or about 11 May, 1944.

Specification 2: In that Private Robert L. Williams, Company B, 180th Infantry, did, at or near Campo Leone Station, Italy, on or about 4 June, 1944, desert the service of the United States and did remain absent in desertion until he returned to military control at or near Naples, Italy, on or about 20 September, 1944.

Specification 3: In that Private Robert L. Williams, Company B, 180th Infantry, did, at Disciplinary Training Stockade,

PBS, at or near Naples, Italy, on or about 20 September 1944, desert the service of the United States and did remain absent in desertion until he returned to military control at or near Naples, Italy, on or about 22 October 1944.

Specification 4: In that Private Robert L. Williams, Company B, 180th Infantry, did, at or near Wimmenau, France, on or about 17 January 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat operations against elements of the German Armed Forces, and did remain absent in desertion until he returned to military control at or near Wimmenau, France, on or about 19 January 1945.

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

Specification: In that Private Robert L. Williams, Company B, 180th Infantry, having received a lawful command from Captain Howard M. Richie, Headquarters Company, 1st Battalion, 180th Infantry, his superior officer, to join his company and take up position against the enemy, did, at or near Wildenguth, France, on or about 17 January 1945, wilfully disobey the same.

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

Specification 1: In that Private Robert L. Williams, Company B, 180th Infantry, having been duly placed in confinement in the 45th Division Stockade, near Campo Leone, Italy, on or about 11 May 1944, did, at or near Campo Leone Station, Italy, on or about 4 June 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Private Robert L. Williams, Company B, 180th Infantry, having been duly placed in confinement in the Disciplinary Training Stockade, PBS, near Melito, Italy, on a date unknown, did, at the Disciplinary Training Stockade, PBS, near Melito, Italy, on or about 20 September 1944, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be shot to death with musketry. The findings and sentence were concurred in by all members of the court who were present at the time the vote was taken. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The Commanding General, European Theater of Operations,

confirmed the sentence and forwarded the record of trial to The Judge Advocate General under Article of War 50½, stating in his action as follows:

> "* * * 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 a finding of guilty of a violation of Article of War 64. 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."

3. Evidence for the prosecution: On the 27th day of April 1944 accused was present with his organization, Company B, 180th Infantry, then situated in the "rest area" of the Anzio Beachhead in Italy (R. 10-12). The position was apparently subject to air attack and in the distance the sound of artillery fire could be heard (R. 13). An announcement was made in the company on that date to the effect that all surplus equipment would be turned in and extra ammunition drawn (R. 12-13). The following morning, 28 April 1944, at 0645, accused was not present and was dropped "AWOL" on the morning report (R. 5, 12; Pros. Ex. A). The company moved up to the front lines that evening and into combat with the enemy. The company was still in action in the vicinity on 11 May 1944 when accused returned and surrendered to it (R. 13; Pros. Ex. A).

He was placed in confinement in the regimental stockade on 11 May 1944 (R. 14-15; Pros. Ex. A). Prisoners detained there were assigned to various jobs, "such as digging-in CPs", and about 4 June 1944 they were "detailed" to the Graves Registration Service for the purpose of cleaning up the battlefield around Campo Leone Station (R. 15-16). This was dangerous work and casualties had previously occurred because the area was heavily mined (R. 16, 18). A check of the prisoners on 4 June 1944 having disclosed the unauthorized absence of accused, he was dropped "AWOL" on the morning report of his organization (R. 16; Pros. Ex. A). The record does not disclose the time and manner of the termination of accused's absence without leave but it is shown that on 22 September 1944 he was again in confinement and that he then escaped from the Disciplinary Training Stockade, Peninsular Base Section, APO 782. He was reconfined at the same station on 22 October 1944 (R. 5-6; Pros. Ex. B).

About 16 January 1945 accused's organization was located in the Wildenguth sector in France (R. 21). It had been in the front lines but had been relieved and drawn back about a kilometer (R. 22). In this position it was under mortar and long range machine gun fire (R. 20). The sound of firing could be heard at the company kitchen, which was located just outside the town of Wimmenau approximately four kilometers further to the rear (R. 21-22). On the morning of 16 January accused

was brought to the regimental command post in Wimmenau by military police and was taken to his company kitchen where he was instructed to ready himself preparatory to rejoining his company near the front (R. 19, 21, 23-25). That evening, when a group left the kitchen area to join the company, accused could not be found (R. 19). He was dropped "AWOL" on the company morning report as of 1300 on 17 January 1945 and was absent until 19 January 1945 (R. 6; Pros. Ex. C).

Accused was taken to the battalion command post on 20 January 1945 and given a final opportunity to redeem himself. The sounds of mortar and small arms fire in the front lines, eight hundred yards away, could be heard at the command post, which was itself under .75 mm. cannon fire (R. 7). Captain Howard M. Ritchie, the battalion "S-1", ordered accused to go back to his unit, now in the front lines, and fight but accused asserted that he would not go because he had a leg injury and because the shells bothered him. When a group left for the front lines, accused did not accompany them (R. 6-8).

Accused was questioned by the investigating officer concerning the present charges and, after being warned of his rights under Article of War 24, made an oral statement. He asserted that he joined Company B, 180th Infantry, on the Anzio Beachhead and, although a rifleman, he had little duty. After nine days on the lines, the organization went to a rest area where he "took off". When he returned he was put in the regimental stockade and he again "walked off". He went to the vicinity of Naples but, lacking a pass, he was apprehended. After being confined in a stockade, he was placed in a work detail from which he also "walked off". He was arrested, returned to the 180th Infantry, and taken to his company kitchen. There being no guard over him, he "walked off" once more. He admitted that he had made no attempt to locate his organization while absent (R. 26-27).

4. No evidence was offered by the defense. Accused, cognizant of his rights, elected to remain silent (R. 27-28).

5a. Specification 1, Charge I, alleges desertion at Anzio, Italy, 28 April 1944, with intent to avoid hazardous duty, to wit, return to the front lines for combat operations, terminated by surrender at Anzio, 11 May 1944.

The evidence shows that on the day preceding accused's unauthorized absence his company was instructed to turn in all surplus equipment and draw extra ammunition. Accused was present with the company at the time and must have been aware of these orders. Inasmuch as the company was then temporarily in a rest area behind the front lines on the Anzio Beachhead the announcement could reasonably have meant nothing other than that the company was going into combat, and the organization actually did move to the front lines the same day the accused absented himself. These circumstances amply support the inference that his absence was with intent to shirk the hazardous duty of combat in the front lines.

b. Specification 1, Charge III, alleges that accused escaped confinement at Campo Leone, Italy, on 4 June 1944, and Specification 2, Charge I, alleges that at the same time and place he deserted the service and was returned to military control at Naples, Italy, 20 September 1944.

The evidence in support of the alleged escape shows that accused was a prisoner in the regimental stockade and was "detailed" to the Graves Registration Service for the purpose of helping clear nearby battlefields. When the prisoners engaged in this work were checked on 4 June 1944, it was discovered that accused was missing. The record does not disclose whether accused worked on the battlefield under guard or was merely pledged to return to the stockade. Although the evidence shows that accused was originally in the stockade and was in a confinement status, in view of the evidence that he was detailed to the Graves Registration Service and was sent outside the stockade to work there can be no presumption that this status continued. Some indication that he was not under physical restraint at the time is given by his organization morning report which lists him from confinement "to AWOL" rather than from confinement "to escape". It is, of course, well settled that to constitute the offense of escape from confinement the accused must have been under some physical restraint (MCM, 1928, par. 139; 1912-40 Dig. Ops. JAG 427 (6); CM 244521, Humphrey, 28 BR 337). For lack of any evidence showing such physical restraint Specification 1, Charge III, is not sustained.

The only proof of the termination of the absence without leave which commenced on 4 June 1944 is the morning report of the Disciplinary Training Stockade, Peninsular Base Section, APO 782, which reports that accused escaped from confinement there on 22 September 1944. There being no evidence of an earlier termination, it may legitimately be presumed that the status of absence without leave continued from 4 June to 22 September 1944. The absence without leave for over three and one-half months and the other circumstances warrant an inference of an intent to desert the military service.

c. Specification 2, Charge III, alleges that accused escaped confinement at the Disciplinary Training Stockade, Peninsular Base Section, 20 September 1944, and Specification 3, Charge I, alleges that at the same time and place accused deserted the service and was returned to military control at Naples on 22 October 1944.

The escape of accused and his return to military control as alleged are established by the morning report of the Disciplinary Training Stockade. The offenses were also admitted, in substance, by accused in his oral statement to the investigating officer. The duration of accused's unauthorized absence and the manner in which it was initiated justify an inference of his intent to remain away permanently.

d. Specification 4, Charge I, alleges that accused deserted the service at Wimmenau, France, 17 January 1945, with intent to avoid hazardous duty, to wit, combat operations and that he remained absent in desertion until his return to military control on 19 January 1945.

Following the return of accused to military control at Naples, he was brought under guard about 17 January 1945 to his organization now located near Wimmenau, France. The company had temporarily withdrawn about one kilometer back of the front lines. He was left at the company kitchen, which was situated a few kilometers further to the rear, for the purpose of preparing to join his company immediately. When a group left the kitchen a few hours later for the company area, he had disappeared and was not found for two days. This absence without leave was merely one of a series of unauthorized absences all of which indicated a determined and continued effort on the part of accused to escape duty as a soldier. The sector in which his company was then situated being in the active area of combat operations and under fire, service therein was manifestly hazardous. It is not open to serious question that his intent in absenting himself was to escape this hazardous duty.

e. The Specification, Charge II, alleges that at Wildenguth, France, 20 January 1945, accused willfully disobeyed the command of a superior officer to "join his company and take up position against the enemy", in violation of Article of War 64.

This offense occurred when a superior officer attempted to give accused an opportunity to make good after his repeated derelictions. Accused was ordered to join his company on the front lines but he refused to do so and cravenly insisted that he had a leg injury or for other reasons was unable to obey. A group of soldiers thereafter left the rear position, where the order was given, for the front but accused would not accompany them. The evidence accordingly shows a deliberate and considered refusal on accused's part to obey the legitimate and lawful order of a superior officer. This was a patent example of that intentional defiance of constituted authority contemplated by Article of War 64. His alleged excuses for his disobedience do not mitigate the deliberate character of his refusal to obey the order. The evidence clearly sustains the Specification.

6. As previously stated herein, the Commanding General, European Theater of Operations, confirmed the sentence but withheld execution and requested a determination whether he was authorized to order executed without commuting "the sentence based in part upon a finding of guilty of a violation of Article of War 64". The question is accordingly presented whether a commanding general of the Army in the field has the statutory power to confirm without commuting a death sentence based both upon a finding of guilty of the offense of desertion and upon a finding of guilty of the offense of willful disobedience.

The problem was considered by the Board of Review in the recent case of CM 274990, Baxley, in which the death sentence was predicated upon

findings of guilty of the offense of desertion and the offense of misbehavior before the enemy. After a comprehensive survey and discussion of the powers of confirmation of the commanding general of the Army in the field, the Board in that case said:

> "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 sentence 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."

The Commanding General, European Theater of Operations, does not, therefore, have the power to confirm without commuting the sentence in the instant case and the record of trial must be forwarded to the President.

7. The charge sheet shows that accused is 25 years of age and that he was inducted into the Army 18 October 1941.

8. The court was legally constituted. 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 all other findings of guilty and the sentence and to warrant confirmation of the sentence. The death penalty is authorized upon conviction of desertion in time of war, in violation of Article of War 58, or of willful disobedience in time of war, in violation of Article of War 64.

Abna E. Lifscomb, Judge Advocate.

Robert J. Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 279339 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Robert L. Williams (34162143), Company B, 180th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 1, Charge III, but legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence. 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 willful disobedience of the command of a superior officer, 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 failed to commute the sentence, the record of trial must be forwarded to the President for his action under Article of War 48.

After transmitting the record of trial to The Judge Advocate General, the Commanding General, European Theater of Operations, on 9 May 1945, recommended by radiogram that the sentence to death be commuted to life imprisonment. I recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years, that the sentence as thus modified be ordered executed, and that the Eastern Branch, United States Disciplinary Barracks, Green Haven, New York, be designated as the place of confinement.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Findings disapproved in part. Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for 20 years, on recommendation of The Judge Advocate General. GCMO 334, 20, July 1945)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General

SPJGK - CM 279403

15 MAY 1945

UNITED STATES	FORT LEWIS, WASHINGTON
v.	Trial by G.C.M., convened at Fort Lewis, Washington, 6 April 1945. Dismissal and total forfeitures.
First Lieutenant THOMAS E. KANEY (O-1102324), Corps of Engineers.	

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

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

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

CHARGE I: Violation of the 95th Article of War (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: In that 1st Lieutenant Thomas E. Kaney, Corps of Engineers, Headquarters, Basic Training Section, Army Service Forces Training Center, Fort Lewis, did, without proper leave, absent himself from his organization at Fort Lewis, Washington, from about 14 March to about 17 March 1945.

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

Specification: In that 1st Lieutenant Thomas E. Kaney, * * *, having received a lawful order from Lieutenant Colonel G. E. Maki, Coast Artillery, to report to Basic Training Section Headquarters upon completion of the said Lieutenant Kaney's business at Post Headquarters on the 14 March 1945, the said Lieutenant Colonel Maki being in the execution of his office, did, at Fort Lewis, Washington, on or about 14 March 1945, fail to obey the same.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and its Specification and of Specification 1 of Charge II, and guilty of Specification 2 of Charge II and of Charge II and of Charge III

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 and forwarded the record for action under Article of War 48.

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

At all times material to the issues involved, as well as at the time of trial, accused was in the military service, assigned to Headquarters, Basic Training Section, Army Service Forces Training Center, Fort Lewis, Washington. He wasassigned to this organization on 10 March 1945 by Special Orders which did not specify his primary duty (R. 12-13, Ex. 1). For some time prior to 10 March 1945 accused had been a member of and Executive Officer for Company "A" of the same Section and displayed considerable dissatisfaction when informed of his new assignment to Headquarters (R. 7-10). Between 2:00 and 3:00 p.m., on 14 March 1945, Lieutenant Colonel George E. Maki, Executive Officer, Basic Training Section, and the officer who caused the accused's transfer, conducted accused to Captain James W. McBee, Director of Supply, Basic Training Section, informed the latter that accused was to work under his (Captain McBee's) direction, and left accused with Captain McBee (R. 14). Within a few minutes, accused returned to Colonel Maki, requested and was granted permission to see Lieutenant Colonel Russell P. Tyler, Director of Personnel, Fort Lewis, Washington, for the purpose of endeavoring to arrange for reassignment to a different organization (R. 14). At the time of granting accused this permission, Colonel Maki gave him certain instructions or orders with reference to what he should do after consulting with Colonel Tyler in the event the latter did not grant his request for change of assignment. It was these orders and accused's alleged failure to obey them that gave rise to Charge III and its Specification. Questions presented by the record which are deemed to require discussion in connection with this Charge and Specification make it advisable to quote from the record the testimony of Colonel Maki and Captain McBee with regard to the orders given accused by Colonel Maki. Colonel Maki's testimony was as follows:

DIRECT EXAMINATION

"Q. Did you grant the accused permission at that time?

"A. I took Lieutenant Kaney back to Captain McBee and instructed Captain McBee that Lieutenant Kaney had permission to see Colonel Tyler at post headquarters on the matter of reassignment after which Lieutenant Kaney was to report to Captain McBee and was to report and work for Captain McBee thereafter if Colonel Tyler did not grant reassignment.

"Q. With respect to your directions to Lieutenant Kaney as to when he was to report back, will you state to the court as nearly as you can remember the exact words in which you gave those instructions?
"A. I told Lieutenant Kaney that he was to report - that he could report to Colonel Tyler and when he was through with Colonel Tyler he was to report back to basic training section to Captain McBee.

"Q. At approximately what time did you give this order?
"A. Around 1500 on 14th of March." (R. 14-15).

CROSS EXAMINATION

" Q. Colonel Maki, drawing your attention to the occasion upon which the accused asked your permission to call upon Colonel Tyler, could you - your answer to that was upon completion of his mission to Colonel Tyler he was to return, is that not so?
"A. That is right.

"Q. Now, was the purpose in telling him to return that you wanted him to immediately return or that in the nature of things if Colonel Tyler did not have a suitable position for him he was welcome back to this organization from whence he had come, is that not so?
"A. If Colonel Tyler had no reassignment for Lieutenant Kaney, Lieutenant Kaney was to report back as soon as he was able to the basic training section.

"Q. Well, by that you mean that he was to come right back to perform some job or, in other words, let me ask you this in this manner, supposing Lieutenant Kaney did not complete his mission at Colonel Tyler's office by, oh, 1700 or 1730, was he still expected to report back to the company orderly room or to Captain McBee?
"A. It all depends on what you call completing a mission.

"Q. Well, in other words, he had his conversation with Colonel Tyler and presumably it was unsuccessful as far as Lieutenant Kaney was concerned, was he - this order, was it to immediately report back or was it more or less in the nature of telling the Lieutenant here, you are still assigned here?
"A. It was an order to come back.

"Q. To directly return?
"A. That is correct.

"Q. Let me ask you further, if this conversation continued past the usual working hour, say 1750, 1730, was he expected to return no matter what the hour was?
"A. He was expected to return for duty at the job Captain McBee would assign him.

"Q. In other words, he was expected to return during the normal duty hours?
"A. That would be the presumption, yes." (R. 17-18)

REDIRECT EXAMINATION

"Q. If the accused had spent until seven or eight o'clock at night with Colonel Tyler then when was he to return back to basic training section headquarters to Captain McBee?
"A. When regular duty hours started the next morning.

* * *

"Q. Was your order stated so clearly that the accused knew that he was to report back directly?
"A. He was to report back as soon as he had seen Colonel Tyler on the 14th of March." (R. 18)

RECROSS EXAMINATION

"Q. Colonel, was he to report back for any particular duty or merely to the place which he is assigned?
"A. He was to report back to Captain McBee for duty.
"Q. For whatever Captain McBee may have desired?
"A. That is correct." (R. 18-19)

Captain McBee's testimony on this particular point was as follows:

DIRECT EXAMINATION

"Q. And did you at that time hear Colonel Maki give the accused an order?
"A. Yes, sir.

"Q. What was the order?
"A. Well, there were two of them. The first one, he was to work with me. The next one was that he was after seeing Colonel Tyler, he was to report back to me." (R. 20)

Accused went to see Colonel Tyler on 14 March 1945, was admitted to the latter's office about 3:10 p.m. and remained there until between 4:30 and 5:00 p.m. (R. 29). Asked for his best estimate of the time at which accused left his office, Colonel Tyler said, "I would say it was around five o'clock, 1700." The distance from Headquarters, Basic Training Section, to Colonel Tyler's office was not shown. Colonel Tyler did not state what disposition he made of accused's request for a change of assignment, or, for that matter, whether the matter was even discussed between him and accused.

Duty hours in the Basic Training Section were from 7:45 a.m. to

5:15 p.m., with an hour out for lunch (R. 13).

Accused did not report back to Captain McBee on 14 March 1945 after his interview with Colonel Tyler, nor did he report for duty to Captain McBee on either 15 or 16 March 1945 (R. 21). Captain McBee stated that he was away from his office during portions of the afternoon of 14 March 1945, and therefore he was not available part of the afternoon for the accused to report to him (R. 20). He "felt" that he was "back around headquarters around five" o'clock (R. 21), but it is possible that he was not there at that time (R. 23). Accused did not report to him personally during the rest of that day (R. 21), but he felt certain that he was "around there" sometime close to 5:00 p.m., as he would then have been preparing to quit work for the day (R. 20-21,23). He did not live on the post and usually departed from the field for home about 5:30 each afternoon. A Clerk who was on duty and present in Captain McBee's office on 14 March 1945 until 5:30 p.m. stated that accused had not reported at the office by that hour (R. 25). Sergeant Frank DiMaggio, who was on duty at Headquarters, Basic Training Section, from 5:00 p.m., 14 March 1945, to 7:00 a.m., 15 March 1945, as Charge of Quarters, stated not only that accused did not report to him but also that he did not see accused at Headquarters between those hours (R. 25-27). No officer came there looking for Captain McBee (R. 27-28).

Sergeant DiMaggio stated that the office of the Director of Supply was "right in the headquarters of basic training section." Asked if it was in the same room, he replied in the affirmative (R. 26). Colonel Maki described the physical set-up of the buildings and offices as follows:

> "Headquarters of the basic training section is set up in Building 3560. It is on 13th Avenue between Washington and Oregon. It has sub offices. The property office which is under the director of supply is directly across the road, directly across 13th Avenue from the basic training section headquarters. The warehouses of the basic training section are approximately two hundred yards from basic training section headquarters." (R. 15-16)

Asked if, in the event accused had been present for duty at Headquarters, Basic Training Section, accused would have been present in the office occupied by Colonel Maki himself, Colonel Maki answered, "Not necessarily." (R. 16)

About 9:00 a.m., on 17 March 1945, upon learning that accused was not present for duty, Colonel Maki went to accused's room in the Bachelor Officers Quarters and found accused in bed (R. 16-17).

Over defense counsel's objection a document purporting to be an extract copy of the Morning Report of Headquarters, Basic Training Section, for 17 March 1945 and for 3 April 1945 certified to as a true and complete

copy by a Chief Warrant Officer who described himself as the "official custodian of the morning reports" of that section was admitted in evidence. On 17 March 1945 it showed -

"Kaney Thomas E (CE) 01 102 324 1 Lt
(LS) dy to AWOL 0001 15 Mar 45
Kaney Thomas E (CE) 01 102 324 1 Lt
(LS) Fr AWOL to dy 0800 17 Mar 45"

and on 3 April 1945 it showed -

"CORRECTION 17 Mar 45
Kaney Thomas E (CE) 01 102 324 1 Lt
(LS) Dy to AWOL 0001 15 Mar 45
SHOULD BE
Kaney Thomas E (CE) 01 102 324 1 Lt
(LS) Dy to AWOL 1600 14 Mar 45"

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 remain silent in so far as the Charges and Specifications of which he was found guilty are concerned.

5. Charge II, Specification 2 (absence without leave). The court has found the accused guilty of absenting himself from his organization without proper leave from "about 14 March to about 17 March 1945." It was clearly established that on and for a few days before 14 March 1945 the accused was a member of Headquarters, Basic Training Section, Army Service Forces Training Center, at Fort Lewis, Washington. He displayed his displeasure upon being assigned to Headquarters of that Section and was desirous of procuring a reassignment to another organization. For that purpose he requested and was granted permission to confer with the Personnel Officer of the Post, but was instructed by his superior officer to return to his own organization and to continue on duty with that organization under the direction of its Supply Officer, Captain J. W. McBee, if he was unsuccessful in obtaining a reassignment. It does not appear in the record whether he ever asked the personnel officer for a reassignment during his interview. In any event no reassignment to any other organization is shown and on the date of trial accused was still a member of Headquarters, Basic Training Section. His place of duty was therefore at the office of the Supply Officer or at such place as the latter might designate. It was shown that he was required to report for duty at 7:45 a.m. Captain McBee testified that he failed to report or appear at any time during 15 and 16 March 1945. Colonel Maki found him in bed at 9 a.m. on the morning of 17 March 1945. It was therefore established without contradiction that accused was, as alleged in the specification, absent from his organization during that period of time.

The evidence was therefore clear and convincing that the accused is guilty of the Specification and the Charge. In view of the testimony of Captain McBee and Colonel Maki that the accused did not appear at Headquarters during the time specified the extract copy of the Morning Report had no probative value and therefore it is unnecessary to determine the question of whether it was legally admissible in evidence. An examination of the exhibit (Ex. 2) shows that the original entry was erroneous because the evidence showed, as set forth above, that the correct time of his absence should have been 7:45 a.m. of 15 March 1945. Recognizing the error an attempt to correct it was made on 3 April 1945 by an entry of that date purporting to show accused to have been absent as of 4 p.m. on 14 March 1945. This was also erroneous as it was shown by the evidence of record that at that time accused was in conference with Colonel Tyler with the permission of Colonel Maki. The extract copy fails to show who certified to the original entries. This case demonstrates the possible importance of including in the extract copy any signature or initials that appear on the original. Army Regulations require the morning report to be signed by the commanding officer of the reporting unit (AR 345-400). An accused is entitled to know the name of the person who certified to or signed the original report. By that knowledge it will more readily appear, if such is the case, that the proper officer signed the report and that he knew or should have known the facts reported in the report. In the instant case it is also noted that a chief warrant officer claims to be the official custodian of the report without designating his official capacity. This is an unusual circumstance. For the foregoing reasons in arriving at our decision to sustain the findings we did not give Exhibit 2 any weight as evidence. The finding of guilty should, however, be restricted to 15 March to 17 March 1945 and not "about 14 March 1945."

Charge III and its Specification (failure to obey an order).

The order or instruction given by Colonel Maki to the accused, for the failure to perform which he has been convicted, was not clearly stated by the officer who alleged he gave it. He first stated that accused was "to report to Captain McBee" after he (the accused) had discussed his reassignment with Colonel Tyler. He then qualified that and said accused "was to report and work for Captain McBee thereafter if Colonel Tyler did not grant reassignment." Later he stated, "he was to report back as soon as he had seen Colonel Tyler" and "he was to report back to Captain McBee for duty." Captain McBee stated that he heard the order given and it was that the accused was "to report back to me." It was shown that the interview between the accused and Colonel Tyler lasted until "about" 5 o'clock of 14 March 1945. Duty hours expired at 5:15 p.m. The distance from Colonel Tyler's office to that of Captain McBee was not shown. Under such circumstances it would be unreasonable and unjust to hold that the accused was required to report that afternoon to Captain McBee. The only fair and reasonable interpretation that could be placed on the order was that the accused was to report for duty to Captain McBee at his office at 7:45 on

the morning of 15 March 1945. This he failed to do and that failure was made the basis of Specification 2 of Charge II. The specification under discussion alleges that he failed to obey an order "to report to Basic Training Section Headquarters" on 14 March 1945 "upon completion of" the accused's "business at Post Headquarters on the 14 March 1945." As shown above, no such order was given to the accused. The failure to obey an order - verbal or otherwise - of a superior officer is a serious offense. In order to prove a failure to obey a verbal order it is incumbent upon the prosecution to prove the giving of a clear and understandable order - not one that is ambiguous or uncertain in its terms (CM 237556, 24 B.R. 59). In the instant case neither the time nor the place for reporting appears of record with sufficient clarity to sustain the court's finding. The finding is not in harmony with the reasonable interpretation of the order given. The witnesses stated that the order was that the accused was to report to Captain McBee. The specification alleges he was to report to Headquarters without specifying the person to whom he was to report. The witnesses were vague about the time. If accused's conference lasted during the remaining duty hours of the 14th he was to report the following morning. If he procured a reassignment he did not have to report. It follows that the record does not show beyond any reasonable doubt that the order given required him to report on the 14th nor required him to report to headquarters. For these reasons the finding of guilty should not be sustained.

6. War Department records show that the accused will be 26 years of age on 7 October 1945. He is a high school graduate. From 1 February 1936 to 10 January 1939 he was a student in Junior R.O.T.C. He enlisted in the Florida National Guard on 11 June 1940, served as an enlisted man in Field Artillery, reaching the grade of Instrument Sergeant, until 5 August 1942 when he was commissioned second lieutenant, AUS, Corps of Engineers. On 18 January 1943 he was promoted to first lieutenant. On 18 September 1944 the accused was transferred to the General Hospital at Fort Lewis, Washington, for observation, treatment and disposition. He was on temporary limited service when admitted to the hospital. On 15 November 1944 he was examined by a Disposition Board at the Fort Lewis General Hospital. The Board found that the accused had obtained the maximum benefit of hospital treatment; that he was temporarily physically incapacitated for general military service, but qualified for limited military service "of a non-strenuous nature in the United States Army."

7. 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. In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of Charge III and its

Specification, but is legally sufficient to support so much of the findings of guilty of Charge II and its Specification as finds him guilty of absenting himself from his organization without proper leave from 15 March to 17 March 1945, and is legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK - CM 279403 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 First Lieutenant Thomas E. Kaney (0-1102324), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from about 14 March to 17 March 1945 in violation of Article of War 61 (Charge II, Specification 2) and of failing to obey a lawful order of a superior officer in violation of Article of War 96 (Charge III). 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 attached 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 fingings of guilty of Charge III and its Specification (failure to obey a lawful order), but is legally sufficient to support so much of the findings of guilty of Charge II and its Specification (AWOL) as finds him guilty of absenting himself from his organization without proper leave from 15 March to 17 March 1945, and is legally sufficient to support the sentence and to warrant confirmation thereof.

The accused was the executive officer of a company of a Basic Training Section. He was relieved of this assignment and assigned to duty with the Supply Officer of the Section. He was displeased with this assignment and being unable to procure a different one he absented himself from his organization for two days. His commanding officer found accused in his own bed at 9 a.m. on the third day.

I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $50 pay per month for a period of three 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

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part. Sentence confirmed but commuted to a reprimand and forfeitures of $50. pay per month for three months. G.C.M.O. 300, 7 July 1945

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

SPJGN-CM 279454

UNITED STATES	)	SECOND AIR FORCE
	)	
v.	)	Trial by G.C.M., convened
	)	at Grand Island Army Air
First Lieutenant FRANK B.	)	Field, Grand Island, Nebraska,
LaPORTE, JR. (O-855182),	)	5 April 1945. Dismissal and
Air Corps.	)	total forfeitures.

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

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

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

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

Specification: In that First Lieutenant Frank B. LaPorte, Jr., 430th Bombardment Squadron, 502nd Bombardment Group, did, at Grand Island, Nebraska, on or about 3 March 1945, with intent to do her bodily harm, commit an assault upon Margaret L. Renno by wilfully and feloniously striking the said Margaret L. Renno on the face and body with his hand and foot.

CHARGE II: (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that First Lieutenant Frank B. LaPorte, Jr., ***, was, at Grand Island, Nebraska, on or about 3 March 1945, in a public place, to wit, the Yancey Hotel, drunk and disorderly while in uniform.

Specification 2: In that First Lieutenant Frank B. LaPorte, Jr., * * *, was, at Grand Island, Nebraska, on or about 24 December 1944, in a public place, to wit, Schuff's Cafeteria, drunk and disorderly while in uniform.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge II and the Specification thereunder but guilty of all other Charges and Specifications except Charge III for which the court substituted a finding of guilty of the 96th Article of War. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the findings of guilty of Specification 1, Charge III, as involved the finding of guilty of being disorderly while in uniform, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: Accused, a first lieutenant in the Air Corps, was stationed at the Grand Island Army Air Field, Grand Island, Nebraska (R. 6). On the night of 23 December 1944 he escorted Miss Elizabeth Organ to a dance at the Officers' Club. He had made Miss Organ's acquaintance on a bus earlier in the day and had invited her to the dance, but, after arriving at the club, he paid little attention to her (R. 9). Captain Charles M. Cary, an officer on the Field, danced several numbers with Miss Organ and she asked that he see her home (R. 6, 9). They left the Club around 2 a.m. and on the way to her residence stopped at Schuff's Cafe, an eating place in the Grand Island business section (R. 7).

While they were seated in a booth, accused entered. He was very drunk and very angry and shouted at Captain Cary in a loud voice, "My name is LaPorte and nobody fools with me. Nobody wolfes my date. Major Booth and Colonel Sanborn all know me and nobody fools with me when I am drinking. They all know me". Approaching Captain Cary, accused slapped him across the face with his open hand yelling, "My name is LaPorte; my name is LaPorte. I'll kill you, you son-of-a-bitch, I'll kill you" (R. 7-8, 13-14, 22). Captain Cary tried to pacify accused and momentarily held his arms, but, as soon as he was released, accused picked up a coffee cup and hurled it at Captain Cary. The cup broke against the wall. A group of youths stood behind accused "egging him on", and several other patrons of the cafe gathered around to enjoy the scene (R. 7-8, 13, 15). Accused again slapped Captain Cary but the latter did not retaliate (R. 8, 15). Several enlisted men in the cafe interceded at this point and one of them remarked to accused that he should show more respect for his uniform. In the meantime, Captain Cary having left the cafe, Miss Organ attempted to call a taxi but accused seized her wrist, pulled her into a booth, and engaged her in argument (R. 8, 14-15).

On the night of 3 March 1945 accused accompanied Margaret L. Renno to a dance at the Officers' Club (R. 28). Miss Renno was the daughter of an army captain and was employed by R. J. Guoynes, the manager of

a construction company (R. 33, 47; Pros. Ex. 1). During the evening she danced several times with First Lieutenant Warren W. Harris (R. 31, 42). According to Miss Renno's testimony, she had made previous arrangements to go to Mr. Guoynes' room in the Yancey Hotel to "sign some papers" but she did not leave the dance until midnight. Accompanied by accused, she went to the Yancey Hotel and was about to enter the elevator when he seized her arm and said they would not go up. Miss Renno further testified that she became frightened and ran to the stairs and up to the second floor. Accused followed closely behind, and, catching up with her, struck her on the face and mouth with his fist. She fell to the floor, and, when she refused to obey his order to get up, he kicked her in the hip (R. 27-28). His attack upon her loosened six teeth, cut and bloodied her mouth, and bruised her hip (R. 29, 34, 42). When he departed, she made her way up to the sixth floor where Mr. Guoynes' room was located. She was walking down the corridor crying when Lieutenant Harris, whose room was also on the sixth floor, heard her and took her into his room. After cleaning up there, she went home (R. 27-28, 41-43).

Shortly after his attack on Miss Renno accused met an acquaintance, Miss Katherine Quinn, and a Lieutenant Casey in the lobby of the hotel and unburdened himself of his troubles. He said that he had struck Miss Renno "until her earrings came off" because she was "no good" and deserved it. Miss Quinn stated that accused's appearance showed that he had been drinking and that he called Miss Renno "some pretty bad names" (R. 34-35). After leaving Miss Quinn, accused went to Mr. Guoynes' room and inquired for Miss Renno (Pros. Ex. 1).

4. Evidence for the defense: Accused, after explanation of his rights as a witness, elected to testify (R. 52). He stated that he was 27 years of age, married, and the father of an infant son. His wife was living in Wisconsin at the time of the trial. He had been in the army three and a half years, two and a half years of which were in a commissioned status (R. 52-53).

Concerning the events on the night of 23 December 1944 accused stated that his organization had a reserved table at the club and that he and Miss Organ sat there with some fellow officers. During the evening Miss Organ danced with Captain Cary and other officers as well as the accused. Accused and Miss Organ decided to leave the dance, and he went to the men's room. He stopped to talk to some other officers and when he returned Miss Organ was gone. Another officer informed accused that Captain Cary had taken Miss Organ home, adding that Captain Cary had represented that accused had "passed out" and was put to bed. Accused, who was angry, decided to go home and on the way went into a cafe where he found Captain Cary and Miss Organ. Miss Organ having signalled to him, he went over and said, "I think I'll take my girl home now". Captain Cary replied "you mean it was your date," and an argument ensued. Miss Organ's clothes were slightly disarranged, her hair was "messed up," and

a button was off her dress. When accused inquired what had happened, she said, "you know". Accused became very angry and told Captain Cary to get out. There was a further exchange of words. Accused's hand touched a sticky coffee cup and, "more or less to get rid of it" he threw it across the table but not at Captain Cary. When a little later Captain Cary returned to the table after leaving momentarily, accused gave him a push. Captain Cary went out again, and accused then took Miss Organ home (R. 53-54).

According to the stipulated testimony of Captain Samuel P. Hatcher, who sat at the same table at the dance with accused and Miss Organ, considerable "aside" conversation took place between Miss Organ, Captain Cary, and a lieutenant and his wife. Miss Organ asked Captain Hatcher if he thought accused was too drunk to take her home. Captain Hatcher received the impression that "they" were trying to induce Miss Organ to go home with Captain Cary (R. 47-48).

The testimony of Miss Organ, also given by stipulation, was that "several officers" who were acquainted with accused but whose names she did not remember, warned her against going home with accused because he was too intoxicated. She, therefore, allowed Captain Cary to escort her home. While seated in the cafe, accused came to their booth and commenced to quarrel with Captain Cary. Accused was angry, excited, and loud. She decided to find a taxi and go home by herself to avoid trouble. She turned her back on the quarrel and consequently did not see what happened. When she left, accused followed her, called a taxi, and took her home. "I have never seen him or talked to him since" (R. 47-49).

With reference to the happenings of 3 March 1945 accused testified that during the dance at the Officers' Club Miss Renno had danced several times with Lieutenant Harris and a "Lieutenant McMeans". Accused overheard her tell McMeans that she would go up to Lieutenant Harris' room as soon as she got rid of accused. Later she told accused she had to go up to Mr. Guoynes' room to sign some papers. Accused told her he was going to take her home but she insisted she had to see Mr. Guoynes. He followed her into the lobby of the Yancey Hotel and attempted to reason with her but, as she refused to listen, he walked away. However, after thinking about it and deciding that she might have told him the truth, he went on up to Mr. Guoynes' room but did not find her there (R. 56-57). When he came back downstairs, he met Miss Quinn and talked to her (R. 57). He denied that he was on the second floor of the Yancey Hotel, that he had struck Miss Renno, or that he told Miss Quinn that he had struck Miss Renno (R. 59, 60).

5a. Specification 2 of Charge III alleges that at Grand Island, Nebraska, on 24 December 1944, accused was drunk and disorderly in uniform in a public place, to wit, Schuff's Cafeteria.

Several witnesses testified that accused, who was in uniform, came into a crowded restaurant in Grand Island in a drunken condition and

attacked another officer. Accused in his testimony sought to condone his actions on the ground that the other officer attempted to "wolf" accused's "date". Passing over the unseemly character of such great solicitude on the part of a married officer for the favors of a young lady, it is obvious that even if accused's testimony were true it would not justify the violent display of temper which he exhibited. The evidence, however, fails to bear out accused's defense but, on the contrary, shows rather plainly that the young lady went home with the other officer because she did not wish to be seen with accused in his intoxicated condition. Accused's further testimony that the young lady had been manhandled by the other officer and signalled him to come to her aid is of the same cloth as his statement that he threw the coffee cup, not at Captain Cary, but merely from the table because it was sticky. There is an absence of any provocation for the assault on the other officer, who, it may be observed, handled the incident with remarkable restraint. The conduct of accused was wholly inexcusable. A clear violation of the 96th Article of War is proved.

5b. The Specification of Charge I alleges that accused, at Grand Island, Nebraska, on 3 March 1945, assaulted Margaret L. Renno with intent to do her bodily harm, by striking her in the face and body with his hand and foot. Specification 1 of Charge III, as amended by the action of the reviewing authority, alleges that at the same time and place accused was disorderly in uniform in a public place to wit, the Yancey Hotel. The former Specification was laid under the 93rd Article of War and the latter was found to be a violation of the 96th Article of War.

The evidence leaves no doubt that accused committed an assault on Miss Renno in a corridor of the Yancey Hotel in Grand Island. The dispute as to events preceding the assault is not particularly material. Whether, as Miss Renno testified, she was attempting to go to her employer's room to sign some papers, or whether, as accused testified, she was attempting to rid herself of him for the less innocent purpose of keeping a tryst with another officer in his room, there was in either event no justification for the beating administered. Accused blandly denied committing any assault, but Miss Renno's testimony, corroborated by Miss Quinn's account of accused's admissions immediately after the event, establishes the perjured nature of the denial. The brutal and vicious character of the attack is shown by the injuries which Miss Renno received. Six teeth were loosened, her face was cut, and her body was bruised when accused punched her about the head and kicked her in the body. The evidence clearly establishes an assault "aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed" and is consequently violative of Article of War 93 (M.C.M., 1928, par. 149n).

It is also beyond dispute that accused was guilty of disorderly conduct. He not only committed an aggravated assault upon a woman and left her wandering about the hotel in a dazed and battered condition, but

afterwards bragged about his outrageous behavior alleging that he had struck her until her earrings fell off. The locale of his actions, the Yancey Hotel, was a public place. The Board of Review in CM 213442, Due, 10 B.R. 271, said:

> "*** The hallway in which the disturbances occurred was open to and was used in common by guests of the hotel, their friends, and hotel employees, and must be deemed to have been a public place within the commonly accepted meaning of the term***".

Although there is no direct testimony that anyone witnessed the attack, the circumstances are most favorable to such inference and accused himself afterwards proceeded to publicize it. Disorderly conduct, in violation of Article of War 96, is proved.

6. The accused is about 27 years and 5 months old having been born 14 December 1917. He is a native of Riverdale, Maryland, and after being graduated from the Hyattsville High School, attended the University of Maryland for three years, majoring in Business Administration. He entered the military service 24 September 1941 and served as an enlisted man until 11 May 1942. He then commenced training as an aviation cadet and, upon its completion, was commissioned a second lieutenant in the Air Corps Reserve on 5 September 1942 and entered upon active duty on that date. On 16 August 1943 he was promoted to the temporary grade of first lieutenant in the Army of the United States. His AGO 201 file contains a report of disciplinary action against him under Article of War 104 for being "drunk, profane, threatening and disorderly" in public places on 10 September 1944.

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 Article of War or of the 96th Article of War.

Abner E. Lipscomb, Judge Advocate.

Robert J. Homer, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 279454 1st Ind
Hq ASF, JAGO, Washington 25, D. C.

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 First Lieutenant Frank B. LaPorte, Jr. (0-855182), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of assault with intent to do bodily harm, in violation of Article of War 93; of being drunk and disorderly in uniform in a public place on 3 March 1945 (Spec. 1, Chg. III), and of being drunk and disorderly in uniform in a public place on 24 December 1944, both in violation of Article of War 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the findings of guilty of Specification 1, Charge III, as involved the finding of guilty of being disorderly in uniform, 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 thereof.

The accused escorted a young woman to a dance at the Officers' Club at Grand Island, Nebraska, on Christmas Eve, 1944. When he became intoxicated she went home with another officer. Accused followed the couple into a crowded cafe and created a drunken scene. He threatened to kill the other officer, called him vile names, hurled a coffee cup at him and slapped him. His disgraceful behavior was terminated only by the intervention of several enlisted men. A few months later, on 3 March 1945, accused quarreled with a young woman whom he was escorting. While in a hotel corridor he viciously knocked her to the floor and kicked her thereby cutting and bruising her and loosening several of her teeth.

The AG 201 file of accused contains a report of disciplinary action against him under Article of War 104 for being "drunk, profane, threatening and disorderly" in public places on 10 September 1944. The review of the Staff Judge Advocate in the present case further shows that on 5 February 1943 accused slapped a female employee of the Officers' Club at Kearney, Nebraska, but he escaped any disciplinary action; that on 5 October 1943 he was punished under Article of War 104 for intruding into the hotel room of an officer's wife and annoying her; and that on 24 November 1943 he used insulting and abusive language to two

female acquaintances and wrongfully kissed one of them, for which punishment under Article of War 104 was authorized.

I recommend that the sentence to dismissal and total forfeitures be confirmed but that the forfeitures be remitted and that the sentence as thus modified be ordered executed.

4. Consideration has been given to a letter dated 18 May 1945 from the accused requesting clemency.

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. accused

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. G.C.M.O. 302, 7 July 1945).

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

SPJGV-CM 279483

18 MAY 1945

UNITED STATES v. Flight Officer RICHARD E. DAVIS (T-139625), Air Corps, Squadron H, 2137th Army Air Forces Base Unit (Pilot School, Specialized 4-Engine), Hendricks Field, Sebring, Florida.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Sebring, Florida, 11 April 1945. Dishonorable discharge and confinement for six (6) months. Guardhouse, Hendricks Field, Sebring, Florida.

HOLDING by the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates

1. The record of trial in the case of the flight officer 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 Flight Officer Richard E. Davis, Air Corps, Squadron H, 2137th Army Air Forces Base Unit (Pilot School, Specialized 4-Engine), Hendricks Field, Sebring, Florida, did, at Sebring, Florida, on or about 23 February 1945, with intent to defraud, wrongfully and unlawfully make and utter to Fred Gerdt, a certain check in words and figures as follows, to wit:

Sebring, Fla Feb 23 1945 No.____

TROPICAL STATE BANK 63-421

PAY
TO
THE
ORDER
OF Cash $9.00

Nine Dollars and 00/100 DOLLARS

COUNTER CHECK

/s/ Richard E. Davis 139625
Sebring, Fla. Hendricks Field, Flt. Off H. C.

and by means thereof did fraudulently obtain from Fred Gerdt Nine ($9.00) Dollars in cash, he, the said Flight Officer Richard E. Davis, then well knowing that he did not have and not intending that he should have any account with the Tropical State Bank, Sebring, Florida, for the payment of said check.

Specification 2: In that Flight Officer Richard E. Davis, * * *, did, at Sebring, Florida, on or about 24 February 1945, with intent to defraud, wrongfully and unlawfully make and utter to Fred Gerdt, a certain check in words and figures as follows, to wit:

Sebring, Fla Feb 24 1945 No.____

TROPICAL STATE BANK 63-421

PAY
TO
THE
ORDER
OF Cash $9.00

Nine Dollars and 00/100 DOLLARS

COUNTER CHECK

/s/ Richard E. Davis 139625
Hendricks Field Flt Off A.C. 139625

and by means thereof did fraudulently obtain from Fred Gerdt Nine ($9.00) Dollars in cash, he, the said Flight Officer Richard E. Davis, then well knowing that he did not have and not intending that he should have any account with the Tropical State Bank, Sebring, Florida, for the payment of said check.

Specification 3: In that Flight Officer Richard E. Davis, * * *, did, on or about 26 February 1945, wrongfully fail to maintain a sufficient bank balance in his account with the First National Bank of Eagle Pass,

Eagle Pass, Texas, to meet payment of a certain check made and uttered by the said Flight Officer Richard E. Davis, on or about 26 February 1945, in words and figures as follows, to wit:

EAGLE PASS, TEXAS

Feb 26 1945 No. ____

FIRST NAT'L BANK OF EAGLE PASS

PAY
TO
THE
ORDER
OF Officers Club $25.00

Twenty Five and 00/100 DOLLARS

COUNTER CHECK

/s/ Richard E.Davis Flt Off A.C.
Hendricks Field, Sebring, Fla BOQ 342 139625

Indorsed: Pay to the order of
THE TROPICAL STATE BANK
Sebring, Florida
OFFICERS CLUB
OFFICERS MESS (Club)
HENDRICKS FIELD OFFICERS CLUB
OFFICERS MESS FUND

He pleaded not guilty to all the Specifications and Charge. As to Specifications 1 and 2, respectively, the court found him "Guilty, except the words, 'Nine ($9.00) Dollars in cash', substituting therefor the words, 'merchandise of the value of Nine ($9.00) Dollars', of the excepted words Not Guilty, and of the substituted words, Guilty", and found him guilty of Specification 3 and of the Charge. Evidence of one previous conviction was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for six months. The reviewing authority disapproved so much of the findings of guilty of Specifications 1 and 2 of the Charge as involves findings of guilty of the words "with intent to defraud" and "fraudulently", approved the sentence, designated the Guardhouse, Hendricks Field, Sebring, Florida, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. In view of what is said hereafter, no detailed summation of the evidence in relation to Specifications 1 and 2 is regarded as necessary. It is sufficient to say that, as found by the court, accused received merchandise, to wit: whiskey, in exchange for evidence of indebtedness in the form of checks, which he advised the seller of the whiskey were not good, and which were to be held, until redeemed by the accused, for a period of time, the length of which was a matter of disagreement between the testimony of the bar man and the testimony of accused and other defense witnesses.

4. A careful perusal of the evidence clearly indicates that these were not "checks" at all, but were promises to pay, in the nature of promissory notes or "I.O.U's". The accused gave these two "checks" to Fred Gerdt, and asked him to hold them and that he, the accused, would pick them up. This is corroborated in part by Gerdt himself. It is therefore obvious that it was never intended that these "checks" be negotiated. They were a promise to pay in the future, and not "checks" at all. Cases in most of the jurisdictions interpreting statutes defining offenses involving check frauds, hold that a post-dated check is not a "check" at all (People v. Mazeloff, 242 N.Y.S. 623). A check is an unconditional order to pay (Morrison v. Bailey, 5 Ohio St 13; Shiman v. Mahtook, 17 La. App. 635) and where there is a condition attached, such as in this case, to hold the "check" for a period of time, or to hold it until the drawer redeems it, is not a check but a mere evidence of debt coupled with a promise to pay at a future time.

Since the gravamen of the first two Specifications is the passing of a "check" by means of which the accused obtained an advantage; and the evidence shows he passed no check as such, the Specifications must fall.

5. It may be further pointed out that, under Specifications 1 and 2, the court found him not guilty of obtaining $9.00 on two occasions but found him guilty of obtaining merchandise of the value of $9.00 on each occasion. It would appear that the court thus found accused not guilty of two offenses with which he was charged and found him guilty of two offenses, with which he was not charged. The situation presented by this record seems in principle to be quite the same as that dealt with by the Board of Review in CM 195323, Howanic, et al, 2 B. R. 225, 227, in the following language:

> "Accused were charged under Article of War 94 with the theft and sale of specific articles of Government property, viz., 'beef, butter and pork', in Specifications 1 and 2, and 'butter' in Specifications 3 and 4. By exceptions and

substitutions, the court found accused not guilty of larceny of the articles charged, but guilty of larceny of 'subsistence supplies', a generic term applicable to numerous articles, including beef, butter and pork. In criminal cases the proof must conform to the charge (Wharton on Criminal Evidence, Sections 121, 122, 123; 36 C.J. 851, 852). The proof necessary in a larceny case must include

> '(a) The taking by the accused of the property as alleged; (b) the carrying away by the accused of such property' (page 173, M.C.M.).

Also,

> 'It is elementary that one accused of a crime must be definitely apprised of the offenses charged against him and what he must be prepared to meet * * *. An accused, therefore, cannot be legally convicted of an offense of which he has had no notice and with which he is not charged' (CM 120949, Espinosa; CM 120948, Garcia).

In effect, the court found accused guilty of the larceny of articles of subsistence supplies other than those specifically named in the several specifications. Under the well established rules of procedure governing courts-martial, the court was without power to make such substitution, such power being limited to changes which do not 'change the nature or identity of any offense charged in the specification' (paragraph 78 c, M.C.M.). The court's action in substituting other articles of the same general character but exclusive of those alleged amounted in each instance to conviction of an offense essentially separate and distinct from that charged. This it could not do (CM 189741, Mulkey; CM 129356, Mumford; CM 110910, Brooks)."

Several reasons would appear to require us to conclude, therefore, that the record of trial is legally insufficient to support the findings of guilty under Specifications 1 and 2.

6. The accused is charged, in Specification 3, with a wrongful failure to maintain a sufficient balance to meet the payment of a certain check made and uttered by him. It would appear that the test of whether this failure is "wrongful" is that of "reasonableness". The accused knew that when he issued this check he did not have a sufficient balance to

meet the payment of it. A reasonably prudent man does not issue a check first and then hope, by subsequent action, to build up his balance in time to make the check good. In the second place, although he wired his bank enough to cover the issued check (within not more than 2 days of its issuance); he knew there was another check outstanding that might clear and reduce his balance. The holder of this second check wrote the accused that it would be held for an additional week. The accused asked by letter, for a longer time. He has no right to assume, under such circumstances, that merely because he received no reply the extension of time requested was granted. This kind of conduct constitutes a carelessness of which a reasonably prudent man would not be guilty, and which makes the accused's conduct "wrongful", i.e., of a nature to bring discredit on the military service and hence an offense under Article of War 96.

A mere wrongful failure to maintain a sufficient balance for the payment of a check is sufficient to constitute an offense under Article of War 96. (CM 202027, McElroy; CM 228480, Smith; CM 228793, Patterson; CM 240885, Holley). In the Smith case (supra) exactly as in this case, the accused was only charged (in the pertinent Specifications) with failure to maintain a bank balance to cover issued checks.

An accused is properly chargeable with the status of his bank account, where the status of his account results from the acts of the accused, or from acts which have been brought to his attention (Wanner - 2 Bull. JAG 384-385). In the Smith case above quoted, the accused stated that he had sent his bank a promissory note for $150, to cover some checks he issued, not realizing that it might not be accepted. The Board of Review in that case said (p. 184, BR XVI):

> "* * * Accused sent a promissory note for $150 to his bank accompanied by a statement that he had overdrawn his account. Although accused may have hoped that this action would result in the payment of the checks upon presentation such a hope was clearly unjustified, as was evidenced by the fact that the checks were subsequently dishonored for lack of sufficient funds. * * *"

The accused Davis' hope that the holder of the dishonored check would hold it for the requested length of time was also clearly unjustified, for the fact is, that the check was presented for payment sooner.

In the Law case (CM 232592 - p. 117, BR XIX) the language of the Board of Review is singularly appropriate to the instant case:

"* * * In effect it [the court] found that though he had insufficient funds in the bank to meet his checks when drawn, he intended to have sufficient funds on hand before they were presented. As seen from the Fanning case good intentions alone do not constitute a defense to a charge laid on these facts under Article of War 96. * * *"

Under the circumstances appearing in the record of trial the accused's issuance of the particular check in this case, when he had no money in the bank to meet it at the time, constituted his "wrongful" failure to maintain a sufficient balance and that his subsequent wiring the bank of the money did not, under the peculiar conditions of this case relieve him of his plain duty to maintain such a balance. This is conduct of a nature to bring discredit on the military service (McElroy, supra) and is a violation of Article of War 96.

7. Consideration has been given to the telegram of Bradford, Ellsworth, Manning and Moore sent to the Under Secretary of War on 9 May 1945 and the letter of Bradford Ellsworth dated 14 May 1945, requesting clemency.

8. It is therefore the opinion of the Board of Review that the evidence is sufficient to support the findings of guilty of Specification 3; but insufficient to support the findings of guilty of Specifications 1 and 2 for the reasons set forth herein, and sufficient to sustain the sentence.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

SPJGV-CM 279483 1st Ind

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

TO: The Commanding General, Army Air Forces
Eastern Flying Training Command,
Maxwell Field, Alabama.

1. In the case of Flight Officer Richard E. Davis (T-139625), Air Corps, Squadron H, 2137th Army Air Forces Base Unit (Pilot School, Specialized 4-Engine), Hendricks Field, Sebring, Florida, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that the findings of guilty of Specifications 1 and 2 of the Charge be disapproved. Upon compliance with the foregoing recommendation you will have authority to order the execution of the sentence.

2. In view of the fact that the findings of guilty of Specifications 1 and 2 are not sustained by the evidence and because the neglect disclosed by Specification 3 does not involve moral turpitude (no fraud was shown) and in view of accused's age and the probability of further useful service, I recommend that the unexecuted portion of the confinement be remitted and the execution of the dishonorable discharge suspended.

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 279483).

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

1 Incl
Rec. of Trial

JUN 22 45PM

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

SPJGQ - CM 279485

29 JUN 1945

UNITED STATES v. First Lieutenant JAMES M. THOMPSON (0-741110), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Selman Field, Monroe, Louisiana, 9 April 1945. Dismissal, total forfeitures, and confinement at hard labor for two years.

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OPINION of the BOARD OF REVIEW
ANDREWS, BIERER and HICKMAN, 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 James M. Thompson, Air Corps, did, without proper leave, absent himself from his station at Selman Field, Monroe, Louisiana, from about 1 February 1945 to about 8 February 1945.

Specification 2: In that First Lieutenant James M. Thompson, Air Corps, did, without proper leave, absent himself from his station at Selman Field, Monroe, Louisiana, from about 9 February 1945 to about 20 February 1945.

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

Specification 1: In that First Lieutenant James M. Thompson, Air Corps, did, at Monroe, Louisiana, on or about 20 January 1945, with intent to defraud, wrongfully and unlawfully make and utter to the Frances Hotel, a certain check in words and figures as follows, to wit:

SAN ANGELO, TEXAS Jan. 20 1945 No.___

SAN ANGELO NATIONAL BANK 88-88

PAY TO

Cash---------- OR ORDER $25.00

Twenty-Five----------00/100----------DOLLARS

1st Lt. A.C.
0-741110

/s/ James M. Thompson

and by means thereof did fraudulently obtain from the Frances Hotel, Twenty Five Dollars ($25.00) lawful money of the United States, he, the said First Lieutenant James M. Thompson then well knowing he did not have and not intending that he should have sufficient funds in the San Angelo National Bank, San Angelo, Texas for the payment of said check.

Specification 2: In that First Lieutenant James M. Thompson, Air Corps, did, at Monroe, Louisiana, on or about 29 January 1945, wrongfully and unlawfully make and utter to the Frances Hotel a certain check in words and figures as follows, to wit:

SAN ANGELO, TEXAS January 29 1945 No.___

SAN ANGELO NATIONAL BANK 88-88

PAY TO

Frances Hotel---------- OR ORDER $ 177.48

One Hundred Seventy Seven----48/100-------DOLLARS

1st Lt. A.C.
0-741110

/s/ James M. Thompson

and by means thereof did obtain from the Frances Hotel, Twenty Dollars ($20.00) lawful money of the United States, Thirty Seven Dollars and Forty Eight Cents ($37.48) credit on his room account at the Frances Hotel and possession of five checks previously issued to the Frances Hotel and returned to said hotel because of insufficient funds, to wit:

"A check for Twenty Five Dollars ($25.00) drawn on the San Angelo National Bank, San Angelo, Texas, dated on or about 12 January 1945",

"A check for Twenty Five Dollars ($25.00) drawn on the San Angelo National Bank, San Angelo, Texas, dated on or about 15 January 1945",

"A check for Twenty Five Dollars ($25.00) drawn on the San Angelo National Bank, San Angelo, Texas, dated on or about 15 January 1945",

"A check for Twenty Dollars ($20.00) drawn on the San Angelo National Bank, San Angelo, Texas, dated on or about 17 January 1945",

"A check for Twenty Five Dollars ($25.00) drawn on the San Angelo National Bank, San Angelo, Texas, dated on or about 18 January 1945",

he, the said First Lieutenant James M. Thompson then well knowing he did not have and not intending that he should have sufficient funds in the San Angelo National Bank, San Angelo, Texas, for the payment of said check.

Specification 3: In that First Lieutenant James M. Thompson, Air Corps, did, at Monroe, Louisiana, on or about 1 February 1945, with intent to defraud, wrongfully and unlawfully make and utter to the Ouachita National Bank, Selman Field Facility, a certain check in words and figures as follows, to wit:

No.___ SAN ANTONIO, TEXAS Feb. 1 1945

30-65
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO

PAY TO THE
ORDER OF Cash $ 100.00

One Hundred-------00/100----------DOLLARS
1st Lt. A.C.
0-741110

/s/ James M. Thompson

and by means thereof did fraudulently obtain from the Ouachita National Bank, Selman Field Facility, One Hundred Dollars ($100.00) lawful money of the United States, he, the said First Lieutenant James M. Thompson then well knowing he did not have and not intending that he should have, sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas for the payment of said check.

Specification 4: Identical with Specification 3. It is evident that these two Specifications relate to two separate checks identical in all respects.

Specification 5: Same as Specification 3 except that the amount of the check was $25 and the check was cashed by Hunt and Whittaker, Inc.

Specification 6: Same as Specification 3 except that the date was 2 February 1945 and the check was cashed by Ouachita National Bank (not the Selman Field Facility thereof, as alleged in Specification 3).

Accused pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous conviction was introduced. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence, remitted three years of the confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that accused was a student at the Bombardier Redeployment School at Selman Field, Louisiana, and a member of "Flight 4" (R. 8, 11). Being a married officer, he was not required to live on the post, and he was residing at the Hotel Frances, Monroe, Louisiana, where he had registered on 10 January 1945 (R. 15, 27).

On 31 January 1945, accused requested a leave. The request was denied, inasmuch as accused was obliged to attend classes (R. 13, 14). Accused absented himself without leave from his station on 1 February 1945 and remained absent until apprehended at San Angelo, Texas and returned to military control on or about 8 February 1945 (R. 8, 9, 12, 13, 14).

On or about 8 February 1945 the Adjutant and Executive Officer, San Angelo Army Air Base, San Angelo, Texas directed accused to return "of his own volition" to his station at Selman Field, reporting to the adjutant. Considering "travel time", he should have arrived at Selman Field "on or about" 9 February. He did not report to the adjutant "on or about" 9 February (R. 12). At 9 p.m. on "approximately" 9 February, Captain Edward T. O'Grady, Air Corps, accused's flight leader, talked with accused at the Cascade Bar, Monroe, Louisiana (R. 8, 9). Accused was not intoxicated but appeared nervous and seemed "concerned" and "frightened" about "his condition" (R. 10). Captain O'Grady suggested that accused report to the field and then called the Officer of the Day and told him that accused was in town. Accused did not return to the field, but remained absent without leave until "on or about" 20 February, when he "voluntarily turned himself in" to the Army Air Forces Regional Hospital, Davis-Monthan Field, Tucson, Arizona (R. 9, 12, 14). At the time of his surrender to military control, he was in "proper uniform" (R. 12).

With reference to Specification 1, Charge II, the evidence shows that on 20 January 1945, Thomas Truitt, room clerk at the Frances Hotel, approved for payment the accused's check for $25, which check the cashier then cashed for accused (R. 29, 30). The check is identical with that set forth in the Specification (Ex. 3). The check was dishonored by the drawee bank and, so far as Truitt knows, has not since been made good (R. 30). On 20 January 1945, the accused's account at the San Angelo National Bank, San Angelo, Texas (the drawee bank) showed a credit balance of $6.35 (R. 39).

On 29 January 1945, accused's wife presented to the cashier of the Frances Hotel the check set forth in Specification 2, Charge II, in the amount of $177.48. The check was approved by Rodrick K. DeCell, the room clerk. It was taken by the cashier in payment of $37.48 due on accused's hotel bill and to "take up" five checks in the total amount of $120, previously cashed for accused by the hotel and returned by the drawee bank, which checks corresponded in dates and amounts with the five checks appearing in the Specification (R. 16-20, 24-28; Ex. 2). In a statement to the investigating officer, accused admitted that his wife "cashed" the check (Ex. 2) at his request (R. 21-23). In computing the amount due the hotel, the cashier made a mistake of $20, and on 30 January this amount was refunded to the accused (R. 17, 26, 28). The check was dishonored by the drawee bank (R. 17, 18, 27, 28). Later, the check was made good by "another party", in the presence of a member of the Office of Courts and Boards (R. 28). On 29 January 1945, accused's account at the San Angelo National Bank, San Angelo, Texas (the drawee bank), showed a credit balance of $5.85 (R. 39).

With reference to Specification 3, Charge II, Mr. Delma Carter testified that he was branch manager of the Ouachita National Bank, Selman Field Facility. On 1 February 1945, the accused presented to him the check described in the Specification, in the amount of $100, and Carter cashed it for the accused (R. 31, 32, Ex. 4). The check was dishonored and returned by the drawee bank. It has since been made good (R. 32).

On 1 February 1945, a teller at the Selman Field Facility of the Ouachita National Bank of Monroe, Louisiana cashed for accused the check described in Specification 4, Charge II, in the amount of $100 (R. 33, 34; Ex. 5). The check was dishonored and returned by the drawee bank. Reimbursement for this check was later made (R. 33, 34).

The evidence relating to Specification 5, Charge II, shows that Mr. H. R. Arlig, president of Hunt and Whittaker, Inc., of Monroe, Louisiana, cashed for accused the check described in the Specification, in the amount of $25 (R. 35, 36; Ex. 6). The check was dishonored and returned by the drawee bank (R. 35, 36).

Mr. W. C. Oliver, vice-president of the Ouachita National Bank, Monroe, Louisiana testified with reference to Specification 6, Charge II. On 2 February 1945 he approved for payment the check described in the Specification, in the amount of $100, and the check was then cashed for the accused by the bank (R. 37; Ex. 7). The check was dishonored and returned by the drawee bank, presented to the drawee bank a second time, and again returned dishonored (R. 37, 38). The Ouachita National Bank later received reimbursement for the amount of the check (R. 38).

With reference to Specifications 3, 4, 5, and 6, Charge II, the first three of which involved checks issued on 1 February 1945 and the fourth a check issued on 2 February 1945, the evidence discloses that on 1 and 2 February 1945 the accused's account at the National Bank of Fort Sam Houston, San Antonio, Texas (the drawee bank) showed a credit balance of $13.49 (R. 39).

4. The accused elected to remain silent (R. 39).

Captain W. D. O'Gorman, Medical Corps, testified for the defense by stipulation. He gave accused a neuropsychiatric examination at the Station Hospital, Davis-Monthan Field, Tucson, Arizona (R. 39). This was the place where accused "turned himself in" on 20 February 1945 after his second unauthorized absence. Apparently most of the factual information contained in Captain O'Gorman's testimony was obtained from the accused. In substance, Captain O'Gorman's testimony is as follows:

The past history of accused reveals an "early agression" involving excessive gambling and antagonism toward his father, who repeatedly told him that he should grow up. A flight surgeon warned accused that unless he "slowed down his activity" he would be in trouble (R. 40). The time of this warning does not appear.

Accused was sent to the European Theater of Operations as a bombardier in September 1943 and remained there until May 1944, when he returned to the United States on a 30-day leave, after which he went back to the European Theater. During this second tour of duty he did not participate in any missions (R. 39-40). He returned to this country in October 1944 (R. 40).

Accused has been in four crash landings, three of which took place during his service overseas. In the last crash landing, which occurred on his final mission, he was burned about the hair and face and knocked unconscious (R. 39).

An "associate bombardier" described accused as very agressive and well liked, and stated that accused was involved in "severe combat missions" (R. 40). Since his return to the United States in October 1944, accused has been agitated, restless, and, at times, belligerent toward his superior officers and fellow officers (R. 39). He has suffered from severe headaches, spots in front of his eyes, palpitation of the heart, dizzy spells, loss of appetite, and twitching of the muscles in his right arm (R. 40).

Accused admitted having cashed many checks for which he had no funds in the bank. Believing that charges would be preferred against him for checks which he had passed prior to February 1945, he requested a leave in order to obtain money to make the checks good. The leave

having been refused, he absented himself without leave on 2 February 1945. On that date he cashed checks amounting to $300, after which he went to New Orleans and cashed an additional $75 worth of checks. Proceeding to San Angelo, where he knew someone from whom he could borrow money, he was arrested by the military police and ordered to return to his station. Arrived in Monroe, Louisiana he met friends, who informed him that the authorities were looking for him and intended to prefer charges against him. Frightened by this news, he left Monroe and went to various places, finally surrendering himself at Tucson, Arizona (R. 39). He realizes his mistakes and wants to make "retribution" (R. 40).

Captain O'Gorman concluded that the accused had no "psychotic trend", and diagnosed his condition as "constitutional psychopathic state, emotional type". It was his "impression" that the combat experience to which accused had been subjected "permitted an outburst of psychopathic behavior" (R. 40).

Captain Delbert P. Johnson, Medical Corps, a rebuttal witness for the prosecution, testified in substance as follows: Witness is chief psychiatrist of the Neuropsychiatric Section, Station Hospital, 2530th Army Air Forces Base Unit, Selman Field, Monroe, Louisiana (R. 41). He "studied" at St. Joseph, Missouri, and has had five years' "practical experience" (R. 42). He had the accused under examination from 6 to 9 March 1945 and his opinion concerning accused is based upon that examination and upon "past records" (R. 41, 42). There are no signs of insanity in the accused, and he knows and always has known right from wrong and is able to adhere to the right (R. 41, 42). Witness diagnosed accused as a psychopathic personality (R. 41). In reaching that diagnosis he "considered the question of combat service" and was of the opinion that the combat experience of the accused was not enough "to bring this on or cause this type of behavior". The past history of accused shows that "he had the trends before he had the experience of combat", and that combat service "did not develop his trends". The overseas missions which accused performed "caused him very little distress even though considerable opposition was met". However, in the opinion of the witness, "combat experience would permit an outburst of psychopathic behavior such as in this case" (R. 42).

5. The evidence shows beyond any doubt that the accused was absent without leave for the two periods alleged in the Specifications of Charge I and that he made and uttered the checks as alleged in the six Specifications of Charge II, having at the time insufficient funds in the drawee bank for their payment. Specification 2 of Charge II did not allege an intent to defraud. Presumably this arose from the fact that the check which was the subject of that Specification was given for a past consideration; namely, payment of a hotel bill and reimbursement for five checks previously uttered by the accused and dishonored by the drawee bank. Whether the fact that a check is

given for a past consideration negatives an intent to defraud need not be determined, for the issuing of a check with knowledge that there are insufficient funds in the drawee bank to meet it constitutes an offense under Article of War 96 (CM 224286, Hightower, 14 BR 97, 101, and cases there cited), and it is no defense that the check was given for a pre-existing debt (CM 202601, Sperti, 6 BR 171, 219, and cases there cited).

All the Specifications relating to the checks allege that accused knew that he did not have and did not intend that he should have sufficient funds in the drawee bank for the payment of the checks. To support those allegations the prosecution proved that on 20 January 1945, when accused uttered the $25 check on the San Angelo National Bank, his balance was $6.35; that on 29 January, when he uttered the check for $177.48 on the same bank, his balance was $5.85; and that on 1 and 2 February, when he uttered four checks amounting to a total of $325, drawn on the National Bank of Fort Sam Houston, his balance with that bank was only $13.49. In addition, we have the accused's admission to Captain O'Gorman, the medical officer who testified by stipulation for the defense, that since his return to the United States in October 1944, the accused has cashed many checks for which he had no funds; that on 2 February 1945 he cashed $300 worth and shortly thereafter went to New Orleans and cashed a further $75 worth of checks; and that he realized his "mistakes" and felt it incumbent upon him to make "retribution". The defense offered no evidence, documentary or otherwise, tending to show lack of knowledge of the insufficiency of the funds in the drawee banks to meet the checks, nor is there any evidence tending in the slightest degree to prove an intent to furnish sufficient funds for the payment of the checks. Although the failure of an accused to testify in his own behalf may not be considered against him (MCM 1928, p. 62), his failure to produce evidence which, if favorable, would naturally have been produced, is open to the inference that the facts were unfavorable to his cause, and the inference is equally applicable to the non-production of documents (8 Wigmore, Evidence, 3rd ed., sec. 2273).

Upon the whole record, the evidence is sufficient to justify the court's conclusions and to support the findings. That the accused, or someone on his behalf, eventually made some or all of the checks good, does not negative the intent to defraud nor otherwise amount to a defense.

6. Some of the testimony of Captain Feille and First Lieutenant Bostrom concerning Charge I and the Specifications thereof was hearsay and should not have been admitted, but the competent evidence clearly supports the findings, and the error is not prejudicial. Similarly, the erroneous admission of incompetent testimony regarding the insufficiency of the funds on deposit in the drawee banks is not prejudicial error, inasmuch as there was competent testimony showing the exact amount on deposit on the applicable dates.

The medical testimony does not question the sanity of the accused, and any psychoneurotic condition suggested therein affects only the matter of clemency.

At the close of the prosecution's case, the court overruled a motion by the defense for a finding of not guilty of Charge II and the Specifications thereof. The motion was based upon the contention that intent to defraud had not been proved (R. 39). For the reasons hereinbefore set forth, the overruling of the motion was proper.

7. War Department records show that the accused is 23 years old and married. He lives in Toronto, Ohio, which was his birthplace. He was graduated from Toronto (Ohio) High School in 1939, and from June 1939 to January 1940 drove a truck for a contracting firm. From January 1940 to April 1942 he worked as a rodman and transitman for the Ohio Power Company. He enlisted in the Army in April 1942 and was appointed an aviation cadet on 24 May 1942. On 6 March 1943, after completion of the aviation cadet training program and graduation from the Roswell Army Flying School, Roswell, New Mexico, he was commissioned a second lieutenant, Army of the United States. He was promoted to first lieutenant on 23 February 1944. He served in combat as a bombardier in the 567th Bombardment Squadron, 389th Bombardment Group (Heavy), Eighth Air Force, and was awarded the Distinguished Flying Cross and the Air Medal with three Oak-Leaf Clusters.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized for violation by an officer of Article of War 61 and Article of War 96.

Fletcher R. Andrews, Judge Advocate

[illegible], Judge Advocate

_____, Judge Advocate

SPJGQ-CM 279485 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUL 1 8 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 First Lieutenant James M. Thompson (0-741110), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave on two occasions for periods of seven and eleven days respectively (Specifications 1 and 2, Charge I), in violation of Article of War 61, and of making and uttering six checks aggregating $527.48, knowing that he did not have and not intending that he should have sufficient funds in the drawee bank to meet them (Specifications 1 to 6, inclusive, Charge II), in violation of Article of War 96. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence, remitted three years of the confinement, 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 as approved by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion.

The accused was a student at the Bombardier Redeployment School, Selman Field, Louisiana. Having been refused a leave, he absented himself without leave on 1 February 1945 and remained absent until apprehended at San Angelo, Texas on 8 February. Ordered to return to his station, he failed to do so and was absent without leave from 9 February until 20 February, when he "turned himself in" at an Army hospital at Tucson, Arizona.

On 20 and 29 January and on 1 and 2 February he drew a total of six checks on banks in which he had insufficient funds on deposit to meet them. The aggregate amount of the checks was $527.48, and it is clear from the evidence that he knew of the insufficiency of the funds in his account. For five of the checks he received cash. One of the checks was given in payment of a hotel bill and for the purpose of "taking up" five

other checks (not involved in the present trial) which had been dishonored by reason of insufficient funds. Most if not all of the checks involved in the present trial have been "made good", apparently by the accused's father.

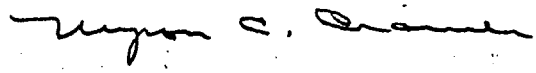
Accused served in combat as a bombardier with the Eighth Air Force in the European Theater of Operations from September 1943 to May 1944 and was awarded the Distinguished Flying Cross and the Air Medal with three Oak-Leaf Clusters. He has been in four crash landings, in the last of which he received burns about the face and hair and was rendered unconscious. Since his return to the United States he has been "agitated and restless" and has suffered from sharp headaches, dizzy spells, muscular twitchings, and other disorders. Two psychiatrists, one a witness for the defense, the other for the prosecution, diagnosed the accused as a constitutional psychopath and were of the opinion that his severe combat experience "permitted" an "outburst of psychopathic behavior", although the prosecution's psychiatrist thought that accused had psychopathic "trends" before his service in combat. To the psychiatrist for the defense, accused disclosed a realization of his "mistakes" and expressed a desire to make "retribution."

4. Attached to the record of trial are letters from Senator Robert A. Taft, Senator Harold H. Burton, and Congressman Earl R. Lewis, all of Ohio, copy of a telegram from Senator Taft, and letters from numerous persons intimately acquainted with the accused and his family. These letters attest the high character of the accused and the excellent reputation which he and his family bear in and about his home community. They request clemency in view of his good character and splendid service, and express the opinion that his derelictions resulted from a psychoneurotic condition caused by the strain of his experiences in combat. Senators Taft and Burton and Congressman Lewis have also appeared before the Board of Review, urging clemency. Consideration has been given to the letters and oral pleas.

5. I recommend that the sentence as approved by the reviewing authority be confirmed but that in view of the youth and prior good record of the accused and the emotional stress resulting from his arduous combat service, the forfeitures and confinement be remitted, and the dismissal suspended during good behavior.

6. Inclosed is a form of action designed to carry into execution

the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

7 Incls.
1. Rec of Trial
2. Form of Action
3. Ltr fr. Sen Taft w/2 Incls.
4. Ltr fr. Sen Burton
5. Copy telegram fr. Sen Taft
6. Ltr fr. Cong. Lewis, Apr 30/45 w/12 Incls.
7. Ltr fr. Cong. Lewis, May 5/45 w/5 Incls.

(Sentence as approved by reviewing authority confirmed but forfeitures and confinement remitted and dismissal suspended. G.C.M.O. 359, 21 July 1945).

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

15 MAY 1945

SPJGV-CM 279519

UNITED STATES	)	XXXVI CORPS
v.	)	Trial by G.C.M., convened at Camp Gruber, Oklahoma, 14 February, 10, 13 and 14 April 1945. Dismissal.
Major STEPHEN A. DERRY (0-295340), Corps of Engineers.	)	

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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Major Stephen A Derry, Corps of Engineers, did at Fort Leavenworth, Kansas, on or about 23 October 1944, with intent to deceive and thereby obtain a higher grade upon an exercise which had been returned to him by the Command and General Staff School with an unsatisfactory grade, change the words and figures "0200 12 Aug" in paragraph 3 c (1) of said exercise to read "0200 13 Aug", and, with knowledge that such action was cheating, did submit the said exercise as thus altered to the said school with request for reconsideration of the grade on the basis in part of the said words and figures "0200 13 Aug".

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

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

Accused was a student attending the 20th General Staff Course at the Command and General Staff School, Fort Leavenworth, Kansas. He turned in

a solution of problem 184c, which solution stated "0200 12 August" as the answer to paragraph 3c(1) of such problem. His paper was graded "unsatisfactory" and returned to him. The following day, 23 October 1944, accused filed a request for a reconsideration of his grade, returned the graded paper (Ex. "B"), and called the attention of the instructor to his answer, paragraph 3c(1) of the problem, which appeared to have been altered to read "0200 13 August". The original solution (Ex. B) is in evidence, and it is apparent that the figure "3" in such date has been written over the figure "2".

The usual procedure in handling examination papers for each problem at the Staff School was as follows: in each classroom boxes or trays were passed from one student to the other and the finished papers were dropped in. There were also boxes in the hall, in which students might deposit their completed papers. The noncommissioned officer in charge of the hall collected all the papers, checked them against the list of the students present and turned in the papers in person to the instructor in charge of the test (R. 32). The instructor and his assistant graded the papers (R. 32). Each paper carried the code number of the student and not his name. The code number of accused was 533. Those papers, which were marked "unsatisfactory", a failing grade, were reconsidered by the instructor personally. When all of the papers had been graded they were given by the instructor to the master sergeant in charge of the Faculty Board Record office (R. 30). That office translated the code number to the name of each student, attached a copy of the correct solution, and placed the graded papers in the student's box in the classroom (R. 32). If a student felt that his papers were erroneously graded, he had the right to make a request for a reconsideration of his grade, commonly known as "reclama" (R. 30) and filed a form in which he indicated the errors in grading (R. 31). Each classroom had a reclama box which was emptied every half hour by the message center and the reclamas were brought to the record office. The reclama, plus a slip of paper showing the grade previously awarded, was sent to the chief of the section (R. 31).

After having been graded, accused's solution of problem 184c was returned to him on 22 October 1944 (Pros. Ex. "B"). It was graded "U", a symbol meaning unsatisfactory. Accused, through the regular channels, filed a reclama on the next day (Pros. Ex. "C"). This claim for a change of grade was based on his answers to requirements 4, 10 and 11 of the problem. As to requirement 10, accused stated, "note that my answer was 0200 13 August."

For some reason, which is not stated in the record, after the examination paper bearing the code number 533 (accused) had been graded, the chief instructor, Lieutenant Colonel James H. Prescott, directed that a photostatic copy of it be made (R. 37). Colonel Prescott brought the papers to the reproduction section (R. 37). Sergeant Robert Quinn received

the papers from him (R.26) and made a photostatic copy of them (R. 26). Within an hour the original examination papers were returned to the instructor (R. 28, 37). Sergeant Quinn identified Prosecution's Exhibit A as the photostatic copy which he made of the examination papers brought to him (R. 26). Lieutenant Colonel Prescott was positive that the answer to requirement 3c(1), a date, was written on the original examination paper of accused as: "0200 12 August" (R. 37). That is the date which appears in the photostatic copy (Pros. Ex. "A"). The examination paper returned by accused with the reclama, however, showed the answer to the same requirement 3c(1) as "0200 13 August". The figure 2 in the date "12 August" appeared to have been changed to 3, so that it read "13 August". Accused had completed nine problems in the course, prior to undertaking the one involved in this case (R. 57). The grade "satisfactory" is a passing grade, while "unsatisfactory" indicates a failure. His solution of five problems had been marked "satisfactory". Four others had been marked "unsatisfactory". If accused's solution of this problem (184c) had been "satisfactory", he would have been entitled to receive a passing grade for the entire course (R. 57, 58). The solution as altered, although it was not correct, was so nearly correct as to merit the marking "satisfactory", and thus to have given him a passing grade (R. 40). The matter was reported to the Commandant of the School, who ordered that an investigation be made by Lieutenant Colonel Allan P. Browne, JAGD. After being warned by Colonel Browne of his rights under the 24th Article of War, the accused submitted to him a written explanation (Pros. Ex. "D"):

> "Sunday evening after return from the movie, I went to bed, considerably concerned over how I stood in my class. I dream't about the school, classes and distinctly recall my dream of taking examinations and <u>remember well changing my answers before turning in my paper</u>. I also remember getting out of bed and writing the 'reclama' on the last test.
>
> "On the basis of the above, it is requested that the 'reclama' be withdrawn." (Underscoring supplied).

4. Accused, after being duly advised of his rights, took the stand under oath on his own behalf. He identified Prosecution's Exhibit "B" as the solution of a problem which he had submitted at the Command and General Staff School, Fort Leavenworth, Kansas (R. 44, 55). Accused thought that "0200 13 August" was the date originally given in his answers to the problem (R. 45), but he was not sure about it (R. 55, 56). The answer contained in Exhibit "B" (13 August) was on the paper when he received it after having been graded. In his opinion neither 12 August

nor 13 August was the correct date and a change from 12 to 13 would not have made any difference, as the solution of the problem would have been incorrect in either case. His answer was written in pencil and any markings in ink on Exhibit "B" were not his (R. 45, 46). He denied having any knowledge as to how the date "12" in Exhibit "A" was changed to "13", that which appears in Exhibit "B" (R. 46). Accused knew that his solution of four problems had been graded as unsatisfactory (R. 48). Accused identified Exhibit "C" as the reclama which he sent in (R. 47). Although he put in a reclama, he did not expect to get any better grade (R. 51).. He submitted the reclama to call the attention of the school to the fact that the instructor had announced a solution from the platform which differed from the official solution furnished with the problem (R. 51). When accused prepared the reclama, he did not notice that the figure 3 had been written over the figure 2 (R. 56).

Accused's civilian and military record was introduced to show his previous excellent character and record (Def. Ex. #2). Colonel Harold A. Doherty testified that accused had performed his duty in a very satisfactory manner and would rate him as excellent (R. 26). Major Frederick A. Rohrman testified that accused's reputation was excellent.

5. The evidence discloses beyond a doubt that the examination papers of accused as turned in on the day of the examination, read in answer to requirement 3c(1) "0200 12 August". Lieutenant Colonel Prescott, chief instructor, definitely remembered that such was the date written in the examination papers. The photostats (Pros. Exs. "A" and "F"), an exact mechanical reproduction of the original examination papers, confirm his testimony.

Accused testified that when he received the graded papers and filed his "reclama" the date shown on the examination papers (Pros. Ex. "B") read "0200 13 August". If his testimony was correct, then the change in such date of necessity must have been made between the time that the corrected and graded papers were placed in accused's box in the classroom on Saturday 21 October and the time when accused retrieved the papers on Sunday 22 October.

Accused in a written statement to the investigator, dated 24 October at 0425, stated that he had dreamt about the examination "and remember [ed] well changing my answers <u>before turning in my paper</u>" (Pros. Ex. "D"). Since there are no other changes in the examination paper except in the date in answer to requirement 3c(1), the accused was claiming in effect that the change in date was made by him prior to submitting the examination papers for grading. In view of the irrefutable proof that the change

of date occurred after the papers were graded and after a photostat had been made, such defense can have but little weight.

Later in the same day, 24 October, accused after being confronted with the photostat of his original examination paper stated under oath to the investigating officer:

> "* * * I do not know when the date on the requirement was changed to '0200, 13 Aug' or how it was changed or who changed it. I can see it is marked over * * *." (Pros. Ex. "E").

On the witness stand accused stated that he could not say whether he had answered requirement 3c(1) with one or the other date and denied having altered the date. He testified also that when he wrote the reclama he did not notice that the numeral "2" had been written over and changed to "3".

If we accept as true the testimony of the accused that the alteration in date was not made by him then there are only two possible hypotheses to explain the changed answer.

a. It was made by a person who wished to do the accused harm. In such case unless such other person knew that the accused would file a reclama, accept the alteration as his own and consequently incur the serious charge of cheating, he would accomplish nothing by altering the date. No one could have known that the accused would submit a reclama until he did so.

b. That someone inadvertently or without any motive changed the date in question after the accused's paper had been graded.

We consider both of these possibilities to be unreasonable and improbable. The conduct of the accused in stating first to the investigating officer that he had made the changes in the examination papers prior to turning them in, and later that he did not know whether his answer to the requirement 3c(1) was 12 August or 13 August, appears to evince some consciousness of guilt. It would be almost impossible for accused not to have noticed at the time when he wrote the reclama that the figure 3 had been written over the figure 2. Finally, the accused accepted the alteration as his own and attempted to turn it to his own personal benefit by using it in the reclama to obtain a higher grade.

6. Where circumstances are relied on entirely to justify a conviction, the circumstances must not only be consistent with guilt, but

inconsistent with innocence. In other words, the proof must exclude every reasonable hypotheses, except that of accused's guilt.

> Sullivan v. United States, 283 F. 865;
> Sherman v. United States, 268 F. 516;
> United States v. Hart, 162 F. 192, 197.

> "Where the only competent evidence is circumstantial, it must, in order to be sufficient to support conviction, be of such nature as to exclude every reasonable hypothesis except that of accused's guilt." (Dig. Ops. JAG 1912-1940, sec. 395(9)). (Underscoring supplied).

In this case not only does the evidence point to the accused as being the only person who could possibly have any motive to alter the date, but until he was apprised of the fact that the original copy of the examination papers had been photostated, he claimed that he had made the changes in his examination papers before he turned them in. Further, if he did not change the dates, he accepted the changed figures as his own and made a request for a better grade on the strength of such alteration. We are of the opinion that the circumstantial evidence in this case meets the test above stated. The web of circumstances pointing to accused's guilt is too strong to permit of any reasonable doubt. The court saw the accused and observed his conduct and demeanor, while on the witness stand. It did not believe his rather vague explanation of the motive for filing the reclama and his denial of guilt. We think the correctness of the court's finding is supported by the record, and can find no reasonable basis for disturbing the findings and the sentence.

7. Consideration has been given to a letter by Lieutenant Colonel Frank A. Lowry, JAGD, special defense counsel, addressed to the Board of Review and a letter and brief by Laura M. Miller, civilian defense counsel, addressed to The Judge Advocate General. Both letters and inclosures are attached to the record.

According to civilian defense counsel's brief the trial was had under some difficulties. The distractions and annoyances of which counsel complains are hardly conducive to a dignified and orderly trial and do not tend to produce that quiet calm judicial atmosphere associated with the courts. We find, however, that there was nothing in this regard which was prejudicial to the substantial rights of the accused.

Much was made in the briefs of both civilian defense counsel and special defense counsel, Lieutenant Colonel Lowry, of the fact that the accused's resignation was brought to the court's attention during the trial. Defense counsel requested that since an undesirable inference might

be drawn, a letter written by the accused and appended to the resignation also be included in the record. This letter was thereupon read into the body of the record. It stated that the accused was not making an admission of guilt, that he was absolutely innocent and that he believed a court-martial was a black mark against an accused regardless of the findings, thus giving the reason for his resignation. Under all the facts and circumstances of this case we hold that the admission of the resignation and its appended letter was not injurious to the substantial rights of the accused.

8. The records of the War Department show that accused is 39-9/12 years old. He was born in Pittsburgh, Pennsylvania, and resides in Cleveland, Ohio, and is married. He is a civil engineer in civilian life and is a graduate of Penn State College. He was appointed a second lieutenant, Engineer Reserve, on 20 May 1932 and promoted a first lieutenant on 16 February 1940. He was called on active duty on 19 March 1942 and was promoted to captain in the Army of the United States on 30 December 1942 and major on 23 May 1943.

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

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

SPJGV-CM 279519 1st Ind

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

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 Major Stephen A. Derry (0-295340), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of cheating while a student at the Command and General Staff School, Fort Leavenworth, Kansas, in violation of the 95th Article of War. 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. 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.

Accused was a student attending the 20th General Staff Course at the Command and General Staff School. He turned in a solution of a problem, which stated a date material to the correctness of the answer as "0200 12 August". The paper was graded and returned to him, marked "unsatisfactory". On the next day he filed a request for a reconsideration of his grade, and returned the graded paper with the date in question changed to read "0200 13 August". The figure "3" in such date had been written over the figure "2". The solution thus altered was nearly enough correct to have given him a marking of "satisfactory", a passing grade.

I recommend that the sentence be confirmed and ordered executed.

4. Consideration has been given to a letter and brief addressed to me by Laura E. Miller, civilian defense counsel, to a letter addressed by her to Brigadier General E. S. Greenbaum, Executive Officer, Office of the Under Secretary of War, and to a letter addressed by Lieutenant Colonel Frank A. Lowry, special defense counsel, to the Board of Review.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

5 Incls
1 Rec of Trial
2 Form of Action
3 Ltr fr Mrs Miller to TJAG w/incls
4 Ltr fr Mrs Miller to Gen Greenbaum
5 Ltr fr Lt Col Lowry

(Sentence confirmed. G.C.M.O. 266, 3 July 1945).

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

SPJGH-CM 279578

21 MAY 1945

UNITED STATES	PANAMA COAST ARTILLERY COMMAND
v.	Trial by G.C.M., convened at Fort Clayton, Canal Zone, 21 March 1945. Dismissal and total forfeitures.
First Lieutenant EMIL E. LOYD, JR. (0-1048077), Coast Artillery Corps.	

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

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

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

CHARGE I: Violation of the 95th Article of War

Specification 1: In that First Lieutenant Emil E. Loyd Jr., 766th AAA Gun Battalion, was at Fort Clayton, Canal Zone, on or about 20 February 1945, drunk and disorderly in uniform in a public place, to wit, Fort Clayton Officers' Club and the grounds adjacent thereto.

Specification 2: In that First Lieutenant Emil E. Loyd Jr., * * *, did, at Fort Clayton, Canal Zone, on or about 20 February 1945, wrongfully strike Second Lieutenant Elaine Macleod, ANC, on the face and body with his hands.

CHARGE II: Violation of the 69th Article of War

Specification: In that First Lieutenant Emil E. Loyd Jr., * * * having been duly placed in arrest at Fort Clayton, Canal Zone, on or about 20 February 1945, break his said arrest before he was set at liberty by proper authority.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 1 of Charge I excepting therefrom the words "drunk and", and guilty of all other Specifications and each Charge. No evidence of any previous convictions was considered. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. In the early afternoon of 20 February 1945 accused escorted Second Lieutenant Elaine MacLeod and Second Lieutenant Frances Garden, both members of the Army Nurse Corps, to the Officers' Club at Fort Clayton, Canal Zone. They whiled away the afternoon taking pictures, drinking, and having lunch (R. 65, 72). Sometime after 5 p.m. First Lieutenant Lee M. Croake happened to pass quite close to the place where the three were sitting. Noticing blood on the floor he stopped and inquired whether he could be of any assistance, an offer which accused rejected with the remark "this is none of your affair" (R. 47). He overheard one of the nurses express a desire to go to the ladies' room and accused reply, "You are going to sneak out the back way. I brought her here and I am going to take her home" (R. 47). According to the testimony of Lieutenant MacLeod and Lieutenant Garden this unpleasantness between Lieutenant MacLeod and accused led the former to throw the contents of her glass at accused. He responded to this by going to the bar and purchasing another round of drinks. When he returned to the table Lieutenant MacLeod was crying. Accused dropped a glass and in attempting to catch it cut his finger (R. 65, 66, 72). With the breaking of this glass a loud and mildly profane altercation ensued between Lieutenant MacLeod and accused which culminated in the latter slapping her several times and twisting her arm (R. 15, 19, 32, 33, 40). This disturbance attracted the attention of the other officers in the club and one of them, Captain Paul W. Warlick, approached the group with a view to putting an end to the dispute. He noticed blood on accused's trousers, and on Lieutenant MacLeod's face, blouse, and skirt. Adopting a ruse, he asked accused if he was Lieutenant Powell. Accused replied in some such fashion as "I am not Lieutenant Powell, I am not Lieutenant this, I am not Lieutenant anybody" (R. 33). Captain Warlick then suggested that accused had better leave the club. Accused told him to mind his own business or there would be trouble (R. 33, 34). However, accused and his two companions left almost immediately thereafter but not before he had turned to some of the onlooking officers and challenged them to a fight if they felt that the affair was any concern of theirs (R. 16, 41, 47).

Outside the club Lieutenant MacLeod and accused continued their argument. They had proceeded about 100 yards when they began scuffling again. Accused put his arm around her neck and she began to beat him on the chest whereupon accused punched her in the stomach. When she broke

away from him and began to run accused tackled her and knocked her down (R. 16, 35, 41, 47, 50, 51, 59, 62, 63). At this point Major John P. Gustafson, who had witnessed the entire affair both in and outside the club, placed accused under arrest. While accused accompanied Major Gustafson - as he was directed to do by the latter - back to the Officers' Club he asked the reason for his arrest (R. 17, 36, 83). On reaching the club Major Gustafson ordered accused to remain outside while he went in to summon the Officer of the Day (R. 17, 83). As soon as Major Gustafson left, accused commandeered a weapons carrier which had been parked outside the club by Technician Fifth Grade Miguel Santana who had been ordered to meet another officer there. Following accused's directions T/5 Santana drove accused to his quarters, helped him dress a cut on his finger and an abrasion over his eye, and then drove him to a point outside the post where accused told him to return to Fort Clayton and say nothing about the trip (R. 51-53).

Both Lieutenant MacLeod and Lieutenant Garden were called as witnesses for the prosecution. Lieutenant MacLeod testified that she had known the accused for approximately one year. She stated that she is subject to "crying jags" which are best treated by giving her "a good shake or slap." In fact accused was forced to do this to her on prior occasions when she became hysterical. Of the events of the night in question she could recall only that she was crying after she threw the drink at accused and that he tried to stop her from crying by holding her arm. After accused left her she returned to the nurses' quarters. The blood on her face was not her blood and there were no bruises or other marks on her face or body that would indicate accused had struck her (R. 64-70).

Lieutenant Garden testified that in the past she had seen Lieutenant MacLeod and accused slap each other "in fun", "the way a boy and girl will do." She further stated that Lieutenant MacLeod was subject to attacks of hysteria and that she herself had shaken her to bring her out of them. As to the incident of the night of 20 February she denied that she saw accused strike Lieutenant MacLeod, although she did see him raise his hand. When confronted by the prosecution with her signed statement which contradicted her testimony on this point the witness insisted that that had been extorted from her by the investigating officer and that she had told him she had not seen accused strike Lieutenant MacLeod. Likewise, she stated that she did not hear Major Gustafson tell accused he was under arrest. All that she heard him say was "I want to see you", or words to that effect. Again her statement was produced to contradict her but she maintained that the word "arrest" had been inserted therein over her protests. She corroborated Lieutenant MacLeod's testimony that the latter bore no physical evidence of having been assaulted by accused (R. 71-82).

4. Accused after being advised of his rights elected to be sworn and testify. He stated that he attended Corpus Christi Junior College Academy in Corpus Christi, Texas, and subsequently Texas A & M for one year. With the coming of war he left college and enlisted in the Army. On the day in question, 20 February 1945, he had escorted Lieutenant MacLeod and Lieutenant Garden to the Officers' Club at Fort Clayton. They arrived there about 2:30 p.m. and after drinking "a few beers" they went outside to take pictures. Five pictures designed to show, and in fact showing, that pleasant relations existed between the three at this time were introduced in evidence (R. 103; Def. Exs. 4-8). They returned to the club for lunch and more drinks. There was some difficulty with three naval officers who were drunk and who displayed too much of an interest in accused's companions but accused finally managed to dispose of them. Two of accused's brother officers joined the party for about 20 minutes and everyone had a drink or two. When they left, Lieutenant MacLeod threw her drink on accused. When drinking together they were in the habit of making a gesture with their glass as if to throw its contents, but on this occasion she miscalculated. Accused was not angry. In fact, he purchased three more drinks. While carrying these drinks from the bar to the table accused dropped one and in some fashion cut the index finger of his right hand "all the way to the bone." Lieutenant MacLeod was crying but accused did not pay any particular attention to her, being too much concerned with his finger. The crying grew to hysteria and it was then that accused "probably" slapped her. He has had experience with such scenes as this before and the only way to bring Lieutenant MacLeod out of them is to slap her. The three moved to a more secluded part of the club where Lieutenant MacLeod continued her crying. Accused could not remember what he said to the officers whose attention was attracted to the scene. He could not remember having an argument with Lieutenant MacLeod as they left the club. He could not remember tackling her and he had "no reason whatsoever in the world" to punch her in the stomach (R. 98-106).

Accused further stated that he has been "going with" Lieutenant MacLeod for about one year and that he intends to marry her. The only thing which has stood in the way up to now is his present wife (R.110).

On cross-examination he admitted that on 20 February he left the post in a truck passing through the gate about 7 p.m. (R. 109, 110).

Lieutenant MacLeod, recalled, confirmed accused's testimony that the only obstacle to their marriage was accused's existing marriage (R. 111).

First Lieutenant Russell W. Paulson and First Lieutenant Kinsey L. Plummer testified that on 20 February 1945 they met accused, who was accompanied by two nurses, at the Officers' Club about 5:30 p.m.

They joined accused and his companions in a drink and remained about 20 minutes or one half hour. During that time everyone was congenial and neither witness observed any ungentlemanly behavior on the part of accused (R. 92-97).

Major Frank N. McGill testified that he was Senior Controller for the 26th Fighter Command and that accused, up to a week before this trial, was Antiaircraft Artillery Liaison Officer with that command. It is of extreme importance that there be a Liaison Officer on duty twenty-four hours a day. The witness was never informed that accused was unfit to perform this duty on the evening of 20 February 1945. Accused's work as Liaison Officer has been excellent and the witness would be willing to have him continue to act as such (R. 89-91).

Captain Joseph Burr testified that he was a Controller for the 26th Fighter Command. On 20 February accused was scheduled to go on duty at 8 p.m. He was a little late but he had made arrangements with the officer who preceded him to hold over until he arrived. Shortly after 8 p.m. accused reported for duty. It was the witness' function, among other things, to make sure that the Liaison Officer was capable of performing his job and he noticed nothing unusual about accused except that he had a bruise on his forehead, was nervous, and had a "suppressed excited appearance." He stated that accused performed his work in an excellent manner (R. 87-89).

5. The court called as a witness Lieutenant Colonel Chester E. Glassen who testified that he was directed by the Commanding General, Coast Artillery Command, to investigate the incident that occurred at the Officers' Club on the evening of 20 February. On the occasion of his first interview with Lieutenant Garden she insisted that she did not see accused strike Lieutenant MacLeod. When the witness returned some days later with a statement for her signature he spoke to her about the Article of War governing perjury because of the disparity between her statement and that of the other witnesses. Lieutenant Garden then gave another statement, which was taken down by a stenographer, transcribed, and signed by her the next day. Before she signed it she looked it over and suggested one or two immaterial changes. She made no objection to the part which said that she had seen accused strike Lieutenant MacLeod, nor to the part which said she had heard Major Gustafson place accused under arrest (R. 112-117).

On cross-examination and examination by the court the witness said that the first two interviews lasted about one half hour and that during the second interview Lieutenant Garden was in tears. He denied that he had used force, promises or duress to obtain the statement from Lieutenant Garden. He wanted Lieutenant Garden to

understand that what she said might be used against her and for that reason he read the portion of the Manual dealing with perjury, a practice he used with other witnesses (R. 117, 118).

6. a. Specifications 1 and 2 of Charge I:

The first of these Specifications, after its modifications by the findings of the court, alleges that accused was disorderly in a public place, the Officers' Club, Fort Clayton, Canal Zone, in violation of Article of War 95. The second Specification alleges that accused committed an assault and battery on Second Lieutenant Elaine MacLeod, ANC, in violation of Article of War 95. The uncontradicted evidence shows that accused slapped, punched, and tackled Lieutenant MacLeod. The accused contended that the assault was committed for the purpose of shocking Lieutenant MacLeod out of an hysterical attack or, somewhat inconsistently, that there was consent to it. But the evidence as to accused's belligerent mood, and the character and violence of his assault warranted, if it did not require, the rejection by the court of these defenses. In thus assaulting a female officer accused was obviously guilty of "conduct unbecoming an officer and a gentleman" in violation of Article of War 95 (CM 234296, Pennington, 20 B.R. 325). The evidence further shows that accused was insolent and pugnacious toward other officers, one of whom was his superior, that he engaged in a loud and mildly profane argument with an Army nurse, and that he broke arrest. Inasmuch as the accused strenuously objected to the court's considering the fact of the assault to establish the allegation of disorderliness this conduct of accused, apart from the assault, is important. In pressing this objection he relied on paragraph 27, Manual for Courts-Martial, 1928, which provides:

> "One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person. Thus a soldier should not be charged with disorderly conduct and for an assault when the disorderly conduct consisted in making the assault, * * *."

Accordingly, at the outset of the trial, accused moved to strike the allegation of disorderliness from Specification 1. This motion was denied, and rightly, since the court could not at that time know that the evidence would bear out accused's contention. At the close of the prosecution's case the accused for the same reason moved for a finding of not guilty of Specification 1. This likewise was denied. We of course do not know whether the court in denying the motion considered the evidence as to the assault on the question of disorderliness, or whether they thought that accused's conduct, apart from the assault, was sufficiently indecorous in itself to constitute a violation of Article of War 95. If the court did consider the evidence as to the assault under

the Specification we think their action was erroneous. Plainly it violated the admonition of the Manual and equally plainly, it seems to us, it violated the dictates of ordinary fairness. The prosecution pressed to a successful issue a Specification which charged the accused with assault in violation of Article of War 95. We see no reason why it should seek to use the same conduct to support another Specification laid under the same Article of War. It just will not do to say that accused was not prejudiced because the sentence was not thereby increased. He was prejudiced to the extent that anyone who is convicted of two offenses when he should be convicted of only one is prejudiced. We hold, therefore, that the assault should not have been considered in deciding whether accused was guilty of the offense alleged in Specification 1, in violation of Article of War 95. So far as there is anything to the contrary in Lowther, CM 233763, 20 B.R. 111, we decline to follow it. Neither can we assent to the proposition that accused's other actions constituted a violation of Article of War 95. In our opinion, his conduct, apart from the assault, was not so conspicuously disorderly as to amount to a violation of that Article. It does not stamp accused as morally unfit to be an officer or to be considered a gentleman. For these reasons, therefore, we hold that the record is legally sufficient to support the finding of guilty of Specification 2 and legally sufficient to support only so much of the finding of guilty of Specification 1 as involves a finding that accused was disorderly at the time and place alleged in violation of Article of War 96.

b. Specification of Charge II:

This Specification alleges that accused broke arrest. The evidence establishes that Major Gustafson ordered accused into arrest after he had witnessed accused's assault on Lieutenant MacLeod. The fact that accused accompanied Major Gustafson and inquired into the reasons for his arrest likewise establish that he heard and understood the order. Under Article of War 68 an officer has power to order into arrest any person subject to military law who takes part in a quarrel, fray or disorder. Clearly accused's arrest was warranted under this Article of War. The evidence further shows that Major Gustafson ordered accused to remain outside the Officers' Club while he went in search of the Officer of the Day and that accused, instead of so remaining, commandeered a Government vehicle and left the post. It was accused's duty to remain in the immediate vicinity of the Officers' Club while Major Gustafson sought out the Officer of the Day, presumably to arrange the details of accused's arrest, and in failing to do this, accused was guilty of breach of arrest. It is immaterial that this breach was for the purpose of enabling accused to report for duty as Antiaircraft Artillery Liaison Officer. The record is legally sufficient to support the finding of guilty of this Specification.

7. Every member of the court who sat at accused's trial and the personnel of the prosecution and defense signed a petition for clemency

asking that accused be retained as an officer, which petition is attached to the record. There is likewise attached to the record a letter from Major Richard B. Walker, dated 13 April 1945, who states that since 25 March 1945 accused has been Assistant S-3 under his supervision and that he has performed his work in an excellent manner. He further states that accused, during this period, has completely abstained from liquor.

8. War Department records show that accused is 24 years old and married. He attended the Agricultural and Mechanical College of Texas from 20 August 1941 to 11 December 1941 where he was a member of the ROTC. On 9 February 1942 he enlisted in the Army and on graduation from the Antiaircraft Artillery School, Camp Davis, North Carolina, he was commissioned a second lieutenant, Army of the United States. On 1 May 1943 he was promoted to first lieutenant.

9. The court was legally constituted and had jurisdiction of the accused and the subject matter. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge I as involves a finding that accused was disorderly at the time and place alleged in violation of Article of War 96, legally sufficient to support the findings of guilty of all other Specifications and the Charges, and legally sufficient to support the sentence and to warrant confirmation of the sentence. The sentence imposed is authorized upon conviction of a violation of either Article of War 69 or Article of War 96. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Thomas N. Tabby, Judge Advocate

William H. Gambrell, Judge Advocate

Robert E. Trevithan, Judge Advocate

SPJGH-CM 279578 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUL 25 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 First Lieutenant Emil E. Loyd, Jr. (0-1048077), Coast Artillery Corps.

2. Upon trial by general court-martial this officer was found guilty of being disorderly in uniform in the Fort Clayton Officers' Club and vicinity in violation of Article of War 95 (Spec. 1 of Charge I); guilty of assault on Second Lieutenant Elaine MacLeod, Army Nurse Corps, in violation of Article of War 95 (Spec. 2 of Charge I); and guilty of breach of arrest in violation of Article of War 69 (Spec. of Charge II). He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. 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 only so much of the finding of guilty of Specification 1 of Charge I as involves a finding that accused was disorderly at the time and place alleged in violation of Article of War 96; legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. In the early afternoon of 20 February 1945, accused escorted Second Lieutenant Elaine MacLeod, A.N.C., and another Army nurse to the Officers' Club, Fort Clayton. During the afternoon the three lunched, took pictures and had several drinks. About 6 p.m. they were sitting in the club drinking when accused and Lieutenant MacLeod engaged in a loud argument which culminated in his slapping her and twisting her arm. This scene attracted the attention of the other officers in the club and one of them, a captain, approached accused with a view to remonstrating with him. When the captain suggested that accused leave the club, accused told him to mind his own business. Almost immediately thereafter, however, accused did leave but not before he had turned to some of the onlooking officers and challenged them to a fight if they felt the affair was any concern of theirs. Outside, the argument between accused and Lieutenant MacLeod continued. They began to scuffle and accused punched her in the stomach. She broke away from him and ran but he tackled her and knocked her to the ground. Accused was then placed under arrest by an officer who had been a witness to the entire affair both in and outside the club. They returned to the club and the arresting officer directed accused to remain outside while he went in to summon the Officer of the Day. As soon as he disappeared accused commandeered a Government vehicle which was parked outside the club and directed the operator to drive him to his quarters and thence to a point off the post. He then dismissed the driver and reported for duty as Antiaircraft Artillery Liaison Officer.

I recommend that the sentence be confirmed but that the execution of the dismissal be suspended during good behavior, that the total forfeitures be reduced to a forfeiture of pay of $50 per month for six months, and that the sentence as thus modified be carried into execution.

4. Consideration has been given to a clemency recommendation signed by all the members of the court who sat at accused's trial, and the personnel of the prosecution and the defense, to the effect that accused be retained in the service.

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part. Sentence confirmed, dismissal suspended, forfeitures reduced . GCMO 330, 9 July 1945).

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

SPJGN-CM 279593

15 MAY 1945

UNITED STATES v. Private EDWARD J. TRACY (36651946), Headquarters and Base Service Squadron 77th Air Service Group.	)	XXI BOMBER COMMAND Trial by G.C.M., convened at APO #247, 7 April 1945. Dishonorable discharge, and confinement for five (5) years. Disciplinary Barracks.

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

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

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

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

Specification: In that Private Edward J. Tracy, Headquarters and Base Services Squadron, 77th Air Service Group, did, at Island Stockade, APO 247, on or about 20 March 1945, offer violence against Herbert A. Holmes, First Lieutenant, CMP, Company "C", 745th Military Police Battalion, his superior officer, who was then in the execution of his office, in that he, the said Private Edward J. Tracy, did threaten and menace the said Lieutenant Herbert A. Holmes by brandishing a jagged broken mirror in his hand and stating "What do you want to do, get your throat cut?" or words to that effect.

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that Private Edward J. Tracy, Headquarters and Base Services Squadron, 77th Air Service Group, having received a lawful order from Staff Sergeant Archie L. Jackson, Company "C", 745th Military Police Battalion, a non-commissioned officer who was then in the execution of his office, to report to the Guard Tent, did at Island Command Stockade, APO 247, on or about 20 March 1945, willfully disobey the same.

He pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 1, Charge II, but guilty of both Charges and all other Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence, designated the 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 findings of guilty of Specification 2, Charge II, and Charge II, present no legal problem, and, since these findings are sustained by the evidence, they will not be discussed. Concerning the Specification, Charge I, it is sufficient to observe for the purpose of this opinion that the evidence shows that at the time and place alleged First Lieutenant Herbert A. Holmes, the prison officer of Island Stockade, APO #247, accompanied by Captain Nelson S. Bockus and Staff Sergeant Archie L. Jackson, called the accused from the tent to which he was assigned as a garrison prisoner. When the accused appeared, Lieutenant Holmes asked him if he had understood the order which the sergeant had previously given to him to surrender a bracelet which, under the rules of the guardhouse, he had no right to retain. According to the testimony of Lieutenant Holmes, the accused, who had only a short time before had an altercation with the staff sergeant concerning the surrender of the bracelet, took "* * * one step backward and as he was stepping backward he looked down at his hand * * *" and said "What are you looking for, do you want to get your throat cut?" (R. 19). As these words were spoken, Lieutenant Holmes, who was standing about five feet from the accused, observed that he had a broken mirror in his hand. Lieutenant Holmes looked at the accused for "probably two or three seconds and then" said, "Apparently you have not learned your lesson", and turned and left the stockade. Lieutenant Holmes was of the opinion that the broken mirror was a dangerous weapon and that, the accused, if pressed, would probably have used it "as a weapon" (R. 20, 21). Captain Bockus gave similar testimony and in particular testified that, while the accused was speaking, his hands "appeared to be hanging at his side" (R. 26). Sergeant Jackson also testified that the accused did not move the hand in which he held the mirror (R. 13). No other witnesses testified for the prosecution concerning the offense in question.

4. The Specification of Charge I alleges that the accused did "offer violence against Herbert A. Holmes, First Lieutenant * * *, his superior officer, who was then in the execution of his office, in that he, [the accused], did threaten and menace the said Lieutenant Herbert A. Holmes by brandishing a jagged broken mirror in his hand and stating 'What do you want to do, get your throat cut' or words to that effect". The Specification was laid under Article of War 64.

The evidence clearly shows that the accused did not brandish a broken mirror as alleged in the above Specification. The evidence does show, however, that the accused, while asking Lieutenant Holmes a disrespectful and threatening question, did hold a broken mirror in his hand without moving it. The question arises, therefore, whether such conduct in the absence of any proof of a hostile gesture or hostile physical movement by the accused constitutes an offer of violence within the meaning of Article of War 64, which provides as follows:

> "Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct."

An analysis of Article of War 64 shows that it provides a maximum penalty of death for four different acts, as follows:

"Any person * * * who * * *
(1) strikes his superior officer
(2) or draws or lifts up any weapon
(3) or offers any violence against him, * * *
(4) or willfully disobeys any lawful command of his superior officer * * *".

In discussing the first three of the above described acts the Manual for Courts-Martial states that:

> "The word 'strikes' means an intentional blow with anything by which a blow can be given.
>
> "The phrase 'draws or lifts up any weapon against' covers any simple assault committed in the manner stated. The weapon chiefly had in view by the word 'draw' is no doubt the sword; the term might, however, apply to a bayonet in a sheath or to a pistol and the drawing of either in an aggressive manner or the raising or brandishing of the same minaciously in the presence of the superior and at him is the sort of act contemplated. The raising in a threatening

manner of a firearm (whether or not loaded) or of a club, or of any implement or thing by which a serious blow could be given, would be within the description, 'lifts up' (Winthrop).

"The phrase 'offers any violence against him' comprises any form of battery or of mere assault not embraced in the preceding more specific terms 'strikes' and 'draws or lifts up'. But the violence where not executed must be physically attempted or menaced. A mere threatening in words would not be an offering of violence in the sense of the article (Winthrop)" (MCM, 1928, par. 134a).

From this explanation it is apparent that the first three acts described in Article of War 64 are closely related and constitute merely different types of assaults or assaults and battery. The word "strikes", the first of this series, merely describes one form of a battery. The words "draws or lifts up any weapon" describes an assault committed in a particular manner with a weapon. The words "or offers any violence against him", with which we are at present primarily concerned, are designed to embrace any form of battery or assault not included in the more specific terms "strikes" or "draws or lifts up any weapon". For example, the offense of striking at an officer, although not within the scope of the word "strikes" as used in Article of War 64, is clearly included within the scope of the words "offers any violence". Similarly, the act of rushing toward an officer in an angry and threatening manner would be an offer of violence. The explanation in the Manual makes it clear, however, that in order to constitute an offer of violence within the meaning of Article of War 64 the conduct of an accused must amount at least to an assault and that mere threatening words would not be sufficient. The Manual defines an assault, as follows:

"* * * an attempt or offer with unlawful force or violence to do a corporal hurt to another. (Clark and Marshall). Raising a stick over another's head as if to strike him, presenting a firearm ready for use within the range of another, striking at another with a cane or fist, assuming a threatening attitude and hurrying toward another, are examples of assault.

"Some overt act is necessary in any assault. * * *" (MCM, 1928, par. 149l).

In 17 BR 121, Fields, a case involving an alleged lifting up of a loaded rifle against a superior officer, the Board of Review stated that:

"The Specification, Charge III, alleges that the accused lifted up a loaded service rifle against Captain Gooding but there is nothing in the evidence disclosing

any such act. It does not appear that he lifted his rifle, pointed it or moved it against or toward his superior officer. On the contrary he remained in a fixed position from the time his superior appeared on the scene until he threw aside his rifle after first ejecting the cartridges. The Captain upon discovering the disorder deliberately placed himself in front of the accused and in such a position that the rifle was pointed in his general direction. The accused remained in the same position, his rifle at 'low port', and Captain Gooding himself testified he was not personally pressed. Other witnesses corroborate this fact. There was no threatening motion or any overt act by the accused whereby he actually attempted to inflict injury upon his superior. Although the accused did make a remark to the effect that if he, the accused, fired, he would take the Captain with him there was not a present offer of violence accompanying his words and no 'lifting up' of his rifle as alleged. The finding of guilty under the Specification is unwarranted."

The conduct of the accused in the present case was similar to the conduct of the accused in the case quoted above. In that case the accused did not accompany his threatening words by an overt act of lifting up his rifle against his superior officer and in the present case the accused did not accompany his hostile question by an overt act of lifting up a broken mirror against his superior officer. Nor did the accused attempt any violence or commit any overt act within the meaning of the definition of assault. The findings that the accused violated the 64th Article of War are, therefore, unwarranted.

On the other hand, although the evidence fails to show an offer of violence within the meaning of Article of War 64, it does show that the accused was guilty of disrespect toward his superior officer within the meaning of Article of War 63. In 23 BR 168, Hamilton, it was held that the offense of disrespect toward a superior officer was a lesser included offense under a charge of willfully disobeying a superior officer when the Specification alleged the use of disrespectful language. In view of this precedent, and, since the wording of the specification in the present case clearly puts in issue disrespectful words and conduct, the evidence sustaining that part of the specification necessarily established the lesser included offense of disrespect toward a superior officer, an offense violative of Article of War 63.

The table of maximum limits of punishment provided in the Manual for the offense of behaving with disrespect toward a superior officer is confinement at hard labor for six months and forfeiture of two-thirds pay for a like period. The maximum punishment provided for the offense of willful disobedience of a noncommissioned officer, the other offense established by the evidence in this case, is the same (MCM,

1928, par. 104a). Section B of paragraph 104c of the Manual states that:

> "If an accused be found guilty by the court of two or more offenses for none of which dishonorable discharge is authorized, the fact that the authorized confinement without substitution for such offenses is six months or more, will authorize dishonorable discharge and total forfeitures."

In view of the above provision the maximum sentence authorized in the present case is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification, Charge I, and Charge I, as involves the findings that the accused did, at the time and place alleged, behave with disrespect toward Herbert A. Holmes, First Lieutenant, his superior officer, who was then in the execution of his office, in that he, the said Private Edward J. Tracy, did threaten the said Lieutenant Herbert A. Holmes by holding a jagged broken mirror in his hand and stating "What do you want to do, get your throat cut" or words to to that effect in violation of Article of War 63; legally sufficient to support Specification 2 Charge II and Charge II; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

Abner E. Lifscomb, Judge Advocate.

Robert J. Clamen, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 279593 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War

1. In the case of Private Edward J. Tracy (36651946), Headquarters and Base Service Squadron, 77th Air Service Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification, Charge I, and Charge I, as involves the findings that the accused did, at the time and place alleged, behave with disrespect toward Herbert A. Holmes, First Lieutenant, his superior officer, who was then in the execution of his office, in that he, the said Private Edward J. Tracy, did threaten the said Lieutenant Herbert A. Holmes by holding a jagged broken mirror in his hand and stating "What do you want to do, get your throat cut" or words to that effect in violation of Article of War 63; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

2. I concur in the holding of the Board of Review and for the reasons stated therein 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 one year, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. This case is submitted for the action of the Secretary of War in order to avoid the delay which would be involved in transmitting the approved holding overseas for the action of the reviewing authority.

4. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made 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

(Only so much of sentence approved as involves dishonorable discharge, total forfeitures and confinement for one year. G.C.M.O. 230, 19 June 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General

SPJGK - CM 279602

30 MAY 1945

UNITED STATES	)	FAIRFIELD AIR TECHNICAL SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Wright Field, Dayton, Ohio, 5 and 6 April 1945. Dismissal.
Captain VINCENT GRZEGOROWICZ (0-1646750), Signal Corps.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Captain Vincent Grzegorowicz, Signal Corps, 4020th Army Air Forces Base Unit, having been married to Anna Lucille Branch Grzegorowicz as his lawful wedded wife since about 7 July 1943 and such marriage being in full force and effect at all times hereinafter stated, did wrongfully and unlawfully, on four separate occasions at the times and places hereinafter specified, engage in sexual intercourse with one Margaret Leslie, the wife of an enlisted man in the Army of the United States who throughout January 1944 and until about 1 June 1944 was on duty in a theater of operations, the married status of said Margaret Leslie and her husband's duty assignment in a theater of operations being then and there well known to the said Captain Vincent Grzegorowicz, to wit: on two occasions in or about May 1944 at the Dayton Biltmore Hotel, Dayton, Ohio; on one occasion between 20 May 1944 and 31 May 1944 in the apartment of Mr. James T. Ramsey in the 200 block of North Robert Boulevard, Dayton, Ohio, and on one occasion during or about October, 1944 at the residence of said Captain Vincent Grzegorowicz and one Lynn K. Chapman on Bancroft Street, Dayton, Ohio.

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

Specification: In that Captain Vincent Grzegorowicz, then First Lieutenant, Signal Corps, 4020th Army Air Forces Base Unit, having been married to Anna Lucille Branch Grzegorowicz as his lawful wedded wife since about 7 July 1943 and such marriage being in full force and effect at the time hereinafter specified, did, wrongfully and unlawfully, on or about 3 June 1944, transport

from Dayton, Ohio, to Columbus, Ohio, one Margaret Leslie; register himself and the said Margaret Leslie at the Neil House, Columbus, Ohio, as man and wife, to wit: as Lieutenant and Mrs. V. Grzegorowicz; and occupy a hotel room in the said Neil House overnight with the said Margaret Leslie, the wife of an enlisted man in the Army of the United States, the married status of said Margaret Leslie and the military status of her husband being then and there well known to the said Captain Vincent Grzegorowicz.

As a special plea the defense moved to strike from both Specifications that part which described Margaret Leslie as the wife of an enlisted man in the Army of the United States serving in a theater of operations, and the accused's alleged knowledge of that fact on the ground that such was surplusage and constituted pleading the evidence. The court overruled the motion (R. 7), whereupon the accused pleaded not guilty to the Charges and the Specifications. He was found guilty of the Charge and its Specification except the word "four", substituting therefor the word "three," and except the words "on one occasion between 20 May 1944 and 31 May 1944 in the apartment of Mr. James T. Ramsey in the 200 block of North Robert Boulevard, Dayton, Ohio", guilty of the Additional Charge and its Specification, except the words "transport from Dayton, Ohio, to Columbus, Ohio, one Margaret Leslie", of the excepted words, not guilty, of the substituted word, 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 the findings of guilty may be summarized as follows:

It was stipulated by the trial judge advocate, individual defense counsel, and accused that the accused is in the military service and has been since 26 November 1941; that he is a member of the Signal Corps on duty with the 4020th Army Air Forces Base Unit; that on 7 July 1943 accused was married to Anna Lucille Branch Grzegorowicz; that such marriage has been in full force and effect since that date; and that they separated in November 1943 and have since lived separate and apart (Ex. P-1).

The Charge and its Specification.

Mrs. Margaret Leslie, twenty-one years of age, was, during the occurrences hereinafter related, the wife of Claude Robert Leslie, an enlisted soldier in the Army Air Corps (R. 11,12), who, on 12 December 1943 was reported by the War Department as missing in action (R. 57). Photographs of Mrs. Leslie dressed in bathing suit, play suit, and a "T" shirt were introduced in evidence (R. 21, Exs. 2-7). On New Year's Eve preceding 1 January 1944 she and Lieutenant Ralph Morgan were attending a party at the Officers' Club, Patterson Field, Fairfield, Ohio. There she first met the

accused (R. 12,13,25). Later, on or about the first of April 1944, she met the accused and Lieutenant Morgan in the lobby of the Biltmore Hotel, Dayton, Ohio (R. 31). The three of them proceeded to the Kittyhawk Room and later in the evening accused took her to dinner and the theater and escorted her home (R. 26,31). Sometime "around Easter of '44" (Easter took place on 9 April 1944) she began having "dates" with the accused once or twice a week (R. 13,27). On cross-examination it was shown that on 12 April 1944 she wrote a letter to the accused addressing him as -

> "Dearest Greg:
> My darling, it seems like time just drags when we're not together and when we are - its hardly no time before we have to part - "

and after three pages concerning her activities and an invitation to join her "mother-in-law" on a trip, she closed with -

> "Greg darling. I do love you so very much. I didn't believe it could be possible for me to love you anymore than I already do -
> "Until Tonight. All my love.
> Forever
> Margaret." (R. 24, Def. Ex. A.)

Mrs. Leslie testified that she informed accused when she first started going with him she was married and that her husband was missing in action (R. 13,14). On cross-examination she stated that she told accused of her marital status about the first of April 1944, the second time she went with him, and that accused stated he already knew she was married, Lieutenant Morgan having told him (R. 23,24,56). She stated that she wore wedding rings on all occasions when she went out with accused (R. 23, 33). She also stated that accused advised her sometime in May 1944 that he was married, but that he was not in love with his wife and that he was separated from her (R. 14,19,36,56). According to her testimony, around the first of May 1944, after having dinner and a few drinks together, she and the accused went to the accused's room in the Biltmore Hotel where they had their first act of sexual intercourse. She remained in the room of accused until the next morning (R. 14,15,57).

Early in May 1944 a second act of sexual intercourse between the two occurred under the "same" circumstances (R. 15). They first had dinner and then proceeded to accused's room at the Biltmore Hotel where she remained until the next morning, at which time they had breakfast together (R. 15). On cross-examination Mrs. Leslie testified that each of the two acts of intercourse at the Biltmore Hotel occurred on a Saturday night (R. 34). Upon examination of a calendar she stated the first act occurred on 29 April 1944 and the second one on 13 May 1944 (R. 35).

On 18 June 1944 while Mrs. Leslie and the accused were at Phillips Swimming Pool, Dayton, Ohio, she was informed by telephone that her husband "was safe" (R. 18,48). She mentioned this to the accused (R. 18,48). Mrs. Leslie had previously been notified around 12 December 1943 that her husband was missing in action and had heard nothing about him until this time (R. 57,58). Her husband returned to the United States on 25 June 1944 and she only saw accused twice after that (R. 49,66). When asked concerning her husband, "Were you anxious to see him again?" she replied, "I was anxious to hear that he was safe" (R. 58).

Pursuant to a telephone call by Mrs. Leslie to the accused in early October 1944, she and accused met at the Crystal Bar, Miami Hotel, Dayton, Ohio, and after dinner went to the apartment shared by the accused and Mr. Lynn K. Chapman (R. 15,16,52,59). Mr. Chapman and "a girl" were in the apartment when they arrived but they left about 12:00 p.m. (R. 16). Mrs. Leslie and accused thereupon proceeded to accused's room where they remained together until the next afternoon. On this occasion they again had sexual intercourse (R. 15,16,17).

Mr. Chapman testified that the last time he saw Mrs. Leslie arrive at the apartment which he shared with accused she brought some groceries and she and accused prepared dinner (R. 60). Later while Mrs. Leslie and accused were in the kitchen accused "seemed to be in argument with her so we (witness and his girl friend) stayed out of the kitchen." Witness then added:

> "*** I imagine about 11:30 Capt. Grzegorowicz came in and went into his bedroom and shut the door. I don't remember him saying anything to me at that time, then we decided to go to a show. I believe my friend asked Mrs. Leslie if she wanted us to drop her off at the house and she said no she would be leaving shortly anyway so we must have left, must have been around a quarter of 12:00 or 12:00." (R. 60)

When witness returned to the apartment about 4:00 a.m. he did not see accused or Mrs. Leslie but doubted if he "could" have seen anyone in the living room when he came in for "as I remember I did not" out the lights on in the living room (R. 60,62). When he arose about noon he opened his bedroom door and as he remembered it accused was in the kitchen and Mrs. Leslie was sitting in the living room (R. 60).

Additional Charge and its Specification.

Mrs. Leslie testified that in the early part of June 1944, pursuant to a suggestion by accused, she and the accused went by train from Dayton, Ohio, to Columbus, Ohio, the tickets used having been provided by accused (R. 18,19,57). On the train she became ill (R. 48). Upon arrival in Columbus they went to the Neil House where accused registered and they spent the night

in the same room, leaving there about 5:00 p.m. the next day (R. 18,19, 47). There was no act of sexual intercourse between the two in Columbus (R. 47).

It was stipulated by and between the trial judge advocate, the individual defense counsel, and the accused as follows:

"4. That register card No. M-26480 of the Neil House Hotel, Columbus, Ohio, under date of 3 June 1944 bears the signature of the accused as follows: 'Lt. and Mrs. V. Grzegorowicz, O-1646750, Hq ASC, Patterson Field, Ohio'; that the time of registration was 8:59 PM; and that the rate paid was four dollars and ninety-five cents ($4.95)." (Prs. Ex. 1)

Technical Sergeant Claude R. Leslie testified that he was the husband of Margaret L. Leslie whom he had married on 27 March 1942. On 1 December, while acting as a ball-turret gunner on a B-17 bomber on his 25th combat mission from England he was shot down and was missing in action until 6 June 1944, when he was able to make his way to a neutral country (R. 64-65). He returned to the United States on 25 June 1944. He spent 21 days on furlough at Dayton, Ohio. It was quite some time after he was home that he "tricked" his wife into telling him that she had been "running around with" Captain Grzegorowicz. She did not tell him about "running around with" Lt. Morgan, but told him about "running around with" Lieutenant Ely of the Navy. Witness had never met the accused (R. 67-68).

4. Evidence for the defense.

Accused, after being apprised of his rights as a witness, elected to take the stand and testify under oath (R. 88). He stated that he was 28 years of age and married but that he separated from his wife in November 1943 (R. 90,92).

He was introduced to Mrs. Leslie "just as Margaret" in the latter part of December 1943 and next saw her that month at the New Year's party at the Officers' Club. He saw her again in the Biltmore Hotel in early March 1944 and "I saw Mrs. Leslie on an average of twice a week for a time there" (R. 90,91). At this time he did not know she was married. She wore no wedding rings. He advised her of his marital status and that he was separated from his wife (R. 91,92). It was not until the latter part of April 1944 that Mrs. Leslie told him she was married. She told him that her husband had gone overseas, that he was missing in action, and she believed him to be dead (R. 93-94).

Accused stated that when he told the investigating officer that he knew in February 1944 that she was married he was wrong (R. 108). Accused testified further that in May 1944 he only saw Mrs. Leslie twice and that he had no sexual intercourse with her during that month, nor at any time

after he knew she was married (R. 98,119).

"Q. Now you have stated that you have seen Mrs. Leslie quite often when you first started going with her, what was the reason for your seeing her only twice in the month of May?

"A. Well, toward the end of the month of April she had started to make all sorts of embarrassing telephone calls at the office for one thing, and also at the YMCA where I was living at the time, she was calling me up all times of the day and night. On one occasion got me out of bed at about 3:30 in the morning and sounded like an emergency the way she told it to me and I went down and she was out in a parked car in front of the place with another couple, and in circumstances that were pretty disgusting to me; and I was breaking off with her and was going to see as little of her as possible."

On cross-examination he admitted that he had engaged in sexual intercourse with Mrs. Leslie for the first time five or six days after he met her in the Biltmore Hotel about the middle of March (R. 112), and also in April, but he denied any such intercourse on the 29th of April 1944 (R. 114). This testimony was later stricken from the record upon motion of defense counsel (R. 113), but the accused was required to answer the question whether he had intercourse with Mrs. Leslie in April 1944 in the Dayton Biltmore Hotel. Accused replied; "I believe I did", but was positive that he did not do so on or about 29 April because he did not see her on that date (R. 114-115). He saw her only twice in May and emphatically denied having intercourse with her upon either of these occasions (R. 115).

In a pre-trial statement accused admitted that he had had sexual relations with Mrs. Leslie after he learned that she had been married, but she had led him to believe that her husband was dead (R. 120). Accused contended on the witness stand that he never had "dates with her after" he knew her husband was in the Army (R. 124).

In June 1944 accused arranged with "a Lieutenant Chalin" to visit Columbus, Ohio (R. 100). Lieutenant Chalin was unable to leave and upon accused's arrival at the station he found Mrs. Leslie there with a ticket and a little bag (R. 100,125,126). He had earlier in the week told Mrs. Leslie of his plans for the trip (R. 125). She was ill before departure and on the train she became worse (R. 126). Upon arrival in Columbus she told accused she had no funds (R. 126). Accused admitted he registered as "Lt. and Mrs. V. Grzegorowicz" at the Neil House where they spent the night, leaving Columbus early in the evening of the next day (R. 126,127). They did not engage in sexual intercourse on that occasion (R. 126). Accused further admitted he knew she was married at this time (R. 127). In answer to a question by the court as to the nature of Mrs. Leslie's illness, accused replied, "monthly period, sir" (R. 138).

Accused stated Mrs. Leslie did not come to his apartment in October 1944, but was there in September 1944 (R. 122). On this occasion he "told

Mrs. Leslie exactly what I thought of her" (R. 105). Shortly after 11:00 p.m. he went to his bedroom leaving Mrs. Leslie in the kitchen and retired alone (R. 105,123). The next morning upon arising at 10:30 or 10:45 a.m. he was surprised to discover Mrs. Leslie on the davenport in the living room (R. 106). Mrs. Leslie told him she must have fallen asleep the previous evening not realizing how late it was (R. 106). He denied having sexual intercourse on this night (R. 106).

Mr. James T. Ramsey testified he lived at 218 N. Roberts Boulevard, Dayton, Ohio, and that on two occasions, the first "in the middle of April 1944" and the second about ten days later, Mrs. Leslie and the accused visited him at his apartment (R. 143,144). On neither of the visits was she wearing wedding rings (R. 145,146). On another occasion, one morning in June 1944 at about 1:00 a.m. Mrs. Leslie, who was "considerably upset and nervous," telephoned the witness and then came alone to his apartment, where she spent the remainder of the night (R. 148).

Lieutenant Morgan testified he became acquainted with Mrs. Leslie at the Lantz Merry-Go-Round in December 1943, and subsequently had numerous dates with her until March 1944. He saw her two or three times a week, mostly on week ends (R. 77,78). She was never wearing wedding rings when she was with him (R. 78). He did not know she was married until about the last of February. She told him she was married and that her husband had been shot down over Germany and had been missing for quite some time and that she did not think he was alive (R. 84). Witness never told accused that she was married (R. 84). Lieutenant Morgan stated that he grew tired of her in February and stopped going with her about the first of March (R. 87). Witness further testified he could remember two or three times shortly after accused started going with Mrs. Leslie that accused stated that he (accused) had had sexual intercourse with her (R. 86,87). When asked if he himself had ever had sexual intercourse with Mrs. Leslie Lieutenant Morgan elected not to answer in exercise of his constitutional rights (R. 80).

Lieutenant Colonel Arthur Y. Snell, Chief of the Radio Branch of the Communications Maintenance Section of the Maintenance Division, testified he had been acquainted with accused since February of 1944 and that he (accused) was in charge of the command and liaison group or sub-unit of the Communications Unit of the Radio Branch (R. 153). He performed these duties in an excellent to superior manner and his character and reputation for truth and veracity were excellent (R. 153,154).

Major Kenneth A. Carmin testified he had known accused since March 1943 and that accused was assigned to his unit (R. 154). He performed his duties in an excellent to superior manner and was held in high regard by their mutual acquaintances (R. 155).

5. The accused has been found guilty of having sexual intercourse with Margaret Leslie, the wife of an enlisted man, in Dayton, Ohio, on three separate occasions, at a time when he himself was married to another and had knowledge that Mrs. Leslie's husband was an enlisted man in the military service. He has also been found guilty of registering himself and her as "Lieutenant and Mrs. V. Grzegorowicz" at a hotel in Columbus, Ohio, and of occupying a room there overnight with her, while he was married to another and had knowledge of her marital status. The record clearly shows that shortly after her husband had been reported missing in action, Mrs. Leslie began "running around" with a Lieutenant Morgan, who introduced her to accused in the latter part of 1943, and that in March, following an apparent break between her and Lieutenant Morgan, she had her first date with accused, thereby inaugurating a relationship that existed for a number of weeks. The accused admitted that he did have sexual intercourse with Mrs. Leslie, but denied that he had such relations with her on the dates alleged in Specification 1, and that he had ever had sexual intercourse with her after learning that she was married. In addition he contended that when Mrs. Leslie went with him to Columbus, Ohio, she did so without being invited by him. The record discloses numerous contradictions between the accused's testimony and his pre-trial statements. The reference by Mrs. Leslie to her mother-in-law in her letter to accused, dated 12 April, which letter the defense offered in evidence, shows that Mrs. Leslie at least held herself out to accused as being married, and indicates by the casual manner in which it was made that it was not news to accused that she had a mother-in-law. The court had the opportunity to see the witnesses and to observe their demeanor on the witness stand. The Board finds nothing in the record that would warrant disturbing its findings concerning the disputed facts.

Four undisputed essential facts appear in the record, which were admitted by accused, namely: that the accused during all of the occurrences alleged was a married man and Margaret Leslie was not his wife; that Margaret Leslie was a married woman; that the two did carry on an affair from some time in March 1944 until at least June 1944, during which period they did at times engage in sexual intercourse; and that on 4 June 1944 accused, then a first lieutenant, registered himself and Mrs. Leslie at a hotel in Columbus, Ohio, to which they had gone from Dayton on the same train, as "Lieutenant and Mrs. V. Grzegorowicz," and remained together in a room there overnight. In addition, as previously indicated, the Board agrees with the conclusions reached by the trial court that prior to 1 May 1944 accused was well aware of the fact that the husband of Mrs. Leslie was an enlisted man, who had been reported missing in action, that with that knowledge he committed two acts of adultery with her, and that after the return of accused's husband to the United States, a fact of which accused was also well aware, accused committed a third act of adultery with Mrs. Leslie in the month of October 1944. These facts fully establish a series of acts of adultery by a married officer with the wife of one whom he knew to be an enlisted man. Such conduct clearly brings discredit upon the military service and thereby violates Article of War 96 (CM 276250, Harvey). The Board of Review has consistently held it to

be a violation of Article of War 95, as conduct unbecoming an officer and a gentleman, for an officer to register at a hotel as his wife a woman whom he well knows not to be his wife (CM 233780, Bentley, 20 B.R. 127; CM 245014, Cookerly, 29 B.R. 99). The Board finds no difficulty in concluding that accused's action in registering Mrs. Leslie as his wife at a public hotel, and of spending the night with her in a room there constitutes a violation of Article of War 96. That Mrs. Leslie very willingly cooperated with accused in the commission of the offenses of which he was found guilty, and, as contended by accused, may even have sought him out after he desired to sever his relations with her, might be considered as extenuating circumstances, but accused's guilt is not affected thereby.

6. War Department records disclose that this officer will be 29 years of age on 19 July 1945 and the record of trial indicates he was married 7 July 1943. He is a high school graduate, and before entering the service had been for nine years a licensed amateur radio operator and employed as a radio repairman and electrician. He entered the service as an enlisted man on 26 November 1941, attained the grade of corporal, and upon graduating from Eastern Signal Corps Officers' School was appointed a second lieutenant, Signal Corps, Army of the United States, on 24 April 1943. He was promoted to the grade of first lieutenant, Signal Corps, Army of the United States - Air Corps, on 14 September 1943 (to terminate upon relief from duty with Army Air Forces), and reaffirmed or reappointed first lieutenant, Signal Corps, Army of the United States, on 1 January 1944. He was rated as excellent or superior in the performance of his duties. On 30 August 1944 he was promoted to the grade of captain, Signal Corps, in the Army of the United States.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK-CM 279602 1st Ind

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 Board of Review in the case of Captain Vincent Grzegorwicz (O-1646750), Signal Corps.

2. Upon trial by general court-martial this officer, though married, was found guilty of engaging in sexual intercourse on three occasions, and of registering at a hotel and occupying a hotel room overnight with a woman who was not his wife but the wife of an enlisted man reported missing in action, 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. 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, married but separated from his wife, met and became temporarily enamoured with the comely 21-year old wife of an enlisted man, who for five months had been reported as missing in action. During their association of several months they engaged in sexual intercourse at least three times and on one occasion spent the night together in a hotel room. The girl's husband upon his return to the United States "tricked" his wife into telling him of some of "her affairs" with officers of the armed forces during his absence, including that with the accused, and initiated these charges. In view of accused's excellent military record and his special technical skill and knowledge of radio, I recommend that the sentence be approved but commuted to a reprimand and forfeiture of $100 of his pay per month for six months, and that the sentence as thus modified be carried into execution.

4. Consideration has been given to a request for clemency addressed to the Commanding General, Fairfield Air Technical Service Command, from Captain Erven T. Larson and Captain James R. Maumenee, Air Corps, Defense Counsel, and First Lieutenant Jonathan C. McEvoy and First Lieutenant Frank Simpson, Judge Advocate General's Department, Assistant Defense Counsel, in which they inclosed a request for clemency signed by one member of the general court-martial which tried the accused, and letters from Lieutenant Colonel Arthur Y. Snell, Air Corps, and Colonel Charles W. Haas, Air Corps, attesting to the efficiency of accused and recommending clemency in his behalf. These documents are attached to the record of trial.

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
1. Record of trial
2. Ltr requesting clem to Com General, Fairfield, ATSC, 18 May 45, w/enc.
3. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but commuted to a reprimand and forfeiture of pay of $100. pay per month for six months. G.C.M.O. 323, 9 July1945).

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

SPJGK - CM 279646

9 MAY 1945

UNITED STATES	)	HEADQUARTERS FOURTH AIR FORCE
v.	)	Trial by G.C.M., convened at McChord Field, Washington, 20 March 1945. Dismissal, total forfeitures and confinement for nine (9) months.
Second Lieutenant ROBERT O. KOCH (0-761125), Air Corps.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Robert O. Koch, Squadron "V", 464th AAF Base Unit, McChord Field, Washington, a married man, did, at Tacoma, Washington, from on or about 1 February 1945 to on or about 24 February 1945, wrongfully, dishonorably and unlawfully live and cohabit as man and wife with a woman, Maynell Milton, alias Mrs. Robert O. Koch, not his wife.

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, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of nine months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution may be summarized as follows: It was stipulated that the accused was lawfully married on 1 August 1942 to Julia Lorrenzoni Koch at Baltimore, Maryland, and that at the time of the trial she was living and was still the accused's wife (R. 7). On 4 February 1945 the accused rented a bedroom from Mrs. Millie R. Hurd at 1113 North Oaks, Tacoma, Washington. The accused was accompanied by a young lady whom he introduced to Mrs. Hurd as his wife (R. 7). The two

occupied the room as man and wife continuously for a period of at least two weeks (R. 8-9), and seemed devoted to each other (R. 10). Miss Maynell Milton, age 19, of San Francisco, California, testified that she came to Tacoma with the accused about 30 January 1945 and lived with him as his wife in the house of Mrs. Hurd at 1113 North Oaks, Tacoma, Washington, for three weeks. During that time they indulged in sexual relations. Miss Milton stated that she was never married to the accused and that she knew the accused had a wife living. She represented to the accused that she was 21 years of age (R. 12). Accused tried to persuade her not to come to Tacoma but to wait until he had obtained a divorce from his wife. It was their intention to get married when accused obtained a divorce, and with this in view they consulted a lawyer in Nevada about instituting divorce proceedings.

4. The accused having been advised concerning his rights elected to be sworn and to testify on his own behalf. He stated that he was in the military service during the time the offense was alleged to have been committed and at the time of the trial (R. 15). He admitted that although married to another woman he lived as man and wife with Miss Milton at the time and place alleged in the Specification (R. 15-16). He stated that when he was stationed in Nevada he had consulted a lawyer in regard to the initiation of proceedings for a divorce but that he did not proceed further than the making of tentative arrangements because he was transferred from that State. He planned to marry Miss Milton as soon as he obtained a divorce (R. 16-18). He stated that in his opinion living with Miss Milton under the circumstances did not bring "dishonor upon anyone" (R. 20-21).

5. The evidence for the prosecution and the admissions made under oath by the accused in his testimony clearly establish that the accused, a married officer in the military service of the United States, did at the time and place alleged in the Specification, live and cohabit as man and wife with Miss Maynell Milton, a woman who was not his wife. The only defense that the accused attempted to raise was that he acted with good intentions because he intended to get a divorce and marry Miss Milton and that his conduct "did not dishonor anyone".

The Board of Review has consistently held that a married officer who lives in adultery with a woman who is not his wife is not only guilty of dishonorable conduct unbecoming an officer and a gentleman, in violation of Article of War 95 (CM 202212, 5 BR 373; CM 203719, 7 BR 279; CM 208296 9 BR 1; CM 276250, Harvey) but also of conduct of a nature to bring discredit upon the military service in violation of Article of War 96 (CM 216152, 11 BR 111; CM 234110, 20 BR 237; CM 234787, 21 BR 162). Furthermore, adultery is a statutory offense in the State of Washington (Sec. 2457, Vol. 4, Remingtons' Revised Statutes of Washington, Annotated, page 452).

We find no difficulty therefore in sustaining the findings of guilty of the Charge and its Specification.

6. War Department records show the accused to be 27½ years of age and married. He graduated from high school and the University of Montana (A.B., 1938), and for four years was employed as an athletic instructor and as a tutor for backward students. He was a student for three years in the C.M.T.C., and on 7 July 1942 enlisted in the service as an Air Cadet. Upon the successful completion of his training as Pilot, on 5 December 1943, he was commissioned Second Lieutenant, AUS.

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

Judge Advocate.

Judge Advocate.

Judge Advocate.

SPJGK - CM 279646 1st Ind.

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 Robert O. Koch (O-761125), Air Corps.

2. Upon trial by general court-martial this married officer was found guilty of wrongfully, dishonorably and unlawfully living and cohabiting for a period of three weeks with a woman not his wife, 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 a period of nine months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The accused officer, married but separated from his wife, rented and occupied a room with a 19-year old girl, not his wife, as man and wife for a period of three weeks. He stated that he intended to marry her when he was able to obtain a divorce from his wife. The misconduct of accused was first called to the attention of the military authorities by the parents of the girl. Prior to the commission of the offense here involved accused had tendered his resignation from the Army for the good of the service in lieu of trial by court-martial for an alleged willful disobedience of superior authority and an alleged deceitful attempt to obtain an extension of leave of absence. His resignation was not accepted because of the institution of the present charge.

It is my opinion that accused is morally unfit to remain an officer. I recommend that the sentence be confirmed but that the confinement and forfeitures be remitted and the sentence as thus modified be 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 forfeitures remitted, GCMO 242, 19 June 1945).

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

SPJGH - CM 279653

21 MAY 1945

UNITED STATES V. Second Lieutenant WALTER E. BOYTER (0-1824856), Infantry.	)	SEVENTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Leonard Wood, Missouri, 10 April 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 above named officer 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 58th Article of War.

Specification: In that Second Lieutenant Walter E. Boyter, Infantry, attached, unassigned, 1718 SCU, Station Complement, Headquarters, Fort Leonard Wood, Missouri (then Company "E", 276th Infantry, 70th Infantry Division), did, at Fort Leonard Wood, on or about 9 November 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Leonard Wood, Missouri, on or about 6 March 1945.

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

Specification 1: In that 2nd Lieutenant Walter E. Boyter, Infantry, attached, unassigned, 1718 Service Command Unit, Station Complement, Headquarters, Fort Leonard Wood, Missouri, then unassigned, did, at Indianapolis, Indiana, on or about 1 January 1945, present for payment a claim against the United States, by presenting to Major B. B. Callaway, Finance Department, at Indianapolis, Indiana, an officer of the United States

duly authorized to pay such claims, in the amount of $200.00, for partial payment of pay and allowances due him, the said 2d Lt. Boyter, which claim was false in that no such amount was due him, the said 2d Lt. Boyter, and was then known by the said 2d Lt. Boyter to be false.

Specification 2: In that 2nd Lieutenant Walter E. Boyter, Infantry, attached unassigned, 1718 Service Command Unit, Station Complement, Headquarters, Fort Leonard Wood, Missouri, then unassigned, for the purpose of obtaining payment of a claim against the United States by presenting to B. B. Callaway, Major, Finance Department, an officer of the United States duly authorized to pay such claims, did, at Indianapolis, Indiana, on or about 1 January 1945, make and use a certain writing, to-wit: an alleged copy of Par 2, Special Orders No. 44, Headquarters, 274th Infantry, 17 December 1944, which said 2nd Lieutenant Walter E. Boyter then knew contained the statement that he had been granted 12 days emergency leave, effective on or about 18 December 1944, which order and statement was false and fraudulent in that 2nd Lieutenant Walter E. Boyter was then absent without leave, and which order and statement was then known by the said 2nd Lieutenant Walter E. Boyter to be false and fraudulent.

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

Specification 1: Same allegations as Specification 2, Charge II, except false orders were Par. 2, Special Orders No. 46, Headquarters, 274th Infantry, 27 November 1944, stating that accused had been granted an emergency leave for 12 days effective on or about 28 November 1944, which orders accused presented to Colonel F. D. Foster, Finance Department, on or about 6 December 1944, at San Francisco, California, for the purpose of obtaining payment of a claim against the United States.

Specification 2: Same allegations as Specification 2, Charge II, except false orders were Par. 2, Special Orders No. 44, Headquarters, 274th Infantry, 9 January 1945, stating that accused had been granted an emergency leave for 15 days effective on or about 10 January 1945, which orders accused presented to Major E. J. McNaughton, Finance Department, on or about 20 January 1945, at Goodfellow Field, San Angelo, Texas, for the purpose of obtaining payment of a claim against the United States.

Specification 3: In that 2nd Lieutenant Walter E. Boyter, Infantry, attached, unassigned, 1718 Service Command Unit, Station Complement, Headquarters, Fort Leonard Wood, Missouri, then

692nd Tank Destroyer Battalion, did, at Phoenix, Arizona, on or about 28 January 1944, present for payment a claim against the United States, by presenting to 2nd Lieutenant Frank M. Sutton, AUS, Finance Department, at Phoenix, Arizona, an officer of the United States duly authorized to pay such claims, in the amount of $225.00 for partial payment of pay and allowances due him, the said 2nd Lieutenant Boyter, which claim was false in that no such amount was due him, the said 2nd Lieutenant Boyter, and was then known by the said 2nd Lieutenant Boyter to be false.

Specification 4: In that 2nd Lieutenant Walter E. Boyter, Infantry, attached, unassigned, 1718 Service Command Unit, Station Complement, Headquarters, Fort Leonard Wood, Missouri, then 692d Tank Destroyer Battalion, did, at Camp Campbell, Kentucky, on or about 31 January 1944, present for payment a claim against the United States, by presenting to Captain John A. Townley, Finance Department, at Camp Campbell, Kentucky, an officer of the United States duly authorized to pay such claims, a Pay and Allowance Account, for pay and allowances due him, the said 2nd Lieutenant Boyter, which claim was false, in that he, the said 2nd Lieutenant Boyter, wrongfully failed to enter on said Pay and Allowance Account the correct sums then due the United States, and was then known by the said 2nd Lieutenant Boyter to be false.

Specification 5: Same allegations as Specification 3, Additional Charge, except false claim was for $190 and was presented at Camp Hood, Texas, on or about 24 February 1944, to Captain L. L. Lentz, Finance Department.

Specification 6: Same allegations as Specification 4, Additional Charge, except false claim was presented on or about 1 March 1944.

Specification 7: Same allegations as Specification 4, Additional Charge except false claim was presented on or about 31 March 1944.

Specification 8: Same allegations as Specification 3, Additional Charge, except false claim was for $60 and was presented at Dallas, Texas, on or about 8 April 1944, to Captain E. C. Hertweck, Finance Department.

Specification 9: Same allegations as Specification 3, Additional Charge, except false claim was for $80 and was presented at Los Angeles, California, on or about 10 April 1944, to Colonel L. L. Gocker, Finance Department.

Specification 10: Same allegations as Specification 3, Additional Charge, except false claim was for $106 and was presented at Phoenix, Arizona, on or about 13 April 1944, to 2d Lt. Frank M. Sutton, Finance Department.

Specification 11: Same allegations as Specification 3, Additional Charge, except false claim was for $115 and was presented at Chicago, Illinois, on or about 15 April 1944 to Colonel H. D. Ayres, Finance Department.

Specification 12: Same allegations as Specification 3, Additional Charge, except false claim was for $140 and was presented at Washington, D. C., on or about 17 April 1944, to Colonel Carl Witcher, Finance Department.

Specification 13: Same allegations as Specification 3, Additional Charge, except false claim was for $75 and was presented at Lexington, Virginia, on or about 22 April 1944, to 2d Lt. C. L. Parfitt, Finance Department.

Specification 14: Same allegations as Specification 4, Additional Charge, except false claim was presented at Lexington, Virginia, on or about 1 May 1944, to 2d Lieutenant C. L. Parfitt, Finance Department.

Specification 15: Same allegations as Specification 3, Additional Charge, except false claim was for $90 and was presented at Lexington, Virginia, on or about 13 May 1944, to 2d Lt. C. L. Parfitt, Finance Department.

Specification 16: Same allegations as Specification 3, Additional Charge, except false claim was for $150 and was presented at Washington, D. C., on or about 18 May 1944, to Colonel Carl Witcher, Finance Department.

Specification 17: Same allegations as Specification 3, Additional Charge, except false claim was for $240 and was presented at Los Angeles, California, on or about 30 May 1944, to Colonel G. Klein, Finance Department.

Specification 18: Same allegations as Specification 3, Additional Charge, except false claim was for $200 and was presented at Camp Campbell, Kentucky, on or about 26 May 1944, to Captain John A. Townley, Finance Department.

Specification 19: Same allegations as Specification 4, Additional Charge, except false claim was presented at Phoenix, Arizona, on or about 1 June 1944, to First Lieutenant William J. Powers, Jr., Finance Department.

Specification 20: Same allegations as Specification 4, Additional Charge, except false claim was presented at Chicago, Illinois, on or about 6 June 1944, to Colonel H. D. Ayres, Finance Department.

Specification 21: Same allegations as Specification 4, Additional Charge, except false claim was presented at Camp Campbell, Kentucky, on or about 12 June 1944, to Captain John A. Townley, Finance Department.

Specification 22: Same allegations as Specification 3, Additional Charge, except false claim was for $90 and was presented at Camp Campbell, Kentucky, on or about 12 June 1944, to Captain John A. Townley, Finance Department.

Specification 23: Same allegations as Specification 3, Additional Charge, except false claim was for $150 and was presented at Camp Hood, Texas, on or about 21 June 1944, to First Lieutenant C. B. Fink, Finance Department.

Specification 24: Same allegations as Specification 3, Additional Charge, except false claim was for $200 and was presented at Luke Field, Arizona, on or about 28 June 1944, to Lieutenant Colonel William Alberts, Finance Department.

Specification 25: Same allegations as Specification 4, Additional Charge, except false claim was presented at Camp Barkeley, Texas, on or about 1 July 1944, to First Lieutenant W. G. Brayles, Jr., Finance Department.

Specification 26: Same allegations as Specification 3, Additional Charge, except false claim was for $125 and was presented at Chicago, Illinois, on or about 3 July 1944, to Colonel H. D. Ayres, Finance Department.

Specification 27: Same allegations as Specification 4, Additional Charge, except false claim was presented at Fort Benning, Georgia, on or about 31 July 1944, to First Lieutenant E. N. Guyton, Finance Department.

Specification 28: Same allegations as Specification 4, Additional Charge, except false claim was presented at Fort Benning, Georgia, on or about 31 August 1944, to Captain S. G. Harriss, Jr., Finance Department.

Specification 29: Same allegations as Specification 4, Additional Charge, except false claim was presented at Chicago, Illinois, on or about 7 September 1944, to Colonel H. D. Ayres, Finance Department.

Specification 30: Same allegations as Specification 3, Additional Charge, except false claim was for $330 and was presented at Luke Field, Arizona, on or about 11 September 1944, to Lieutenant Colonel William Alberts, Finance Department.

Specification 31: Same allegations as Specification 4, Additional Charge, except false claim was presented at Los Angeles, California, on or about 12 September 1944, to Colonel G. Klein, Finance Department.

Specification 32: Same allegations as Specification 4, Additional Charge, except false claim was presented at Camp McCoy, Wisconsin, on or about 30 September 1944, to Lieutenant Colonel K. C. Barnes, Finance Department.

Specification 33: Same allegations as Specification 3, Additional Charge, except false claim was for $140 and was presented at Chicago, Illinois, on or about 18 October 1944, to Lieutenant Colonel H. R. Priest, Finance Department.

Specification 34: Same allegations as Specification 3, Additional Charge, except false claim was for $150 and was presented at St. Louis, Missouri, on or about 19 October 1944, to Lieutenant Colonel W. Gritz, Finance Department.

Specification 35: Same allegations as Specification 3, Additional Charge, except false claim was for $159 and was presented at Dallas, Texas, on or about 19 October 1944, to Major E. C. Hertweck, Finance Department.

Specification 36: Same allegations as Specification 3, Additional Charge, except false claim was for $150 and was presented at Atlanta, Georgia, on or about 23 October 1944, to Colonel E. Richards, Finance Department.

Specification 37: Same allegations as Specification 3, Additional Charge, except false claim was for $170 and was presented at Cincinnati, Ohio, on or about 24 October 1944, to Lieutenant Colonel E. G. Doyel, Finance Department.

Specification 38: Same allegations as Specification 3, Additional Charge, except false claim was for $230 and was presented at Fort Sheridan, Illinois, on or about 28 October 1944, to Captain R. R. Hubner, Finance Department.

Specification 39: Same allegations as Specification 3, Additional Charge, except false claim was for $235 and was presented at Buffalo, New York, on or about 31 October 1944, to Colonel J. Harris, Finance Department.

Specification 40: Same allegations as Specification 3, Additional Charge, except false claim was for $180 and was presented at Fort Benning, Georgia, on or about 23 October 1944, to Major S. G. Harriss, Jr., Finance Department

Specification 41: Smae allegations as Specification 4, Additional Charge, except false claim was presented at San Frnacisco, California, on or about 6 December 1944, to Colonel Harry Foster, Finance Department.

Specification 42: Same allegations as Specification 4, Additional Charge, except false claim was presented at New York, New York, on or about 12 December 1944, to Colonel C. K. McAlister, Finance Department.

Specification 43: Same allegations as Specification 3, Additional Charge, except false claim was for $125 and was presented at Plant Park, Florida, on or about 18 December 1944, to Captain N. G. Eyrich, Finance Department.

Specification 44: Same allegations as Specification 3, Additional Charge, except false claim was for $115 and was presented at Lakeland, Florida, on or about 18 December 1944, to Captain C. D. Horn, Finance Department.

Specification 45: Same allegations as Specification 3, Additional Charge, except false claim was for $175 and was presented at Miami, Florida, on or about 21 December 1944, to First Lieutenant Thomas V. Casalett, Finance Department.

Specification 46: Same allegations as Specification 3, Additional Charge, except false claim was for $150 and was presented at Maxwell Field, Alabama, on or about 27 December 1944, to Lieutenant Colonel E. E. Feind, Finance Department.

Specification 47: Same allegations as Specification 3, Additional Charge, except false claim was for $200 and was presented at Meridian, Mississippi, on or about 27 December 1944, to Major Rudolph Kay, Finance Department.

Specification 48: Same allegations as Specification 4, Additional Charge, except false claim was presented at Fort Thomas, Kentucky, on or about 12 January 1945, to Captain Howard P. Ward, Finance Department.

Specification 49: Same allegations as Specification 4, Additional Charge, except false claim was presented at Boston, Massachusetts, on or about 9 January 1945, to Colonel H. S. Ruth, Finance Department.

Specification 50: Same allegations as Specification 3, Additional Charge, except false claim was for $150 and was presented at Dallas, Texas, on or about 19 January 1945, to Captain A. E. Assalino, Finance Department.

Specification 51: Same allegations as Specification 3, Additional Charge, except false claim was for $155 and was presented at Goodfellow Field, Texas, on or about 20 January 1945, to Major E. J. McNaughton, Finance Department.

Specification 52: Same allegations as Specification 3, Additional Charge, except false claim was for $200 and was presented at Chicago, Illinois, on or about 26 January 1945, to Lieutenant Colonel H. R. Priest, Finance Department.

Specification 53: Same allegations as Specification 3, Additional Charge, except false claim was for $200 and was presented at Detroit, Michigan, on or about 29 January 1945, to Colonel Roy J. Caperton, Finance Department.

Specification 54: Same allegations as Specification 4, Additional Charge, except false claim was presented at Bolling Field, D. C., on or about 2 February 1945, to Lieutenant Colonel C. O. Gealta, Finance Department.

Specification 55: Same allegations as Specification 4, Additional Charge, except false claim was presented at Philadelphia, Pennsylvania, on or about 9 February 1945, to Colonel L. E. Gruber, Finance Department.

Specification 56: Same allegations as Specification 3, Additional Charge, except false claim was for $85 and was presented at Pittsburgh, Pennsylvania, on or about 17 February 1945, to Colonel Alfred N. Taylor, Finance Department.

Specification 57: Same allegations as Specification 3, Additional Charge, except false claim was for $190 and was presented at Baltimore, Maryland, on or about 23 February 1945, to Lieutenant Colonel William J. McManus, Finance Department.

Specification 58: Same allegations as Specification 4, Additional Charge, except false claim was presented at Richmond, Virginia, on or about 1 March 1945, to Colonel Alfred N. Taylor, Finance Department.

Specification 59: Same allegations as Specification 2, Charge II, except false orders were Par. 2, Special Orders No. 44, Headquarters, 274th Infantry, 25 January 1945, stating that accused had been granted an emergency leave for 15 days effective on or about 26 January 1945, which orders accused presented to Colonel L. E. Gruber, Finance Department, on or about 9 February 1945, at Philadelphia, Pennsylvania, for the purpose of obtaining payment of a claim against the United States.

By appropriate exceptions and substitutions accused pleaded not guilty to desertion under Charge I and its Specification but guilty to absence without leave for the period alleged in violation of Article of War 61. He pleaded guilty to all other Charges and Specifications. He was found not guilty of desertion under Charge I and its Specification but guilty of absence without leave for the period alleged in violation of Article of War 61, and guilty of all other Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement at hard labor for 15 years. The reviewing authority approved the sentence but remitted 10 years of the confinement and forwarded the record of trial for action under Article of War 48.

3. Pertinent evidence introduced by the prosecution is hereinafter summarized under appropriate headings indicating the Charges and Specifications to which it is relevant.

a. Charge I and Specification:

Accused absented himself without leave from his station at Fort Leonard Wood, Missouri, on 9 November 1944 and remained absent until voluntarily returning to his station on 6 March 1945 (R. 66; Pros. Exs. 1, 1a).

b. Charge II, Specification 2; Additional Charge, Specifications 1, 2, 59:

These four Specifications allege respectively that on 1 January 1945, 6 December 1944, 20 January 1945 and 9 February 1945, in order to obtain payment of purported claims, accused presented to various finance officers of the Army false orders stating accused had been granted emergency leave. The prosecution introduced evidence demonstrating that on 1 January 1945, at Indianapolis, Indiana, accused presented to Major B. B. Callaway, a Finance Officer of the United States Army, a purported extract copy of Paragraph 2, Special Orders No. 44, Headquarters 274th Infantry, Fort Leonard Wood, Missouri, 17 December 1944, which stated that accused had been granted twelve days emergency leave effective on or about 18 December 1944. At the same time accused presented a Pay and Allowance Account to Major Callaway, using the purported Special Orders to justify his presence in the city of Indianapolis. Believing these orders to be authentic and relying thereon, Major

Callaway paid accused the sum of $200 on the Pay and Allowance Account. In fact, this extract copy of Special Orders had not been issued by the authority appearing thereon but had been falsely and fraudulently prepared by accused who was absent without leave at the time he exhibited them (R. 80; Pros. Exs. 60, 60a).

On 6 December 1944, at San Francisco, California, accused presented to Colonel F. D. Foster, a Finance Officer of the United States Army, a purported extract copy of Paragraph 2, Special Orders No. 46, Headquarters 274th Infantry, Fort Leonard Wood, Missouri, 27 November 1944, which stated that accused had been granted twelve days emergency leave effective on or about 28 November 1944. At the same time accused presented a Pay and Allowance Account to Colonel Foster, using the purported Special Orders to justify his presence in the city of San Francisco. Believing these orders to be authentic and relying thereon, Colonel Foster paid accused the sum of $245.10 on the Pay and Allowance Account. In fact, this extract copy of Special Orders had not been issued by the authority appearing thereon but had been falsely and fraudulently prepared by accused who was absent without leave at the time he exhibited them (R. 80; Pros. Exs. 61, 61a).

On 20 January 1945, at Goodfellow Field, San Angelo, Texas, accused presented to Major E. J. McNaughton, a Finance Officer of the United States Army, a purported extract copy of Paragraph 2, Special Orders No. 44, Headquarters 274th Infantry, Fort Leonard Wood, Missouri, 9 January 1945, which stated that accused had been granted fifteen days emergency leave effective on or about 10 January 1945. At the same time accused presented a Pay and Allowance Account to Major McNaughton, using the purported Special Orders to justify his presence at Good fellow Field. Believing these orders to be authentic and relying thereon, Major McNaughton paid accused the sum of $155 on the Pay and Allowance Account. In fact, this extract copy of Special Orders had not been issued by the authority appearing thereon but had been falsely and fraudulently prepared by accused who was absent without leave at the time he exhibited them (R.80; Pros. Exs. 62, 62a).

On 9 February 1945, at Philadelphia, Pennsylvania, accused presented to Colonel L. E. Gruber, a Finance Officer of the United States Army, a purported extract of Paragraph 2, Special Orders No. 44, Headquarters 274th Infantry, Fort Leonard Wood, Missouri, 25 January 1945, which stated that accused had been granted fifteen days emergency leave effective on or about 26 January 1945. At the same time accused presented a Pay and Allowance Account to Colonel Gruber, using the purported Special Orders to justify his presence in the city of Philadelphia. Believing these orders to be authentic and relying thereon, Colonel Gruber paid accused the sum of $246.50 on the Pay and Allowance Account. In fact, this extract copy of Special Orders had not been issued by the authority appearing thereon but had been falsely and fraudulently prepared by accused who was absent without leave at the time he exhibited them (R. 80; Pros. Exs. 63, 63a).

c. Charge II, Specification 1; Additional Charge, Specifications 3 to 58, inclusive:

These fifty-seven Specifications charge accused with presenting for payment fifty-seven false claims against the United States. The prosecution introduced evidence proving that false claims for pay and allowances and for partial pay and allowances in the following amounts were presented to the following finance officers of the United States Army on the following dates and were paid by such finance officers with the resultant running total of overpayments being made to accused, viz (R. 67-79 incl; Pros. Exs. 2 to 40 incl; Pros. Exs. 3a to 40a incl):

Charge and Spec	Ex. Nos.	Amt of False Claim	Finance Officer To Whom Presented	Approx Date Presented	Running Total of Amt Overpaid Accused
Add Ch, Spec 3	3,3a	$225	2d Lt F M Sutton Phoenix, Arizona	28 Jan 44	$139.80
Add Ch, Spec 4	4,4a	$96.50	Capt J A Townley Camp Campbell, Ky	31 Jan 44	$225.00
Add Ch, Spec 5	5,5a	$190.00	Capt L L Lentz Camp Hood, Texas	24 Feb 44	$221.80
Add Ch Spec 6	6,6a	$53.70	Capt J A Townley Camp Campbell, Ky	1 Mar 44	$225.00
Add Ch Spec 7	7,7a	$240.75	Capt J A Townley Camp Campbell, Ky	31 Mar 44	$225.00
Add Ch Spec 8	8,8a	$60.00	Capt E C Hertweck Dallas, Texas	8 Apr 44	$217.80
Add Ch Spec 9	9,9a	$80.00	Col L L Gocker Los Angeles, Calif	10 Apr 44	$281.00
Add Ch Spec 10	10,10a	$106.00	2d Lt F M Sutton Phoenix, Arizona	13 Apr 44	$361.80
Add Ch Spec 11	11,11a	$115.00	Col H D Ayres Chicago, Illinois	15 Apr 44	$460.00
Add Ch Spec 12	12,12a	$140.00	Col Carl Witcher Washington, D. C.	17 Apr 44	$583.20
Add Ch Spec 13	13,13a	$75.00	2d Lt C.L.Parfitt Lexington, Va	22 Apr 44	$616.20
Add Ch Spec 14	14,14a	$170.10	"	1 May 44	$726.00

Add Ch, Spec 15	15,15a	$90.00	2d Lt C L Parfitt Lexington, Va	13 May 44	$706.80
Add Ch Spec 16	16,16a	$150.00	Col Carl Witcher Washington, D C	18 May 44	$814.80
Add Ch Spec 17	17,17a	$240.00	Col G Klein Los Angeles, Calif	30 May 44	$1160.90
Add Ch Spec 18	18,18a	$200.00	Capt J A Townley Camp Campbell, Ky	26 May 44	$947.60
Add Ch Spec 19	19,19a	$246.50	1st Lt W J Powers, Jr Phoenix, Arizona	1 Jun 44	$1406.00
Add Ch Spec 20	20,20a	$246.50	Col H D Ayres Chicago, Illinois	6 June44	$1652.50
Add Ch Spec 21	21,21a	$46.50	Capt J A Townley Camp Campbell, Ky	12 Jun 44	$1699.00
Add Ch Spec 22	22,22a	$90.00	Capt J A Townley Camp Campbell, Ky	12 Jun 44	$1688.20
Add Ch Spec 23	23,23a	$150.00	1st Lt C B Fink Camp Hood, Texas	21 Jun 44	$1762.60
Add Ch Spec 24	24,24a	$200.00	Lt Col W Alberts Luke Field, Ariz	28 Jun 44	$1903.80
Add Ch Spec 25	25,25a	$245.10	1st Lt W G Brayles Camp Barkeley, Texas	1 Jul 44	$2139.00
Add Ch Spec 26	26,26a	$125.00	Col H D Ayres Chicago, Illinois	3 Jul 44	$2238.80
Add Ch Spec 27	27,27a	$341.60	1st Lt E N Guyton Fort Benning, Ga.	31 Jul 44	$2359.10
Add Ch Spec 28	28,28a	$246.50	Capt S G Harriss, Jr Fort Benning, Ga.	31 Aug 44	$2359.10
Add Ch Spec 29	29,29a	$246.50	Col H D Ayres Chicago, Illinois	7 Sep 44	$2605.60
Add Ch Spec 30	30,30a	$330.00	Lt Col W Alberts Luke Field, Ariz.	11 Sep 44	$2843.20
Add Ch Spec 31	31,31a	$246.50	Col G Klein Los Angeles, Calif	12 Sep 44	$3089.70

Add Ch Spec 32	32,32a	$245.10	Lt Col K C Barnes Camp McCoy, Wis	30 Sep 44	$3182.10
Add Ch Spec 33	33,33a	$140.00	Lt Col H R Priest Chicago, Illinois	18 Oct 44	$3170.90
Add Ch Spec 34	34,34a	$150.00	Lt Col W Gritz St Louis, Mo.	19 Oct 44	$3320.90
Add Ch Spec 35	35,35a	$159.00	Maj E C Hertweck Dallas, Texas	19 Oct 44	$3471.50
Add Ch Spec 36	36,36a	$150.00	Col F Richards Atlanta, Ga.	23 Oct 44	$3604.70
Add Ch Spec 37	37,37a	$170.00	Lt Col E G Doyel Cincinnati, Ohio	24 Oct 44	$3749.50
Add Ch Spec 38	38,38a	$230.00	Capt R R Hubner Fort Sheridan, Ill	28 Oct 44	$3845.90
Add Ch Spec 39	39,39a	$235.00	Col J Harris Buffalo, N. Y.	31 Oct 44	$4169.60
Add Ch Spec 40	40,40a	$180.00	Maj S G Harriss,Jr Fort Benning, Ga	23 Oct 44	$4349.60

During accused's unauthorized absence from 9 November 1944 to 6 March 1945 no pay or allowances accrued to him from the United States (Par 3a, AR 35-1420, 15 Dec 1939, Par 9a (1), AR 605-300, 14 Sep 1944). Nevertheless, during that absence accused presented the following false claims for pay and allowances to the following finance officers of the United States Army on which he received payment of the amounts claimed, viz (R. 68, 79; Pros. Exs. 41 to 59 incl; Pros. Exs. 41a to 59a incl):

Charge and Spec	Ex. Nos.	Finance Officer To Whom Presented	Approx Date Presented	Amount of False Claim
Add Ch Spec 41	41,41a	Col H Foster San Francisco, Calif	6 Dec 44	$245.10
Add Ch Spec 42	42,42a	Col C K McAlister New York, N Y	12 Dec 44	$245.10
Add Ch Spec 43	43,43a	Capt N G Eyrich Plant Park, Fla	18 Dec 44	$125.00
Add Ch Spec 44	44,44a	Capt C D Horn Lakeland, Fla	18 Dec 44	$115.00
Add Ch Spec 45	45,45a	1st Lt T V Casalett Miami, Fla	21 Dec 44	$175.00

Add Ch Spec 46	46,46a	Lt Col E E Feind Maxwell Field, Ala	27 Dec 44	$150.00
Add Ch Spec 47	47,47a	Maj R Kay Meridian, Texas	27 Dec 44	$200.00
Add Ch Spec 48	48,48a	Capt H P Ward Fort Thomas, Ky	12 Jan 45	$246.50
Add Ch Spec 49	49,49a	Col H S Ruth Boston, Mass	9 Jan 45	$246.50
Add Ch Spec 50	50,50a	Capt A E Assalino Dallas, Texas	19 Jan 45	$150.00
Add Ch Spec 51	51,51a	Maj E J McNaughton Goodfellow Field, Texas	20 Jan 45	$155.00
Add Ch Spec 52	52,52a	Lt Col H R Priest Chicago, Illinois	26 Jan 45	$200.00
Add Ch Spec 53	53,53a	Col Roy J Caperton Detroit, Michigan	29 Jan 45	$200.00
Add Ch Spec 54	54,54a	Lt Col C O Gealta Bolling Field, D C	2 Feb 45	$246.50
Add Ch Spec 55	55,55a	Col L E Gruber Philadelphia, Pa.	9 Feb 45	$246.50
Add Ch Spec 56	56,56a	Col A N Taylor Pittsburgh, Pa.	17 Feb 45	$85.00
Add Ch Spec 57	57,57a	Lt Col W J McManus Baltimore, Md.	23 Feb 45	$190.00
Add Ch Spec 58	58,58a	Col A N Taylor Richmond, Va.	1 Mar 45	$242.30
Ch II, Spec 1	59,59a	Maj B B Callaway Indianapolis, Ind.	1 Jan 45	$200.00
			TOTAL	$3663.50

4. After having been fully informed of his rights, accused elected to testify under oath in his own behalf. He testified that shortly before absenting himself without leave, the finance officer at Fort Leonard Wood questioned him about two partial payments made

to him in October 1944. Being cognizant of the frauds he had perpetrated in filing pay and allowance accounts for money not due him, he became "panicky" and thereafter absented himself without leave in order to locate someone who could advise and aid him in extricating himself from his difficulties (R. 82, 83, 89). During his unauthorized absence he attempted to contact a chaplain in the 14th Tank Destroyer Battalion. In his efforts to locate him accused traveled to New York and then to Georgia. Thus began accused's peregrinations about the country which continued during the period of his absence. He testified that during his travels he obtained a letter from Father Poynton in Teaneck, New Jersey, and late in February 1945 he saw Representative Walter G. Andrews, a member of the House Military Affairs Committee, who prepared a letter concerning accused which was addressed to General Elliott at Fort Leonard Wood (R. 83). Both of these letters recommending clemency and consideration for accused were admitted in evidence (R. 87, 88; Def. Exs. A, B).

Accused admitted that he knew that the four Special Orders purporting to grant him different leaves of absence were false when he presented them to various finance officers during his unauthorized absence (R. 89).

With respect to the numerous false claims that he presented accused testified that he had numerous changes of station during the year 1944 which explained why so many pay vouchers were presented at different stations prior to his unauthorized absence which commenced in November 1944 (R. 92, 93). He admitted that there was no "legal justification" for his presentation of these false pay vouchers. He first began presenting false vouchers in an attempt "to salvage marital and family life" (R. 84). He thought he could make "readjustment" for the sums he had improperly obtained once he was transferred overseas (R. 85). The only excuse he offered for his conduct was that he was "under the impression that the pay account was, well, on the order of a drawing account" and that although he had "overdrafts" against his pay account the matter "could be reconciled at a later date" (R. 84).

5. The evidence in the record of trial amply sustains all findings of guilty and demonstrates conclusively that accused's pleas of guilty were not improvidently entered. It is quite apparent that from January to October 1944, accused presented 38 false pay and allowance claims against the United States and thereby fraudulently obtained from various finance officers of the United States Army a total of $4349.60 to which he was not entitled. When he became fearful that his fraudulent conduct had been discovered, he absented himself without leave for approximately four months from 9 November 1944 to 6 March 1945. During his unauthorized absence he presented false leave orders on at least four occasions to enable him to obtain payment of further false pay and allowance claims. Although no pay or allowances accrued to him while he was absent without leave (Par. 3a, AR 35-1420, 15 Dec 1939; Par 9a (1), AR 605-300, 14 Sep 1944) nevertheless, during this period accused presented

a total of 19 false pay and allowance accounts to various finance officers of the United States Army located throughout the country and thereby fraudulently obtained from the United States a total of $3663.50 on these 19 vouchers to which he was not entitled. On the entire 57 false pay and allowance accounts, presented over a period of from January 1944 to March 1945, accused defrauded the United States of a total of $8013.10.

6. Accused is 29 years of age and is married and has two children, possibly three. He attended the University of Missouri for a half year during 1934-1935 and the University of Southern California for one and a half years during 1935-1937. In civilian life he worked at various jobs having been employed as a mail clerk, an assistant manager of a gasoline station, a minor league baseball umpire, a stock clerk, a drill press operator and a craneman. He was inducted into the military service on 2 October 1942. On graduation from the Tank Destroyer School, Camp Hood, Texas, he was commissioned a second lieutenant, 23 April 1943. On 29 September 1944 he requested assignment to parachute training but his request was not favorably considered.

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, 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 or Article of War 94.

Thomas N. Jaffy, Judge Advocate.

William H. Gaubrell, Judge Advocate.

Robert E. Trevithan, Judge Advocate.

SPJGH-CM 279653 1st Ind

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 Walter E. Boyter (0-1824856), Infantry.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, absenting himself without leave for about four months, in violation of Article of War 61 (Chg. I, Spec.), of presenting false leave orders on four different occasions in order to obtain payment of four claims he presented against the United States (Chg. II, Spec. 2; Add. Chg., Specs. 1, 2, 59), and of presenting 57 false pay and allowance accounts against the United States, over the period from January 1944 to March 1945, for which he fraudulently obtained the total sum of $8013.10, all in violation of Article of War 94 (Chg. II, Spec. 1; Add. Chg., Specs. 3-58 incl.). He was sentenced to dismissal, total forfeitures and confinement for 15 years. The reviewing authority approved the sentence but remitted 10 years of the confinement 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, as approved by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion. Accused absented himself without leave from his station from 9 November 1944 until 6 March 1945 when he voluntarily returned (Chg. I, Spec.). On four occasions during his unauthorized absence he presented false leave orders to finance officers of the United States in order to justify his presence in their respective localities and to obtain payment of four pay and allowance accounts he presented to them (Chg. II, Spec. 2; Add. Chg., Specs. 1, 2, 59). During the period from January to October 1944, accused presented 38 false pay and allowance claims to various finance officers of the United States at different stations where he was located from time to time and thereby defrauded the United States of the aggregate sum of $4349.60. During his unauthorized absence from 9 November 1944 to 6 March 1945 he presented 19 additional false pay and allowance claims to various finance officers of the United States Army whereby he defrauded the United States of an additional $3663.50 (Chg. II, Spec. 1; Add. Chg., Specs. 3-58 incl.).

I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution and that the United States

Penitentiary, Leavenworth, Kansas, be designated as the place of confinement. Section 80, Title 18, U. S. Code, 1940 Edition, authorizes penitentiary confinement for presenting false claims against the United States.

4. Consideration has been given to the inclosed letter from accused dated 20 May 1945, to a letter from the Honorable W. G. Andrews, a member of the House of Representatives, dated 28 April 1945 and to another letter of accused forwarded therewith.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Ltr fr W G Andrews, MC, to S/W w/incl
3. Ltr fr accused, 20 May 45
4. Form of action

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 213, 13 June 1945).

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

SPJGQ - CM 279726

UNITED STATES v. Private HARRY A. SCOTT (36016219), (Trainee) Company B, 62nd Infantry Training Battalion.	INFANTRY REPLACEMENT TRAINING CENTER Camp Howze, Texas Trial by G.C.M., convened at Camp Howze, Texas, 21 February 1945. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

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

- - - - - - - - - - -

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Harry A. Scott, Company B, 62nd Infantry Training Battalion, having received a lawful command from 1st Lieutenant Ervin W. Emswiller, his superior officer, to join his company at drill, did at Camp Howze, Texas, on or about 7 February 1945, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence of one previous conviction was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years at such place as the reviewing authority might direct. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and withheld the order directing the execution of the sentence, pursuant to Article of War 50½.

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

Shortly after the company formation at 1300 hours on 7 February 1945, First Lieutenant Emswiller directly ordered the accused to go out and join his company at drill. The accused said, "I will not go", and did not comply with the order, though he was given ample opportunity to

do so (R. 7), and warned that serious charges would follow (R. 13). The accused gave no reason for his refusal (R. 9, 18). The order was, in terms, "Private Scott, you will go out and train, and go now" (R. 13). At that time, Lieutenant Emswiller was company executive. Captain Kimberling was company commander (R. 9, 15). First Sergeant Benjamin (R. 16) and Corporal Rychwalski (R. 20) corroborated the testimony of Lieutenant Emswiller to the facts above stated.

4. For the defense, a portion of the record of a trial of the accused by Special Court-Martial on 9 February 1945 showed that the accused had been confined in Fort Worth city jail 14 January 1945 and had been placed in arrest in Company C area, Casual Battalion, 23 January 1945 (R. 21). It was stipulated that if Captain Kimberling, then commanding Company B, 62nd Infantry Training Battalion, since transferred to another station, were present in court, he would testify (R. 21) that the accused was transferred to that company from Company C, Casual Battalion, on 4 February 1945, that the accused was then under charges for violation of the 96th Article of War, of which charges Captain Kimberling was notified, and that Captain Kimberling placed the accused in arrest in quarters (R. 22).

Lieutenant Emswiller was called as a witness for the defense (R. 8-9). When the witness ordered the accused to drill, he knew that the accused had joined the company three days previously, 4 February 1945, with charges pending against him, and that Captain Kimberling, his company commander, had ordered the accused, "you will stay in your quarters" (R. 12). Lieutenant Emswiller did not know how the accused was carried on the morning report (R. 11) nor whether he had undergone any training since joining the company (R. 12). He knew that the accused had gone on sick call that morning and that the doctor had told the accused that there was nothing wrong with him and that he would go out to train (R. 12). Lieutenant Emswiller's understanding of the status of the accused as to detention was that "he was just told to stay in his quarters, as I understood it, except when training time was he was to be out for formations" (R. 10); "in confinement, not arrest", "just restricted, not under guard" (R. 10); "confinement in quarters, that is, just confined and training" (R. 9). The witness understood that the accused's former company commander, in notifying Captain Kimberling of the charges against the accused, had asked Captain Kimberling to "keep him in", meaning "not to let him out on pass" (R. 9, 11). "There was an IARTC ruling which said that those people would train, they could not be kept in" (R. 9). From memory, to the best of Lieutenant Emswiller's knowledge, the accused was in training status and was there to train (R. 13).

The accused elected to remain silent (R. 23), and introduced no other evidence.

5. The accused, a private soldier, refused to obey the order of his superior officer, the company executive, that he perform training duty, consisting of company drill. His only defense was that he had previously been placed by the company commander in arrest in quarters, pending the disposition of certain previous charges against him.

The Boards of Review have held in cases of officers under arrest that orders to duty are in conflict with orders into arrest, and so constitute a constructive release from prior arrest when given by authority competent for that purpose (CM 256909), Robinson, 36 BR 379, 3 Bull. JAG 380), but are unlawful orders, the disobedience of which is no offense, when given by authority subordinate to that which ordered the arrest (CM 258734, Gilliam, Board of Review, 18 August 1944). These were cases where the duty called for involved the exercise of command, or was of such military character that its performance by one under arrest clearly would be inappropriate and offensive to military standards of propriety. It has been held that an officer under arrest is not exempt from every kind of duty, and the terms of his arrest may permit his performance of duties not clearly inappropriate to that status. Thus a medical officer in arrest may continue to perform, not only his routine duties, but special duty of non-military character, as taking over public property under orders (CM 127903 (1918), Dig. Op. JAG 1912-40, sec. 427 (2)).

The disqualification of an officer, while in arrest, to exercise command, to wear his sword, and to enjoy various privileges ordinarily attending his rank, is deeply rooted in military tradition (Davis, Military Law of the United States, Third Edition, Revised p. 483, 62; Winthrop, Military Law and Precedents, Second Edition, 1920 Reprint, p. 125, 116; Dig. Op. JAG 1912, p. 480). The same considerations do not wholly apply to the case of a private soldier under arrest. True, he is not on full duty status, nor should he be accorded full military honors or dignity, but there is no equivalent historical background of relief from duty in his case.

Under former Articles of War, soldiers under charges were not placed merely in arrest, but in confinement. Article 66 of the Articles of War of 1874 expressly provided that soldiers under charges would be confined until tried or released by proper authority (Sec. 1342, RS 1878). Under this provision, the Manuals for Courts-Martial of 1898 (page 8) and of 1908 (page 9) provided:

> "Privates in arrest may, in the discretion of the commanding officer, be required to attend parades, inspections, drills, school or other military duties and to assist in policing in and around their barracks." * * * *

In that situation, Winthrop wrote (p. 125, op. cit.) that enlisted men in confinement awaiting trial should "be given proper exercise, and may be put on drill or other light duty", the statement being based upon Army Regulations 999 of 1899.

That doctrine is fortified by reference to present Army Regulations concerning prisoners in confinement, who are expressly to be required to engage in intensive training and disciplinary drills in addition to hard labor (Par. 20e, AR 600-375, May 17, 1943). This provision is applicable to "all prisoners confined in post, camp or station guardhouses or stockades, except prisoners in solitary confinement", and so includes garrison prisoners merely detained for trial, as well as those arraigned or sentenced (par. 7a), and whatever the gravity of their offenses or alleged offenses as classified in par. 7b, of the mentioned Regulations. Since training and drill are not regarded as inappropriate to the status of confinement, it would be inconsistent to say that such activities are inappropriate, by reason of honor, dignity, or other such considerations, to the status of mere arrest, awaiting trial, where the presumption of innocence still clings to the accused.

Appropriateness aside, the question remains whether any rule of law or regulations forbids the training or drill of soldiers in the status of arrest. If there is such prohibition, it must arise from the language of Article of War 69, as nothing else does so. Article of War 69 provides that "any person subject to military law", charged with an offense, "shall be placed in confinement or in arrest, as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement". It then provides:

> "Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters or tent, unless such limits shall be enlarged by proper authority."

Article of War 69 was first enacted in its present form in 1916, and was included in the Code of 1920. Superseding the previous Articles 65 and 66, one of its effects was to do away with the mandatory confinement of soldiers under charges and make arrest without confinement, theretofore appropriate for officers only, an authorized means of detention for soldiers awaiting trial. The effect of the change was recognized as abolishing prior provisions for different treatment of officers and enlisted men charged with offenses, and making "identical provisions relating thereto for all persons subject to military law" (Note, page 37, par. 46, MCM 1921). It further imports a lessening of the restraint to be used, as, though the language is based in part upon previous Article 65, the person arrested is to be "restricted to", rather than "confined in", his "barracks, quarters or tent", and the meaningful words are added, "unless such limits shall be enlarged by proper authority". The statute thus prescribes adjustable physical

limits of restraint but does not expressly or by implication prescribe any limitation upon the duties of persons in arrest.

The provision above quoted from the earlier Manuals for Courts-Martial, expressly permitting drill and other military duties for privates in arrest, disappeared from the Manuals after the enactment of present Article of War 69. The later Manuals reflect merely the language of the article, that persons in arrest will be restricted to their barracks, quarters or tents unless such limits shall be enlarged by proper authority (MCM 1917, par. 46; MCM 1921, par. 46; MCM 1928, par. 21). However, nothing was substituted for the omitted provision concerning what duties might be required of soldiers in arrest, and no prohibition of drill or other duties appears. Par. 21, MCM 1928, after brief reference to the language of Article of War 69, refers "for other restrictions" to Army Regulations 600-355.

AR 600-355, July 17, 1942, with changes not here pertinent, covers the subject of Arrest and Confinement. Par. 1 thereof states verbatim the language of Article of War 69, par. 1b stating the provision for restriction to barracks, quarters or tent unless such limits are enlarged by proper authority. Further restrictions are stated in par. 7, as follows:

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

Obviously, par. 7a, d and e restate proprieties long-established in officer cases, while par. 7c extends to all military persons in arrest the traditional provision that an officer in arrest will be deprived of his sword (Winthrop, p. 117, op. cit.). That provision, explicit in Article of War 65 of 1874, was omitted from present Article of War 69. Par. 7b merely reiterates the provisions of Article of War 69. Such additional guide as these Regulations furnish must be found in par. 7f. That provision appears to be an outgrowth of par. 7, Article 26, of the Army Regulations of 1821, which required officers and non-commissioned officers in arrest to follow in the rear of their organizations on the march, while "other persons in arrest will be escorted by the police guard, or a detachment from it". The addition of the words "at formations" must be accorded some meaning. The provision prescribes the place to be occupied by persons in arrest when at formations and on the march and necessarily implies possible temporary absence of such persons from areas otherwise delimited by the orders of arrest. It contemplates that persons in arrest may be present at formations, in which case it directs that they will fall in at the rear unless otherwise directed.

The language of Article of War 69, "unless such limits shall be enlarged by proper authority", must be given reasonable and practical interpretation. Even assuming that the word "limits" involves, by implication, some restrictions on duties, it is clear that the present statutory provision was introduced to allow the authorities exercising command over the arrested person a range of discretion as to restraint, not provided for in the antecedent articles. There is no requirement as to the manner in which proper authority must or shall extend the limits of the arrest, so such extension may be accomplished in any manner that will have that effect. Ordinarily, the limits of the arrest are stated in the order of arrest, but there can be no doubt that that order can be modified by subsequent order of the authority imposing the arrest or higher authority. That being so, no sound reason appears why it may not be modified by antecedent standing orders of higher authority which are applicable.

"Arrest" is any restraint of liberty of locomotion (4 Words and Phrases Permanent Edition, 240). Its purpose, when applied to persons awaiting trial on charges, is to accomplish the detention of such persons to assure their presence for trial. Where the circumstances are regarded as rendering confinement unnecessary, there is no valid reason why the soldier awaiting trial should be idle in quarters while his organization proceeds with its training. There is every reason why he should proceed diligently with his training to qualify him at the earliest possible time to serve his country's imperative need. There is no cogent reason why he should not train with his company during duty hours, when the normal surveillance will render his escape highly improbable, and remain in his quarters, or other restricted area, when not so engaged.

It appears in the instant case that superior authority, the Replacement Training Center, had, in some form, ordered that "those people would train - they could not be kept in". The legitimate intendment of that directive was that persons detained for trial should be required to drill, and that such limits of restraint as should be placed upon them were not to interfere with nor delay their training. Such directives are widely in effect at Training Centers throughout the army. The order of the accused into arrest must be assumed to have been given in the light of and pursuant to that stated policy, and not in derogation of it. Accordingly, the order given to the accused to join his company at drill was a lawful order. The accused disobeyed it at his peril. (Par. 134b, MCM 1928, p. 149)

6. The charge sheet data, accepted at the trial, show that the accused was then 26 years and 6 months of age, inducted 3 April 1941. One previous conviction was introduced in evidence. The Staff Judge

Advocate cites four earlier convictions not admissible in evidence, one of which was by general court-martial, under which the accused served a period of confinement in a rehabilitation center.

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

Fletcher R. Andrews, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

SPJGQ - CM 279726 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUN 20 1945

TO: Commanding General
Infantry Replacement Training Center
Camp Howze, Texas

1. In the case of Private Harry A. Scott (36016219), (Trainee) Company B, 62nd Infantry Training Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, and Executive Order No. 9363, dated July 23, 1943, you now have authority to order the execution of the sentence.

2. Considering all the circumstances of the case, it is recommended that the period of confinement be reduced to two years.

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

(CM 279726).

William A. Rounds

WILLIAM A. ROUNDS
Colonel, JAGD
Assistant Judge Advocate General
In Charge of Military Justice Matters

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

SPJGN-CM 279735

U N I T E D S T A T E S	)	THE CAVALRY SCHOOL
	)	
v.	)	Trial by G.C.M., convened at Fort Riley, Kansas, 19 April 1945. Dismissal and confinement for five (5) years.
	)	
Second Lieutenant Layton N. Bennett (O-1179557), Field Artillery.	)	

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

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

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

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

Specification 1: In that Second Lieutenant Layton N. Bennett, Field Artillery, attached unassigned Staff and Faculty, The Cavalry School, Fort Riley, Kansas, did, at Fort Riley, Kansas, on or about 2 January 1945, present for approval and payment a claim to wit: a duly executed "pay and allowance account," WD Form No. 336, dated 2 January 1945, claiming the amount of Ninety Six Dollars and Seventy Cents ($96.70) for base pay, subsistence allowance and rental allowance due him personally for the month of December, 1944, against the United States, by presenting said claim to the Finance Officer, Fort Riley, Kansas, an Officer of the United States, duly authorized to approve, allow and pay such claim, which claim was false and fraudulent in that there were then and there in effect 3 Class E allotments against said

base pay and allowances as follows: Sixty Five Dollars ($65.00) to Mrs. Layton Bennett; One Hundred Dollars ($100.00) to National Bank of Tulsa, Oklahoma; and Fifteen Dollars ($15.00) to Jane Bennett, payable monthly, which Class E allotments were not shown on said "pay and allowance account," and which claim was then known by the said Second Lieutenant Layton N. Bennett to be false and fraudule nt.

Specification 2: In that Second Lieutenant Layton N. Bennett, Field Artillery, attached unassigned Staff and Faculty, The Cavalry School, Fort Riley, Kansas, did, at Fort Riley, Kansas, on or about 1 February 1945, present for approval and payment a claim to wit: a duly executed "pay and allowance account" WD Form No. 336, dated 31 January 1945, claiming the amount of Two Hundred and Forty Six Dollars and Seventy Cents ($246.70) for base pay, subsistence allowance and rental allowance due him personally for the month of January, 1945, against the United States, by presenting said claim to the Finance Officer, Fort Riley, Kansas, an Officer of the United States, duly authorized to approve, allow and pay such claim, which claim was false and fraudulent in that there were then and there in effect 2 Class "E" allotments against said base pay and allowances as follows: Sixty-Five Dollars ($65.00) to Mrs. Layton Bennett and Fifteen Dollars ($15.00) to Jane Bennett, payable monthly, which Class "E" allotments were not shown on said "pay and allowance account", and which claim was then known by the said Second Lieutenant Layton N. Bennett to be false and fraudulent.

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

Specification 1: In that Second Lieutenant Layton N. Bennett, Field Artillery, attached unassigned Staff and Faculty, The Cavalry School, Fort Riley, Kansas, did, at Fort Riley, Kansas, on or about 16 January 1945, with intent to deceive Lieutenant Colonel Curnel S. Hampton, Secretary, The Cavalry School, Fort Riley, Kansas, officially state to the said Lieutenant Colonel Curnel S. Hampton that he had written no checks since 11 January 1945, or words to that effect, which statement was known by the said Second Lieutenant Layton N. Bennett to be untrue in that he had on 12 January 1945, written and uttered six (6) checks, each of these said six (6) checks being in the amount of Ten Dollars ($10.00), drawn on the National Bank of Tulsa, payable to cash, and dated 12 January 1945.

Specification 2: In that Second Lieutenant Layton N. Bennett,

Field Artillery, attached unassigned Staff and Faculty, The Cavalry School, Fort Riley, Kansas, did at Fort Riley, Kansas, on or about 2 January 1945, with intent to deceive Captain Jean W. Schmidt, WAC, Finance Officer, Fort Riley, Kansas, an Officer of the United States, duly authorized to approve, allow and pay claims commonly known as officers' pay vouchers, officially state in an information form submitted to the said Captain Jean W. Schmidt as said Finance Officer that there was due the said Second Lieutenant Layton N. Bennett, personally the sum of Two Hundred and Fifty Two Dollars ($252.00) as monthly pay, rental allowance and subsistence allowance, less the sum of Six Dollars and Seventy Cents ($6.70) as a Class N (insurance) allotment per month, which statement was known by the said Second Lieutenant Layton N. Bennett to be untrue in that there were then and there in effect the following three Class E allotments: Sixty Five Dollars ($65.00) to Mrs. Layton Bennett, One Hundred Dollars ($100.00) to National Bank of Tulsa, and Fifteen Dollars ($15.00) to Jane Bennett.

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

Specification 1: In that Second Lieutenant Layton N. Bennett, Field Artillery attached unassigned Staff and Faculty, The Cavalry School, Fort Riley, Kansas, did, at Fort Riley, Kansas, on or about 1 February 1945, wrongfully and unlawfully sell one 1936 Ford Sedan automobile, Motor No. 2250655, to Private First Class Hubert J. Willis, without first obtaining the written consent of the Muskogee Industrial Finance Corporation, Muskogee, Oklahoma, to said sale; said Muskogee Industrial Finance Corporation then and there having a valid chattel mortgage on said automobile in the amount of Two Hundred Dollars ($200.00), of which amount there remained then due and owing the approximate sum of One Hundred and Eleven Dollars and Fifty Cents ($111.50), which said mortgage was executed by the said Second Lieutenant Layton N. Bennett to the said Muskogee Industrial Finance Corporation, Muskogee, Oklahoma, on 8 August 1944.

Specification 2: In that Second Lieutenant Layton N. Bennett, Field Artillery, attached unassigned, Staff and Faculty, The Cavalry School, Fort Riley, Kansas, did, on or about 18 December 1944, with intent to deceive, wrongfully and unlawfully make and utter to Hotel Nicollet, Minneapolis, Minnesota, a certain check, in words and figures as follows, to wit:

Tulsa, Okla., 18 Dec. 18 19 44 NO.

NATIONAL BANK OF TULSA 86-3-10

Pay to the order of Nicollet Hotel $ 20 82

Twenty- Dollars and 82/100 DOLLARS

FOR

Layton N. Bennett, Lt F.A.
0-1179557

in payment of a past due account, he the said Second Lieutenant Layton N. Bennett, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Tulsa for the payment of said check.

Specification 3: Same as Specification 2 but alleging check drawn on same bank, dated 18 December 1944, at Minneapolis, Minnesota, in the amount of $12.95.

Specification 4: Same as Specification 2 but alleging check drawn on The Kilgore National Bank, dated 26 December 1944, at Kilgore, Texas, in the amount of $20.00.

The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. Evidence was introduced of one previous conviction by general court-martial for wrongfully and negligently making and uttering a check in the amount of $20 without sufficient funds, in violation of Article of War 96. The accused was sentenced to be dismissed the service and to be confined at hard labor, at such place as the reviewing authority might direct, for twenty-five years. The reviewing authority approved the sentence but remitted twenty years of the confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that by orders dated 7 November 1944 the accused was relieved from assignment with the 165th Field Artillery Battalion, Camp Fannin, Texas, and instructed to report, on 30 December 1944, to the Cavalry School at Fort Riley, Kansas (Pros. Ex. U). As was the practice for an officer filing his first pay and allowance voucher at Fort Riley, the accused, on 31 December 1944, filled out and signed an "Information Form - Officer's Pay", which was designed to supply information to the Finance Officer for the preparation of regular monthly pay and allowance vouchers (R. 13, 17, 18;

Pros. Ex. S). Total credits of $252.00 were shown on the information form and, except for a partial payment of $150.00 received in December, 1944, the only debit item listed was a Class "N" (Insurance) allotment of $6.70. This data was reflected in the accused's pay and allowance voucher for December, 1944, which he signed in blank at the time of executing the information form. The voucher showed no Class "E" allotments and called for a net balance of $96.70 (Pros. Ex. T, U).

The practice at Fort Riley, after the officer's initial voucher had been filed, was to prepare subsequent monthly vouchers in the Finance Office and send them in completed form to the officer for his signature (R. 17). Apparently this procedure was followed with respect to the accused's January 1945 voucher, which showed total credits of $253.40, a single debit of $6.50 for Class "N" insurance, and a net balance of $246.70 (R. 18; Pros. Ex. Z). Although signed and returned by him, this voucher was never paid because the Finance Office received information that certain Class "E" allotments, totaling $180.00, were outstanding and had not been listed as debits (R. 18). These were as follows: $65.00, effective 1 October 1943, to Mrs. Layton Bennett (Pros. Exs. M, N); $100.00, effective 1 March 1944, to the National Bank of Tulsa, Tulsa, Oklahoma (Pros. Exs. O, P); and $75.00, effective 1 July 1944, to Jane Bennett (Pros. Exs. Q, R).

The accused had been a guest at Hotel Nicollett, Minneapolis, Minnesota, from 28 September 1944 to 6 October 1944 and had failed to pay his bill at the time of his departure. After considerable correspondence with respect to the delinquent account, the hotel received a check, dated 18 December 1944, for $20.82, bearing his signature and drawn on the National Bank of Tulsa (Pros. Exs. A, B). A check for $12.95, likewise dated 18 December 1944, signed in his name and directed to the same drawee bank was received by Juster Brothers, a haberdashery firm of Minneapolis, Minnesota, as payment for merchandise theretofore purchased by the accused (Pros. Exs. C, D). His account in the drawee bank on 18 December 1944 was $2.61 (Pros. Ex. J). On 26 December 1944, at a time when his account in the Tulsa National Bank showed an overdraft of $0.89, he executed and directed to that bank a draft for $20.00, which was cashed for him by Mr. Jack Lewis, of Kilgore, Texas (Pros. Exs. E, F, G). Another check for $122.20, dated 30 November 1944, drawn on the above mentioned Tulsa bank, made payable to United Package Stores, and bearing the signature and serial number of the accused was cashed by him (Pros. Exs. H, I). The records of the drawee bank disclosed that he had insufficient funds in his account to pay the draft and checks and all were dishonored upon presentment (Pros. Exs. A, C, E, F, H, J).

Lieutenant Colonel Curnel S. Hampton, whose duties as Secretary of the Cavalry School at Fort Riley included giving aid and counsel to the students, attempted to help the accused extricate himself from his financial difficulties (R. 22). The accused promised to write no more checks during his course of instruction but violated his agreement

by making and passing several checks in the course of a poker game on 12 January 1945. Six such checks, each for $10.00 and all drawn on the National Bank of Tulsa, came into the hands of Second Lieutenant Joseph S. Ventura, (R. 24, 25; Pros. Exs. A-1 to F-1). On 16 January 1945 the accused again conferred with Lieutenant Colonel Hampton and, stating that he had adhered to his agreement, asserted, "I have not written any checks. I have not given any I.O.U.'s. I have not gambled and I have spent all of my off duty time studying in the barracks" (R. 23).

On 8 August 1944 the accused made and delivered a promissory note for $200.00 to the Muskogee Industrial Finance Corporation, of Muskogee, Oklahoma, and, as security for its payment, executed a chattel mortgage on a Ford Sedan automobile. The mortgage, among other things, provided that "no part of said mortgaged property shall be sold or disposed of in any way by said Mortgagor without the written consent of said Mortgagee" (Pros. Exs. G-1, H-1, J-1). While the lien was still in effect and of record and without the consent or knowledge of the mortgagee, the accused, on 1 February 1945, sold the car to Private First Class Hubert J. Willis (R. 29, 30; Pros. Exs. G-1, H-1). The sale was consummated at the "Fort Riley Bank" (R. 29). The prosecution introduced into evidence a copy of a Kansas statute which declared, in part, that a person selling mortgaged property without the consent of the mortgagee shall be "deemed guilty of larceny" (Pros. Ex. L-1). The court was asked to take judicial notice of Section 468 of Title 18, United States Code, which provided, in substance, that a person who commits on a federal reservation an act not penal by the laws of the United States but made criminal by a statute of the state wherein the reservation is located, "shall be deemed guilty of a like offense and be subject to a like punishment" (R. 35).

The prosecution introduced into evidence the accused's pretrial statement in which he admitted the execution of the information form and the vouchers for December, 1944, and January, 1945. Conceding that the Class "E" allotments were not listed, he explained that he considered them terminated as of 1 January 1945 on the basis of an authorization of discontinuance which he "thought" he had executed before leaving his former organization. However, "things got balled up" when his "outfit" was alerted and transferred. He made and uttered the checks and draft, but "thought" his bank account was sufficient to honor them upon presentment. The statement likewise acknowledged the untruth of his assertion to Lieutenant Colonel Hampton and admitted the sale of the mortgaged car without the consent of the mortgagee. The accused went on to say that he had completed his course at the Cavalry School with "above standard" grades but was discharged from the class because of the conduct which led to the present charges. He felt that this action constituted punishment for all his offenses and that "it can be used" (Pros. Ex. M-1).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to take the stand in

his own defense. He stated that before reporting to Fort Riley he authorized a discontinuance of his allotments, to be effective 1 January 1945, and left the notice of termination at the Orderly Room of his former organization about a week before it departed from Camp Fannin, Texas. He expected to go overseas after completing the "Pack Course" at Fort Riley and felt that his domestic difficulties would be brought "to a head" by stopping the allowances (R. 36, 37). Soon after his arrival at Fort Riley on 30 December 1944, he went to the Finance Officer, filled out an information sheet, and, at the same time, filed vouchers for travel allowance and December Pay and Allowances (R. 37). He did not list any Class "E" allotments because he was "under the impression that they were stopped January 1st". After he signed his February voucher, he learned that the allotments were still in effect. He thereupon filed another application for discontinuance which applied only to the allotment for $100 to the National Bank of Tulsa. One of the other allotments had already been cancelled (R. 39).

The checks and draft described in the Specifications, as well as the check for $122.20 to United Package Stores, were executed at a time when the stubs in his check book showed sufficient funds in his bank (R. 38). Admitting the sale of the automobile while the mortgage lien was still in effect, he testified that a portion of the proceeds were used to retire an indebtedness at the "Bank in Tyler". He planned to pay the balance of $80.00 to "Muskogee" but this money, which he had kept in his fatigue clothing, was stolen while he was in class. He wrote to the mortgagee inquiring if a partial payment would be acceptable but was advised that the indebtedness must be paid in full. He did not realize that it was illegal to sell "a car with a mortgage on it" (R. 39).

On cross-examination the accused acknowledged that the Class "E" allotments were not listed on his pay vouchers for October and November 1944. Although he made an effort to keep accurate records on his bank account, he did not know the number or total amounts of the checks he gave during December, 1944. He could not produce any check stubs because he had "cleared out everything [he] had in [his] files". As a possible reason for the confusion in his bank account, he stated:

> "The latter part of November, the check to the United Package Stores came back. I issued them a new check, told them I would send them some money. I credited myself back that $122.20. That check wasn't cashed" (R. 42).

He explained that his financial troubles began at Camp Gruber in late July, 1944, when, because of domestic difficulties, he did not hear from his wife or get any news of his two year old son for many months. He started gambling to keep his mind "from those at home". The more he gambled the more indebted he became and he "tried to cover up by writing checks". He had redeemed as many of these as possible. His reason for

selling the car was to realize money with which to pay his debts, and he volunteered for "pack school" in order to "get away" and improve his financial affairs. He had not intended to be a bad soldier but realized that he had done wrong and would receive punishment (R. 43).

5. Specification 1, Charge I, alleges that on 2 January 1945, accused knowingly presented a false claim against the United States in that his pay and allowance account for December, 1944, failed to show three Class E allotments of $65 to Mrs. Layton Bennett; $100 to National Bank of Tulsa, Oklahoma; and $15 to Jane Bennett. Specification 2, Charge I, alleges a similar offense on 1 February 1945 in that his pay and allowance account for January, 1945, failed to show the allotments to Mrs. Layton Bennett and Jane Bennett. These offenses are set forth as violations of Article of War 94. Specification 2 of Charge II alleges that the accused did, "on or about 2 January 1945, with intent to deceive Captain Jean W. Schmidt, WAC, Finance Officer, Fort Riley, Kansas, an Officer of the United States, duly authorized to approve, allow and pay such claims commonly known as officers' pay vouchers, officially state in an information form submitted to the said [Finance officer] that there was due the said [accused] personally the sum of * * * $252 as monthly pay, rental allowance and subsistence allowance, less the sum of * * * $6.70 as a Class N (insurance) allotment per month, which statement was known by the said [accused] to be untrue in that there were then and there in effect" the three Class "E" allotments above described. This offense is laid under Article of War 95.

The evidence showed that the accused arrived at Fort Riley on 30 December 1944 and the next day went to the Finance Office to file vouchers for travel pay and December pay and allowances. He was given an information form which he completed by itemizing his base pay and rental and subsistence allowances. He listed no Class E allotments although three, totalling $180.00, were, in fact, outstanding and being paid at his direction. On the basis of the information supplied by the accused his pay and allowance vouchers for December, 1944, and January, 1945, were prepared and, in due course, were presented for approval and payment. The accused conceded the truth of these facts but contended that his misrepresentation was innocently made because he had theretofore taken action to terminate the allotments as of 1 January 1945. If such action had, in fact, been taken, it seems clear that he realized its effect would be the continuance of the allotments through the month of December, 1944. When testifying as to the status of his bank account, he asserted, in substance, that he expected the allotment payment to reach the drawee bank in December, thus indicating a knowledge that at least the bank allotment was still in effect. He adduced no proof in support of his contention that he had taken formal action to terminate the allotments by 1 January 1945 and could explain their continuance only on the tenuous theory that the termination notice which he executed must

have been misplaced or lost. The court was justified in giving little credence to his testimony and, in view of his admission that the allotments were not listed on his vouchers for October and November, 1944, was warranted in determining that the claims represented by the vouchers for December, 1944, and January, 1945, constituted the continuation of a long course of fraudulent conduct. It is the opinion of the Board that the false and fraudulent character of the statement to the Finance Officer and of the resulting claims, as well as the intent to deceive, were amply established by the evidence.

Consideration has been given to the fact that the voucher for December, 1944, was signed in blank by the accused. After he affixed his signature, however, only the mechanics of completing the voucher from information supplied by him remained, and it may be said that he constituted the finance officer his agent to perform this perfunctory task. The legal effect of the accused's conduct, in supplying information with the expectation that it would be transcribed on the voucher which he signed, was to present a completed claim for approval and payment.

The information as to his pay and allowance account was submitted by accused on a standard form which became a part of the official records of the Finance Office at Fort Riley. Since it was intended to guide Captain Jean W. Schmidt in the performance of her duties, it is clear that the accused's statement was official in character and, being untrue, constituted a violation of Article of War 95. Par. 151, MCM, 1928. The offenses alleged in Specifications 1 and 2 of Charge I and Specification 2 of Charge II were established beyond a reasonable doubt.

6. Specifications 2 and 3 of Charge III allege that the accused did, "on or about 18 December 1944, with intent to deceive, wrongfully and unlawfully make and utter * * * a certain check" in payment of an account, "then well knowing that he did not have and not intending that he should have sufficient funds" in the drawee bank for the payment of said checks. The two alleged checks totalled $33.77. Specification 4 of Charge III alleges that the accused did, "on or about 26 December 1944, with intent to defraud, wrongfully and unlawfully make and utter to Jack Lewis, Kilgore, Texas, a certain draft * * * and by means thereof, did fraudulently obtain from the said Jack Lewis Twenty Dollars ($20.00) in cash, he [the accused] then well knowing that he did not have and not intending that he should have sufficient funds" in the drawee bank for the payment of said draft. These offenses are laid under Article of War 96.

On 18 December 1944, when the accused executed the two checks, his bank account showed a balance of $2.61 and, eight days later, at the time of making and negotiating a draft for $20.00, his account was overdrawn. Confronted with these facts, the accused insisted that the stubs in his check book indicated a balance sufficient to honor the instruments when presented and that he had acted in good faith and was innocent of any intent to deceive. Such a contention is hardly tenable in the face of the admittedly muddled state of his financial affairs. He testified that he

indulged in gambling for many months and, when increasing indebtedness resulted, attempted to "cover" by giving checks. He knew that many such checks were dishonored, among them the original check which he gave to United Package Stores. He was unable to produce any check stubs or other records of his bank account and professed complete ignorance of the number or amount of checks he had written in December, 1944. From the long course of careless and irresponsible conduct in the management of his financial affairs, his addiction to gambling, and the constantly depleted state of his bank account, no other inference than that of guilty knowledge and intent can be drawn. The Army requires of its officers a sense of integrity and responsibility and the accused's conduct, which revealed a sad lack of these qualities, was manifestly of a nature to bring discredit upon the military service. The offenses alleged in Specifications 2, 3, and 4 of Charge III are sustained by the evidence.

7. Specification 1 of Charge II alleges that the accused did "on or about 16 January 1945, with intent to deceive Lieutenant Colonel Curnel S. Hampton, Secretary, The Cavalry School, Fort Riley, Kansas, officially state to the said * * * Hampton that he had written no checks since 11 January 1945, or words to that effect, which statement was known by the [accused] to be untrue in that he had on 12 January 1945, written and uttered six (6) checks, each * * * being in the amount of Ten Dollars ($10.00), drawn on the National Bank of Tulsa, payable to cash, and dated 12 January 1945". This Specification is laid under Article of War 95.

In response to Lieutenant Colonel Hampton's effort to aid in resolving his financial problems, the accused, on 11 January 1945, promised to write no more checks for the remainder of that month. He violated his word the following night when, during the course of a poker game, he made and passed several checks. His false statement that he had adhered to his agreement, made a few days later at the time of an official interview with Lieutenant Colonel Hampton, amounted to misrepresentation of an official nature and constituted conduct which seriously compromised his character and standing as an officer and gentleman. The offense was properly charged as violative of Article of War 95 and was clearly established by the evidence.

8. Specification 1 of Charge III alleges that the accused "did, at Fort Riley, Kansas, on or about 1 February 1945, wrongfully and unlawfully sell one 1936 Ford Sedan automobile, Motor No. 2250655, to Private First Class Hubert J. Willis, without first obtaining the written consent of the Muskogee Industrial Finance Cooperation, Muskogee, Oklahoma, to said sale; said Muskogee Industrial Finance Cooperation then and there having a valid chattel mortgage on said automobile in the amount of $200.00 of which amount there remained then due and owing the approximate sum of * * * $111.50, which said mortgage was executed by the [accused] to the said [mortgagee] on 8 August 1944". This offense is set forth as a violation of Article of War 96.

The evidence establishes and the accused acknowledges the existence of the mortgage and the sale of the automobile without the consent of the mortgagee. The criminal effect of his conduct was shown by reference to a Kansas statute, as well as the assimilating statute (sec. 289, Fed. Penal Code, 1910; 18 U.S.C. 468), which makes the violation of a state law on a Federal reservation a Federal offense. This evidence was adduced for the purpose of proving that the accused had offended that provision of Article of War 96 which denounces "crimes or offenses not capital". The latter is held to include crimes committed in violation of an act of Congress or of legislation enacted under the authority of Congress. Par. 152c, MCM, 1928. Since the sale in the present case was consummated at Fort Riley, a federal reservation, the effect of the assimilating statute is to make the accused's conduct a federal offense and thus an offense "not capital" within Article of War 96. See 10 BR 63, CM 211420, McDonald.

It is clear that the sale of the mortgaged property was, also, "conduct of a nature to bring discredit upon the military service". The Manual for Courts-Martial (par. 152b), in discussing this provision of Article of War 96, provides:

> "'Discredit' as here used means 'to injure the reputation of'. Instances of such conduct on the part of persons subject to military law may include acts in violation of local law committed under such circumstances as to bring discredit upon the military service".

The accused not only offended the state law but also violated an express provision of the mortgage agreement which he had made with a civilian firm. In the opinion of the Board an offense against local law, committed under such circumstances, clearly constituted conduct of a nature to bring discredit upon the military service. The evidence amply sustains the findings of guilty of Specification 1 of Charge III.

9. The accused is about 27 years of age and is married. He attended public school for 12 years and was graduated from high school. He enlisted in the Army on 3 September 1942 and was commissioned a second lieutenant in the Army of the United States on 29 April 1943.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94 and of Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lifsecomb, Judge Advocate.

Robert J. Clamor, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 279735 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War JUL 13 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 Second Lieutenant Layton N. Bennett (0-1179557), Field Artillery.

2. Upon trial by general court-martial this officer was found guilty of knowingly presenting a false claim for pay and allowances in the sum of $96.70, by failing to reveal to the Finance Officer at Fort Riley, Kansas, who approved, allowed, and paid such claims, three outstanding Class E allotments totalling $180 and of knowingly presenting a second false claim for pay and allowances, in the sum of $246.70, by failing to reveal to the same Finance Officer two Class E allotments, totalling $70; both in violation of Article of War 94; of making a false official statement with intent to deceive a superior officer by stating he had written no checks since 11 January 1945, when in truth he had written six checks since that date, and of similarly making a false official statement to a finance officer that he, the accused, was due pay and allowances in the sum of $252 less $6.70 as a Class N allotment, which statement was known by the accused to be untrue in that he had three outstanding Class E allotments totalling $180, both in violation of Article of War 95; and of unlawfully selling an automobile upon which there was an unsatisfied mortgage claim of $111.50, and of fraudulently making and uttering three worthless checks in the sums of $20.82, $12.95, and $20, respectively, both in violation of Article of War 96. Evidence was considered of one previous conviction by general court-martial for wrongfully and negligently making and uttering a worthless check in the amount of $20, in violation of Article of War 96. He was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct for twenty-five years. The reviewing authority approved the sentence but remitted twenty years of the confinement 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 thereof.

The accused, just after his arrival at Fort Riley, Kansas, on 30 December 1944, presented to the finance officer information from which the latter might determine the correct amounts due the accused as pay and allowances for December 1944 and January 1945. In the official statement (described as an "Information Form") which he submitted to the finance

officer the accused failed to list three outstanding Class E allotments for the month of December totalling $180. On the basis of this information form a pay and allowance voucher, omitting the same Class E allotments, was prepared for him and executed by him with the result that he received $96.70 to which he was not entitled. The following month, on 1 February 1945, he executed another pay and allowance voucher for $276.70 but failed to include therein two Class E allotments totalling $80. The accused presented no satisfactory explanation to refute the inference of fraud arising from his failure to reveal his outstanding allotments. Thus these two claims were fraudulent in the total amount of $176.70. On 16 January 1945 he made a false official statement to his superior officer wherein he falsely reported that he had written no checks since 11 January 1945 when, in truth and in fact, he had written six checks since that date. Thereafter the accused sold his automobile, in violation of a local law forbidding the sale of mortgaged property without the consent of the mortgagee, and fraudulently made and uttered three more worthless checks, totalling $53.77.

I recommend that the sentence as approved by the reviewing authority be confirmed but that the period of confinement be reduced to three years, that the United States Penitentiary, Leavenworth, Kansas, be designated as the place of confinement, and that the sentence as thus modified be ordered executed.

4. Consideration has been given to a letter from 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

3 Incls
Incl 1 - Record of trial
Incl 2 - Form of action
Incl 3 - Ltr. fr. accused

(Sentence as approved by reviewing authority confirmed but confinement reduced to three years. G.C.M.O. 343, 21 July 1945).

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

SPJGQ-CM 279757

UNITED STATES	)	FOURTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened
	)	at Hammer Field, Fresno,
Second Lieutenant ROBERT	)	California, 9 April 1945.
D. JONES (O-835654), Air	)	Dismissal, total forfeitures
Corps.	)	and confinement for one (1)
	)	year.

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: In that Second Lieutenant Robert D. Jones, 461st Army Air Force Base Unit, did, without proper leave, absent himself from his organization and proper station at Lemoore Army Air Field, Lemoore, California, from about 4 January 1945, to about 31 January 1945.

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

Specification: In that Second Lieutenant Robert D. Jones, 461st Army Air Force Base Unit, did, at Florence, Alabama, on or about 16 October 1944, wrongfully and unlawfully contract a marriage with Trilby Lee Wells, the said Second Lieutenant Robert D. Jones then having on or about 16 October 1944 a living wife, to wit, Dorcas Jane Partch Jones.

He pleaded guilty to and was found guilty of the Charges and Specifications. No evidence of previous conviction was introduced at the trial. He was sentenced to be 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 three (3) years. The reviewing authority approved the sentence, reduced the period of confinement to one (1) year, and forwarded the record of trial for action under Article of War 48.

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

On 23 January 1944 the accused, while in cadet training, married Miss Dorcas Jane Partch of Wyandotte, Michigan, to whom he had been engaged for some time and who went from her home to Douglas, Georgia, for the wedding there, because the accused was unable to arrange to go north (R. 7, 8; Pros. Ex. 5, 6, 7). She remained with him at Moody Field, Georgia, and Maxwell Field, Alabama until 28 September 1944 when he was transferred to Courtland Field, Alabama and his wife went to her home in Michigan because there was no suitable place for her to stay at Courtland Field (Pros. Ex. 5). According to the statement of the accused (Pros. Ex. 5), his relationship with his wife "was all that it should have been up to (his) transfer to Maxwell Field." While at the latter place they "did not seem to get along so well"; at least the accused "felt that way toward her" though he does not believe that "she shares this feeling".

While at Courtland Field the accused met Miss Trilby Wells of Florence, Alabama and, on 16 October 1944 they were married at Florence but did not establish a common dwelling there (R. 8, 9; Pros. Ex. 5 and 8).

On 14 December 1944 the accused was assigned to the 461st Army Air Forces Base Unit at Lemoore, California, with orders to proceed on or about 16 December 1944 to his new station. He was granted 14 days delay en route plus 4 days travel time but was directed to report to the commanding officer of his new station not later than 3 January 1945 (R. 6; Pros. Ex. 2).

According to his own admissions (Pros. Ex. 5) he left Courtland Field, Alabama on 15 December 1944 and went, by automobile, to Fort Wayne, Indiana, accompanied by Trilby Wells and a friend and roommate, Second Lieutenant Billy Jacques. After staying with the accused for two days at Fort Wayne, Trilby left and returned to Florence, Alabama because the accused had no more money and stated to her that he "was going to see (his) relatives in that area." He did visit his wife and mother in Wyandotte, Michigan and friends in Van Wert, Ohio and Fort Wayne, Indiana. In the latter place he met a girl by the name of Mary Louise Stokes in a restaurant. Although he claims that he had never seen her before in his life, they became so intimate that she arranged to go with him to California and paid a substantial portion of the railroad expenses for both. The accused had not asked her to marry him nor did he induce her to accompany him. They left Fort Wayne on 1 January 1945 for Lemoore Field, California, travelling through Chicago, Illinois; Omaha, Nebraska; Salt Lake City,

Utah; Las Vegas, New Mexico, Los Angeles and Fresno, California. While in Los Angeles and Fresno the accused and Miss Stokes occupied the same bedroom. From Fresno the accused went to Oakland, California, while Miss Stokes went to Hanford, California, and the accused's statement does not disclose what happened to her thereafter.

From Fresno the accused started hitch-hiking east because he was out of money. He went through California, New Mexico, Texas, Arkansas and Tennessee and after arriving at Florence, Alabama remained there two days and then started hitch-hiking back to Lemoore Field, California. He got as far as Kingman, Kansas when, being out of funds, he wired to an uncle in Ohio for money. As a result he was apprehended on 30 January 1945 at Kingman, was surrendered to the military police at the Army Air Field in Pratt, Kansas and was returned, under guard, to Lemoore Field.

For some reason not apparent, the accused denied going through a marriage ceremony with Miss Stokes in Las Vegas, New Mexico but he assigns his relations with her as the chief reason for his going absent without leave because he hoped she would go away from California if he remained away from her long enough (Pros. Ex. 5).

A certified extract copy of the morning report of 461st Army Air Forces Base Unit submitted at Lemoore, California, on 4 January 1945 contained the following notation regarding the accused:

> "atchd unassigned enroute to join from Hq Courtland AAFld Courtland Ala to AWOL 0001."

An extract copy of the morning reports of the Base Guardhouse, Pratt Army Air Field, submitted at Pratt, Kansas, on 31 January 1945 and 7 February 1945, respectively, show the following entries regarding the accused:

> "Ret to mil control this sta by C Auth on 31 Jan 45 at 1100 and put in ar of qrs pending disposition 11 days AWOL"; and

> "Reld to officer gds at 1600 7 Feb 45 for return to proper sta per auth CO" (R. 6, 7; Pros. Exs. 3 and 4).

4. Evidence for the defense, in brief summary, is as follows. The mother of the accused testified that since her divorce in 1936 when the accused was 12 years old, he had lived with her in California although he had been greatly devoted to his father. The accused had never been in trouble and always bore an excellent character. After his graduation from high school he went east to visit his father, who persuaded him to enlist in the Air Corps, which he did, at the age of 18, and without the mother's consent. The father was killed in an accident in April of 1944 and this had a profound effect upon the accused (R. 10-12).

A letter from Mrs. R. D. Jones (Dorcas Jane Partch), the accused's wife, to the commanding officer, Lemoore Army Air Base, was admitted in

evidence without objection (R. 9). Therein she recounted the unhappy life of the accused subsequent to the divorce of his parents; his enlistment in the Air Corps under the persuasion of the father against her wishes and the wishes of the mother; the accused's marriage to her; and the tragic death of the father in an accident and the serious effect it had upon the accused, who was extremely devoted to his father and had joined the Air Corps merely to win his father's admiration and notwithstanding the fact that he had always feared airplanes since childhood and until he learned to fly could not be coaxed into one. After his father's accidental death the accused never seemed to get over it and after the funeral had said he never wanted to go up in an airplane again. His fears grew instead of lessening and he was "frightened to death" every time his plane left the ground. He would actually break out in nervous sweats and pace the floor whenever he was to be checked in his work. Later on when he was assigned to B-24 planes he was broken up over the idea that something would happen to him so that he would not see his wife again and he would sit and brood for an entire evening and hardly utter a word. Several accidents suffered by some of his companions worried him still further. When he came home on leave in December 1944, members of his mother's and father's families as well as those of the wife, commented on how strangely he acted. The wife's mother, who was a nurse for 25 years, said that the accused looked and acted "as if he was bound for a nervous and mental collapse." In the opinion of the wife the accused's actions recently were "absolutely foreign to his whole makeup" in view of his past record and moral background. She cannot understand the bigamous marriage inasmuch as his parents' broken marriage always made him more determined to make his own a success. She believed that a combination of fear of flying, emotional strain over his father's death, and a nervous and mental collapse had motivated his actions (Def. Ex. A).

The accused, having been informed of his rights, elected to remain silent.

5. Notwithstanding the accused's pleas of guilty to all of the Charges and Specifications the prosecution adduced evidence which is convincing of his guilt of each offense alleged, beyond reasonable doubt.

In a voluntary statement the accused admitted his absence without leave for the period set forth in the Specification of Charge I and offered nothing in mitigation or extenuation of his actions. Indeed, although it appears that he dreaded his flying duties, he frankly indicated that his absence was the result of an affair with an unmarried girl who accompanied him across the continent in his change from one station of duty to another, occupying hotel rooms in common with him, and that, in order to free himself from this entangling alliance, he deserted her in California and thereafter went from one place to another until apprehended.

This episode, which certainly suggests grave, moral delinquency, was all the more disgraceful because, although he was not charged with any

other offense arising out of the situation other than the unlawful absence, the accused was, at the time, a married man who had, subsequent to his lawful marriage, contracted a bigamous marriage.

According to the Code of Alabama (where the bigamous marriage took place):

> "If any person, having a former wife or husband living, marries another, or continues to cohabit with such second husband or wife, in that state, he or she shall, upon conviction, be imprisoned in the penitentiary for not less than two nor more than five years" (Title 14, sec. 47).

> "The provisions of section 47 of this title do not apply to any person who, prior to such second marriage, had procured a decree from a court of competent jurisdiction, dissolving his or her former marriage, and allowing him or her the privilege of marrying again; nor to any person who, at the time of such second marriage, did not know that his or her former husband or wife was living, and whose former husband or wife had remained absent from him or her for the last five years preceding such second marriage." (Title 14, Sec. 48)

The evidence shows that the accused was married in Douglas, Georgia on 23 January 1944 and after cohabiting with his wife until 28 September 1944, he was transferred to a new station where there was no suitable provision for his wife and she returned to her home in Michigan. Thereupon he took a fancy to another girl and, without telling her he was already married, or informing his wife, he obtained a license, went through a marriage ceremony with her in Florence, Alabama on 16 October 1944 and thereafter recognized her as his wife until sometime between 15 December 1944 and 1 January 1945 when they parted at Fort Wayne, Indiana. She returned to her home in Florence, Alabama and he proceeded to his new station in California accompanied by another woman whom he had met and who helped to pay his railroad fare and occupied the same hotel rooms with him until, and for some days after, his arrival there.

All these things are admitted by the accused in a voluntary statement and his pleas of guilty obviated the necessity of proof of the essential elements of either offense with which he was charged.

Nevertheless, the evidence in the case, together with all applicable presumptions, shows that the accused did contract a bigamous marriage when he pretended to marry Trilby Wells while his wife Dorcas Jane Jones was still living and they were undivorced. There was no direct proof of the latter facts but in the light of the accused's frank admissions and the letter written by his wife to the accused's commanding officer on 2 February 1945, there could be no other reasonable inference than that the marriage was undissolved and that Dorcas Jane Jones was still living when the purported second marriage was contracted. Where a former marriage has been proved, as in this case, it will be presumed

to be valid, when there is no evidence to the contrary (7 C.J. 1169) and all matters of confession and avoidance must be shown by the defendant (idem. 1171). There was, likewise, competent evidence of the subsequent marriage. Proof of the presumably valid marriage followed by a later marriage while the lawful spouse is still living and the first marriage is undissolved, presents a prima facie case.

There being a solemn judicial admission of guilt by the pleas of the accused, and nothing from which it appears that they were improvidently entered, there is no question about the propriety of his conviction of the offenses with which he was charged.

6. Records of the War Department disclose that this officer was born in Fort Wayne, Indiana, is 20 years and 9 months of age, and is married. After graduation from high school he was employed as stock clerk for a hardware company from April to June 1942; from July to September 1942 he was employed as a stock clerk by the Atlantic and Pacific Tea Company in Wyandotte, Michigan; and from September 1942 to February 1943 he was a machinist employed by the Magnavox Company, Fort Wayne, Indiana. From 1941 to 1942 he was a member of the Reserve Officers' Training Corps. On 26 February 1943 he entered the service as an aviation cadet and, after completing the prescribed course of training at Army Air Forces Pilot School (advanced - 2 engine), Moody Field, Georgia, was commissioned a second lieutenant on 4 August 1944 and was thereupon assigned to duty at Maxwell Field, Alabama.

7. The court was legally constituted and had jurisdiction of the accused and the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed 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 and confinement in the discretion of the court are 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.

_____, Judge Advocate.

SPJGQ-CM 279757 1st Ind

Hq ASF, JAGO, Washington, 25, D. C. JUN 29 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 Robert D. Jones (0-835654), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absence without leave (26 days), in violation of Article of War 61 and of bigamy, 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 three (3) years. The reviewing authority approved the sentence, reduced the period of confinement to one (1) year, 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 and sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. I concur in that opinion.

On 23 January 1944 this officer, while in training as an aviation cadet in Georgia, married a girl to whom he had been engaged for some time. They cohabited in Georgia until 28 September 1944 when she was obliged to return to her home in Michigan because no suitable accomodations for her were available at his new station in Alabama. Thereafter, his love for his wife cooled and he became infatuated with another girl, whom he married in Alabama on 16 October 1944. Having been ordered to proceed to Lemoore Field, California, to arrive there not later than 3 January 1945 he left his station, accompanied by the bigamous wife as far as Fort Wayne, Indiana, where she left him and returned to her home in Alabama. Thereupon, he acquired a third female consort, who accompanied him to California, paying part of his transportation expenses and occupying the same hotel room with him until he deserted her because he feared the consequences of the entangling alliance. Instead of reporting to his new station he traveled east as far as his former station and then to the middle east where he was apprehended in Kingman, Kansas, on 30 January 1945. His lawful wife is devoted to him and she and his mother attribute his escapades to nervous collapse. According to them he was induced to enlist in the Air Corps by his father, against the wishes of the mother and the girl who later became his wife and notwithstanding his life-long fear and dread of airplanes. In the midst of his training his father was killed in an accident and this, together with fatal accidents to some of his companions in training, had a profound effect upon him. However, this may be, it can hardly be said fear of flying or grief over the tragic loss of father and friends should or could, as a consequence, produce and justify

a mania for illicit philandering. Such a course of conduct as is evidenced in this case demonstrates not only lack of the basic fundamentals of character and behavior required of an officer of the Army but involves grave moral turpitude according to civil and military standards.

I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted, that the sentence as thus modified be ordered executed, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviwewing authority confirmed but forfeitures remitted. G.C.M.O. 299, 7 July 1945).

Classification
~~Original~~ - Cancelled
Date - AUG 14 1946
amg

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

10 MAY 1945

SPJGV-CM 279831

UNITED STATES	U. S. TROOPS, ADAK, ALASKA
v.	Trial by G.C.M., convened at Adak, Alaska, 23 March 1945. Dismissal and fine of $500.
Second Lieutenant JAMES D. MONK (O-1051299), Transportation Corps.	

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates.

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

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

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

Specification: In that Second Lieutenant James D. Monk, 860th Army Marine Ship Repair Company (TC), did, at Adak, Alaska, on or about 4 March 1945, without proper leave, go from the properly appointed place, Port Administration Building, for duty as Duty Officer, after having repaired thereto for the performance of said duty.

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

Specification 1: In that Second Lieutenant James D. Monk, 860th Army Marine Ship Repair Company (TC), did, at Adak, Alaska, on or about 4 March 1945 strike Captain Archibald B. Kennedy, Outport Unit (TC), who was then in the execution of his office, on the head with his fist.

Specification 2: In that Second Lieutenant James D. Monk, 860th Army Marine Ship Repair Company (TC), did, at Adak, Alaska, on or about 4 March 1945 draw a weapon, to wit, a .45 calibre automatic pistol against Captain Archibald B. Kennedy Outport Unit, his superior officer, who was then in the execution of his office.

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

Specification: In that Second Lieutenant James D. Monk, 860th Army Marine Ship Repair Company (TC), having received a lawful order from Captain Archibald B. Kennedy, Outport Unit, to get out of the car, the said officer being in the execution of his office, did, at Adak, Alaska, on or about 4 March 1945, fail to obey the same.

The accused pleaded not guilty to, and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to pay the United States a fine of $500. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The accused was detailed as Officer of the Day and as Duty Officer for the 4th of May 1945 at the headquarters of Provisional ATS Battalion (Pros. Ex. A). He reported for duty at about 1840 on that day (R. 8) and was seen at the desk the Officer of the Day usually occupies (R. 9) by the civilian personnel clerk of Headquarters, a Sergeant Bray, who saw nothing unusual in the accused's demeanor or actions (R. 9). The Officer of the Day was required to report at 1830 and serve until 2130, a three hour tour.

The accused left his place of duty before 2105 (R. 9). The only person competent to relieve him of his duty was Captain Layfer, who testified that the duties of the accused would not require him to leave the building and that he, Captain Layfer, did not relieve him. No one had given the accused permission to go (R. 37). At about 2030 Captain Kennedy, commanding officer of Headquarters Company, together with Captain George D. Rowe saw the accused in a car parked outside the orderly room, fumbling in his pockets apparently in search for a key. Captain Kennedy inquired if he was going somewhere to which the accused replied "Yes, if I can find the key" (R. 11-12).

Captain Kennedy then gave the accused a direct order to get out of the car (R. 11) which the accused refused to obey (R. 12). The order was repeated and the accused persisted in his refusal. Captain Rowe distinctly heard the order given to the accused (R. 19) as did Sergeant Griewank (R. 24). Both these witnesses also saw the accused refuse to obey the order. Upon the accused's refusal to obey this direct order given him, Captain Kennedy, who was officer in charge of that area (R.10) ordered the accused placed in arrest. When the accused heard this, he pulled out a .45 pistol and aimed it in the direction of both Captain Kennedy and Captain Rowe. Captain Kennedy "grabbed the gun" (R. 11) and

a scuffle ensued during which the gun went off. Captain Kennedy got part possession of it, whereupon the accused finally relinquished it voluntarily. Captain Kennedy went around to the rear of the car where he placed the pistol. As he again approached the car door where the accused was sitting, the latter "swung at me from his place in the car". Captain Kennedy stepped back and as he did so, the accused got out of the car and struck him (Captain Kennedy) with his fist (R. 12) on the side of the face (R. 22). A fist fight ensued until the accused was finally subdued with the help of Captain Rowe and some enlisted men, and taken to the headquarters orderly room. Upon arriving there, Captain Kennedy learned that the MPs had been called. While waiting for them to arrive, the accused struck Captain Kennedy again.

Accused and Captain Kennedy had known each other since 19 January 1945. Captain Kennedy was wearing the insignia of his grade on his shoulders and overseas cap at the time of the above occurrences (R. 12, 14).

As to the sobriety of the accused, Captain Kennedy did not detect the odor of alcohol on accused's breath, but believed the accused to be intoxicated because the latter was breathing heavily, was pale of complexion, awkward and slow in manner and unclear in speech (R. 12-17).

Captain Rowe also believed the accused intoxicated (R. 20) as did Sergeant Griewank. According to the sergeant the accused's eyes were large and blurred (R. 25). A report of the blood alcohol test taken of accused's blood at 2345 indicated an alcoholic content of 1.6 milligrams per cubic centimeter. The defense raised no objection to this report being offered in evidence (R. 18).

Both Private First Class Adie and Private First Class Harris testified for the defense that they saw accused the night in question and both believed him to be intoxicated (R. 31-33). Lieutenant Belbman, a medical officer, testified that he did not make the blood alcoholic test report which the prosecution had offered in evidence (R. 29), but that a physician must observe the patient as well as have the blood test to be able to determine whether one is intoxicated (R. 29).

4. There can be little doubt that the accused was properly found guilty of all the Charges and Specifications in this case. As to the first Specification and Charge the evidence shows that an order was issued appointing the accused as "Duty Officer" or as "Officer of the Day". The terms were used synonymously. While the testimony failed to prove directly that this order was given him or brought to his attention, the fact that he was present at the time and place specified in that order,

and that he apparently assumed his duties, is sufficient proof that he was on duty at the time and place alleged. Since the evidence shows him away from his appointed place about to depart in a motor vehicle, and that he received no permission or leave from the only proper authority who could give him such permission, the offense is clearly established.

5. The drawing of a weapon against a superior officer (Spec. 1, Chg II) and the striking of a superior officer in the execution of his office (Spec. 2, Chg II) are so well established by the evidence of the superior officer in question that little comment thereon is necessary. In addition to Captain Kennedy, the testimony of both Captain Rowe and Sergeant Griewank, who were eyewitnesses both as to the lifting up of the weapon and the assault and battery, is ample corroboration. That Captain Kennedy was the accused's superior officer is clear from the relative grade of the two persons involved. For by "superior officer" is meant any other commissioned officer of a rank superior to that of the accused (MCM, 1928, par. 134a). Captain Kennedy was clearly "in the execution of his office" within the meaning of the Specification as alleged, since he was "officer-in-charge of the area" (R. 17) and because of his "office" gave the order to the accused which started the chain of offenses that resulted in this trial. The same reasoning applies to the offense of failure to obey the order charged in the Specification of Charge III, as applies above.

6. The offering into evidence of the report of the alcoholic blood test was gross error. Not only was the report itself hearsay evidence, but as it subsequently developed, the report was not even signed by the person who made the test. Since there was ample evidence on the question of intoxication from several witnesses, and since a medical officer testified that the value of the blood level found in the accused was open to question (R. 29) no prejudice to the accused resulted. This is particularly true since the defense raised no question as to the admission of the report.

Some time was spent by both prosecution and defense on the question of whether the accused was or was not intoxicated at the time of the commission of the offenses. To us this question, under all the circumstances in this case, is purely one of the presence or absence of mitigation, and does not affect the validity of the findings.

The Manual for Courts-Martial, 1928 (sec. 126a) provides:

"It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense."

In any event, at best none of the evidence showed that the accused was so intoxicated that he did not know what he was doing, or that his judgment and common sense were so seriously impaired that he was incapable of entertaining only the general intent necessary in any of the offenses with which he was charged and found guilty. None of these offenses require a specific intent. As to the sentence, we feel that its mildness is proof that the court was swayed by every mitigating circumstance shown in the case.

7. One other point requires comment. The accused made application for the appointment of Captain Samuel Pasco, Jr., 278th CA Battalion, assistant Post Inspector, as special defense counsel. The application was denied on the grounds that Captain Pasco was not available for the detail. It may be pointed out in passing that it is not mandatory upon a superior or reviewing authority to grant a request from an accused for a particular officer to be detailed as his counsel. Paragraph 45a of the Manual for Courts-Martial, 1928, provides:

"The accused shall have the right to be represented in his defense before the court * * * by counsel of his own selection, civil counsel if he so provides, or military <u>if such counsel be reasonably available</u>, otherwise by the defense counsel duly appointed for the court pursuant to A.W. 11. * * *". (Underscoring supplied).

It is obvious that the commander of the officer requested is the sole judge of whether such officer is available, or whether he cannot be spared from other duties. At the trial, the defense, after pointing out to the court that it had requested the services of Captain Pasco finally stated that he was satisfied with the regularly appointed defense counsel.

8. The records of the War Department show the accused to be less than 22 years old. He served as an enlisted man from 14 July 1939 to 31 July 1941 and reenlisted on 26 May 1942 for the duration of the war plus six months. Upon graduation from Officer Candidate School he was commissioned a second lieutenant on 4 February 1943 and entered on active duty on that date. At the time of the commission of the offenses

of which he was found guilty he had served overseas nearly two years. He is married. In civil life he was a clerk with an insurance company.

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

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

Classification
changed - cancelled
Date-
By ALBERT W. Jones

SPJGV-CM 279831 1st Ind
Hq ASF, JAGO, Washington, 25, D. C.
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 James D. Monk (O-1051299), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from his place of duty, in violation of Article of War 61, of striking and lifting up a weapon against a superior officer in the execution of his office, in violation of Article of War 64, and failure to obey a lawful order of a superior officer in the execution of his office, in violation of Article of War 96. He was sentenced to be dismissed the service and to pay the United States a fine of $500. 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 Officer of the Day at a camp in Alaska. He left his post about a half hour before the expiration of his tour of duty without permission and without being regularly relieved, and proceeded to get into a car which he was ready to drive off. His superior officer, Captain Kennedy, discovered him in the car and ordered him out. The accused deliberately refused and was ordered in arrest. Whereupon he whipped out a .45 caliber pistol and pointed it at Captain Kennedy. The gun went off in the ensuing scuffle. A short time later, while the accused was being held at the orderly room, awaiting arrival of the military police, he again struck Captain Kennedy on the head with his fist.

The staff judge advocate in his review states that the accused participated in the Aleutian campaign and is authorized to wear the bronze star. In view of this fact I recommend that the sentence be confirmed but the fine imposed be remitted 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 Rec of Trial
2 Form of Action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but fine imposed remitted. G.C.M.O. 305, 7 July 1945).

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

SPJGQ - CM 279842

20 [illegible] 1945

UNITED STATES v. Private ARTHUR P. POTENS (36854399), 1612 Service Command Unit, Reception Center, Company B, Fort Sheridan, Illinois.	)	SIXTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Sheridan, Illinois, 31 March 1945. Dishonorable discharge and confinement for ten (10) years. Penitentiary.

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

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that, Private Arthur P. Potens, 1612 Service Command Unit, Reception Center, Company B, Fort Sheridan, Illinois, then Recruit Reception Center, Fort Custer, Michigan, having been lawfully inducted into the Military Service of the United States, did fail to report for active duty in compliance with Paragraph 3, Special Orders Number 119, Headquarters Detroit Recruiting and Induction District, 2985 East Jefferson Avenue, Detroit, Michigan, dated 20 May 1943, and did, at Fort Custer, Michigan, on or about 27 May 1943, desert the service of the United States, and did remain absent in desertion until he was apprehended at Detroit, Michigan, on or about 3 March 1945.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was submitted. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 20 years. The

reviewing authority approved the sentence, reduced the period of confinement to 10 years, designated the United States Penitentiary, Terre Haute, Indiana, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. The evidence shows that on 28 July 1942 Wayne County Local Draft Board Number 24, Detroit, Michigan, classified the accused as 3-B, the classification covering a person who had dependents and was essentially engaged in national defense work (R. 15). On 27 October 1942, the board reclassified accused, placing him in class 1-A (R. 12-17; Pros. Ex. 2).

On 16 January 1943, Major Arthur A. Holmes, Classification Division, Michigan State Selective Service Headquarters, instructed the draft board by letter to "stay" the induction of accused, and the board complied with these instructions (R. 20; Def. Ex. 1). On 13 March 1943, the draft board wrote Major Holmes, requesting advice about "the situation" (R. 20). Pursuant to a reply from Major Holmes, dated 8 April 1943, and instructions contained in a letter dated 9 April 1943 from Colonel C. E. Strong, Internal Security Officer, Central Procurement District, Army Air Forces, Detroit, Michigan, the board ordered accused to appear for induction at the Induction Center in Detroit, Michigan, on 20 May 1943 (R. 8, 9, 18-22; Pros. Ex. 2; Def. Exs. 2, 2-A, 3).

By his own admission on the witness stand, accused appeared at the Induction Center at the designated time (R. 107, 117, 125), and his name appeared on the draft board's "Form 151", known as the "delivery list", which contained the names of the men ordered by the board to report to the induction center on the day in question (R. 9, 10, 50, 51; Pros. Ex. 1).

As will appear from the testimony of accused, he contended that although he went to the induction center, he did not go through the induction procedure and was never inducted. Among the large number of persons inducted on that and other dates, the induction officials had no affirmative recollection as to the induction of the accused personally, so the evidence for the prosecution consisted principally of an expository explanation of the routine procedure which was followed on 20 May 1943, involving an assumption of regularity in the absence of any record evidence to the contrary, plus certain documentary evidence, hereinafter considered, to show that accused had in fact been inducted.

On 20 May 1943, Major Edward L. Watson and First Lieutenant Aristomenis Mantzoros were on duty at the induction center (R. 26, 27, 68), and they are the witnesses who testified to the induction procedure in effect on that date.

Upon the arrival of the selectees at the induction center, there was a roll call of the men whose names appeared on the draft board delivery lists heretofore referred to, followed by an orientation talk explaining the induction procedure. Thereafter, the men were "called up" to the

reception desk individually by name, and "entered the line for induction" (R. 27, 48-51).

At the reception desk, each man was handed his individual "Form 221", entitled "Report of Physical Examination and Induction" (R. 28, 51). This form originated with the draft board, and Sections I and II of the form, dealing respectively with biographical data and the report of the physical examination by the draft board's physician, were filled out by the draft board prior to the induction process (R. 11, 12, 76, 77). The Form 221 for accused was properly identified and introduced in evidence (R. 11; Pros. Ex. 2).

After the selectee had received his Form 221, a clerk at the reception desk asked him whether he was under arrest awaiting criminal charges or on probation or parole, whether he had ever served "time" in a penal institution, whether he had ever been dishonorably discharged from the military service, and a series of similar questions. If he replied in the affirmative to any of these questions, he was sent to interview a Captain (now Major) Yowel, whose office was on the second floor, and whose primary duty was "handling administrative rejects for moral standards" (R. 28, 46, 47, 55, 57, 58, 77, 78). If the selectee's papers were not in proper shape, Captain Yowel "made an administrative reject" of him (R. 46). Otherwise Captain Yowel sent him back to the first floor to continue the induction routine (R. 47). After the selectee left the reception desk, an identification number was painted upon his hand, entered upon a roster, and marked in pencil upon his Form 221 (R. 28, 51, 52). The accused's Form 221 shows that his identification number was 379 (R. 53; Pros. Ex. 2).

After checking part of his clothing and taking literacy tests in the Classification and Assignment Section, the selectee went from the first floor to the third floor for his physical examination (R. 28, 29, 48, 51, 58). The physical examination was never given at any place outside the induction center (R. 58). The accused's Form 221 shows that he received the physical examination and was declared physically and mentally qualified for general military service (Pros. Ex. 2).

The selectee then proceeded to the assignment desk for assignment to one of the branches of the service. If assigned to the Army, he went down to the second floor and was fingerprinted (R. 29, 57). Immediately thereafter he submitted to a clerk information concerning the relative to be notified in case of emergency and the designation of a beneficiary, as required for the completion of Section III of Form 221. The clerk typed the data onto the form, whereupon the selectee placed his signature at the bottom of Section III, and the signature was witnessed by an induction officer (R. 29, 57, 76, 77). The answers to the questions contained in Section III of the form were never filled in at a place other than the induction center nor for men who were rejected (R. 58). The signature of accused, properly identified as such, appears at the bottom of Section

III of his Form 221, followed by the signature of Lieutenant Mantzoros as witness. May 20, 1943 appears as the date (R. 12, 68, 69, 70, 83; Pros. Ex. 2).

Although a selectee would have been permitted, upon request, to see Captain Yowel even after the completion and signing of Section III of Form 221, he was not sent to Captain Yowel at this stage of the proceedings in the ordinary routine (R. 59).

After the selectee signed Section III, an Army Serial number was assigned to him and his service record was prepared (R. 29, 37, 80). A photostatic copy of accused's service record was received in evidence, signed by Lieutenant Mantzoros, and showing accused as having been inducted into the Army on 20 May 1943 (R. 71, 73; Pros. Ex. 7). Lieutenant Mantzoros testified that the service record would not have been prepared unless accused had been inducted, but he testified also that the service record was prepared before the administration of the oath (R. 71, 72).

After the procedure outlined above, special orders were prepared containing the names of the men accepted and to be inducted on the date in question (R. 29, 64, 80). The special orders for 20 May 1943 were received in evidence. The name and serial number of accused appear thereon (R. 34, 37, 61; Pros. Ex. 4). Any errors on the special orders for 20 May would be shown by entry of correction on the special orders of 21 May. Since no entry concerning accused appears on the special orders for 21 May, the entry concerning his induction on 20 May is correct (R. 34, 35, 39, 40; Pros. Ex. 3). The induction center also kept separate daily records of rejections, and the name of accused does not appear on these records for either 20 or 21 May 1943 (R. 40-43; Pros. Exs. 5, 6). On Form 151, the draft board delivery list previously referred to, accused's name is checked as having been accepted for the Army, and no notation appears that he was held over (R. 10, 33, 44, 45, 66, 78; Pros. Ex. 1).

Each selectee was given an extract copy of the special orders referred to above, which extract copy included his name and serial number (R. 30, 34, 63). Then he arranged with the Transportation Officer for transportation to Fort Custer (R. 38, 48, 49, 74, 75, 82).

Thereafter, in the room where the oath was administered, each man was "called up" according to the names listed on the special orders, and, in the words of Major Watson, "When a man stands there with his extract copy in his left hand, you know the man is there, and the man has his copy, and you never send a man in without checking his name with that. He must answer 'here' and you see the man" (R. 30, 63, 64, 75, 80). If a selectee was not present and could not be located, his name was stricken from the special orders, which were amended on the following day to show why he was absent (R. 64). If accused had not been in the room, his

name would have been removed from the special orders (R. 63). As previously noted, the name of accused appears on the special orders for 20 May 1943, and no amendment or correction concerning him appears on the special orders for 21 May 1943 (Pros. Exs. 3, 4).

Before the administering of the oath, the selectees received another orientation talk, during the course of which they were instructed to report to the Recruit Reception Center, Fort Custer, Michigan, in seven days, in compliance with the order to that effect contained in the special orders (R. 30, 37, 38, 62). The special orders dated 20 May 1943 directed the inductees named therein, including accused, to report to Fort Custer on 27 May 1943 (Pros. Ex. 4).

At the orientation talk, the men were told that anyone not wishing to take the oath should step aside. No one refused to take the oath during May 1943. If accused had refused to take the oath, his name would have been stricken from the special orders, his service record would have been "pulled out", and Form 151 would not have shown him as accepted (R. 30, 31, 38, 39, 70-73, 78, 79).

On 20 May 1943 Lieutenant Mantzoros administered the oath (R. 31, 32, 69). Although Lieutenant Mantzoros did not know from actual knowledge whether the oath was administered to accused, he stated that it must have been, for otherwise he would not have signed the service record and the Form 221 (R. 75, 76). The Form 221 contains a notation, signed by Lieutenant Mantzoros, that on 20 May 1943, accused was inducted for general military service into the Army, transferred to the Enlisted Reserve Corps, and ordered to report on 27 May 1943 for active duty at Fort Custer, Michigan (R. 68-70, 77; Pros. Ex. 2).

Lieutenant Mantzoros testified that during the induction procedure selectees were not permitted to leave the building and that a guard was stationed at the door to see that no selectees left without proper authority (R. 80, 81).

Accused did not report to Fort Custer on 27 May 1943 or at any other time (R. 84-87). After 20 May 1943, the Wayne County Local Draft Board did not hear from accused nor did he report to it. On 27 May 1943 the board classified him as "1-C by induction" and that was their last classification of him (R. 23).

On 9 December 1943, upon notification from The Adjutant General that accused was an absentee "wanted" by the Army, the draft board notified the proper authorities, the Military Police Detachment at Detroit (R. 23, 24). On 3 March 1945, as a result of information furnished by the Provost Marshal in Detroit, Michigan, accused was arrested by the Detroit police at a factory where he was employed (R. 88-91). Accused asked the reason for his arrest and when told that he was wanted as a deserter from the Army, replied that he could not be a

deserter insomuch as he had never been inducted (R. 89). He offered no resistance when arrested (R. 91).

Accused testified that he was born in the former "Austrian-Hungarian monarchy", later Jugoslavia, and became a naturalized citizen of the United States in 1929 (R. 99). He received training in electrical engineering and became a tool and gauge maker and designer (R. 96, 97). He was employed by the Esco Engineering Company in Detroit, but in September 1942 lost his job by reason of an order issued by Colonel Strong of the Air Corps Procurement Division (R. 96-99). Later employed by the Lemay Engineering Company of Detroit and working under that employment at the Goodyear Aircraft Corporation in Akron, Ohio, he was again discharged by Colonel Strong's orders in January 1943 (R. 96, 100).

Accused's difficulties are explained in a letter dated 31 May 1943, which he wrote to Victor W. Rotnem, Department of Justice, Washington, D. C. (Def. Ex. 5). He sent copies of the letter to the Truman Committee, a Special Committee of the United States Senate investigating war materiel procurement activities, and to Senator LaFollette of the Civil Rights Committee (R. 125). In brief, the letter explained that Colonel Strong, Air Plant Protection Officer in Detroit, unjustly ordered accused discharged from the firms above mentioned and from all war production plants under his jurisdiction. Since we are not concerned with the propriety of Colonel Strong's action, we consider it unnecessary to set forth the details of the dispute. According to accused's letter, the difficulty arose from friction between accused and his union (CIO Local 157) on the one hand and the Esco concern on the other. During the course of the dispute, accused and the union filed charges against the company with the War Production Board. Accused appealed Colonel Strong's order, and early in February 1943, a hearing on the appeal took place in Washington. Accused was never informed of the nature of the charges against him and believed that they were "trumped up". The appeal was denied and Colonel Strong's order was "maintained", of which action accused received notice by a letter dated 16 March 1943 from James E. Delaney, Investigator in Charge, Internal Security Section, Army Air Forces Area Supervisor, Detroit, Michigan. Accused and his associates believed that "this maneuver" was "conceived" for the purpose of damaging his character and helping to "squash" the charges made by him and the union against Esco to the War Production Board. Accused's reputation has been injured, he has lost a substantial amount in wages, and he has been denied the privilege of applying for a commission in the Navy.

Despite the supposedly serious nature of the charges against him, continued the letter, accused's draft board ordered his induction, indicating to accused and his friends a vicious intention to punish accused while serving in the Army and unable to defend himself. On 19 May 1943, R. J. Thomas and William C. Stevenson, union officials, appealed the case to the Under Secretary of War. Accused was willing and anxious to be tried on the "so-called charges" (Def. Ex. 5).

Testifying concerning his alleged induction, accused indicated that he was surprised to receive the notice from his draft board to report for induction on 20 May 1943, since his induction had previously been "stayed" and his "case" had not been disposed of by the War Department. Upon inquiry at the draft board, he was shown Colonel Strong's letter instructing the board to proceed with the induction (R. 107, 108, 117, 124, 125). That letter stated that accused's case had been "disposed of" by the War Department (Def. Ex. 3).

Continuing his testimony, accused stated that he reported to the induction center as ordered, asked for advice in view of his situation, and was referred to "Major" (then Captain) Yowel, whose office was on the second floor (R. 107, 109, 117, 125). He explained his difficulties to Captain Yowel and told him that his representatives were in Washington appealing the case to the Under Secretary of War. He asked Captain Yowel to postpone his induction for a day or two pending the outcome of the appeal. After some discussion, Captain Yowel asked accused to wait in the hall (R. 110-112). Accused went to the Navy recruiting desk and volunteered his services to the Navy, but when he explained his situation, the recruiting officer rejected him (R. 112-114, 122). After further conversation with Captain Yowel, accused was asked to step outside again, as Captain Yowel "proposed to" investigate the matter further (R. 114, 115). It being time for lunch, accused left the building, went out for lunch, and never returned (R. 115, 120, 121). He has never taken the oath of allegiance inducting him into the Army and has never been in the presence of or near persons taking the oath (R. 115, 116). He has never seen a copy of Prosecution's Exhibit 4, the special orders issued on 20 May 1943, and has never received instructions to report to Fort Custer or any other military center (R. 122, 134).

According to accused, his reasons for not proceeding with the induction were his rejection on that day by the Navy and the "position" he was in, which he "pleaded" to Captain Yowel (R. 122). Asked why he did not return to the induction center, accused testified that although Captain Yowel was "very sympathetic to the problem" and "admitted" that accused was "in a very difficult situation" and "should be cleared", he gave no encouragement to accused as to what he could do on that day "to help in the psychological gap" which accused "had got into" (R. 120, 121).

Accused testified that he has been in constant communication with various departments of the Government, which statement he can substantiate by copies of the communications (R. 104).

In July 1943 accused received a letter from Captain A. M. Bennett, Sixth Service Command, in which, for the first time, he was informed that he was supposed to be a member of the Armed Service. Captain Bennett's letter inquired as to the "whereabouts" of accused and asked why he had not reported for duty. Accused indicated that in the interim he had not informed "anyone" (apparently meaning the Army and draft board) of his "whereabouts" (R. 104-106, 123).

On 19 July 1943 accused replied to Captain Bennett (R. 104-106; Def. Ex. 4). In the letter, accused again explained his position, including his interview with "Major Yeull", and stated that he had been traveling a good deal in connection with his attempt to clear himself of a "malicious slander" perpetrated against him by persons unknown. He mentioned that the case had been presented to the Under Secretary of War and that he had good reason to hope that he would be "cleared" in the very near future. The last part of the letter is as follows:

> "In conclusion Sir, I herby (sic) wish to state to you and Maj. Gen. Araund (sic), that I have every intention to report for Military duty, as my loyalty to the (sic) Our Country is not inpaired (sic) in the least, in spite of the very negative experiences of the past six Months. I only ask for a chance so I may look any one in the face, regardless of rank" (Def. Ex. 4).

A letter from Walter P. Reuther, vice-president of the United Automobile Workers of America (R. 126), to accused, dated 15 March 1944, was admitted in evidence. The letter states that the writer encloses a copy of a letter which he has received from the Under Secretary of War with reference to accused's "case", and that he (Reuther) will keep accused posted as to further developments (Def. Ex. 7-B).

Several other letters, offered by accused to show the status of his case from time to time, were excluded by the law member. The law member's refusal to admit them will be considered hereinafter.

Accused testified further that at the time of trial his "case" was being processed through the Department of Justice, that it had not been settled, and that it was "still being thrashed around between all these various agencies" (R. 115, 124).

Called in rebuttal, Major Watson testified that lunch was provided for the selectees in the induction center, that they were not permitted to go out for lunch nor to leave the building, and that there was a guard "on the doors" who did not let any selectee leave the building unless he had a pass signed by an officer (R. 135-138).

4. From the foregoing evidence it is apparent that accused claims never to have been inducted into the Army. Although he admits reporting to the induction center on 20 May 1943, he claims to have gone immediately to Captain Yowel's office, and states that after conferring with Captain Yowel and asking for a postponement of his induction, he went out for lunch and never returned.

As opposed to the testimony of accused, there is a chain of circumstances which persuaded the court that the story told by accused was untrue and that in fact he was inducted. Some of those circumstances are the following: 1. The Form 221 prepared for accused contains an

identification number shown by the evidence to be placed upon a selectee's Form 221 after the number had been painted upon the selectee's hand. 2. The Form 221 shows that accused took and passed the physical examination. 3. Section III of Form 221 was signed by accused, and the signing of that section by a selectee occurred after the physical examination and after completion of the section by typing in the data. 4. A service record was prepared for accused. 5. His name and serial number appeared on the special orders for 20 May 1943, and there were no amendments or corrections on that or the next day. 6. On Form 151, accused was checked as accepted and not held over. 7. Immediately prior to the administration of the oath, a check was made from the special orders to make certain that all the selectees were present, and each man answered to his name. If accused had not been present, his name would have been removed from the special orders. 8. No one refused to take the oath during May 1943. 9. Selectees were required to have lunch in the building and were not permitted to leave. A guard was stationed at the door to see that no one did leave. 10. The various documents contain a notation that accused was inducted on 20 May 1943.

In the light of the foregoing evidence, the story told by accused is so improbable that the court was entirely justified in rejecting it. If, as he claims, accused left the building without subjecting himself to any of the induction routine, the events shown by the prosecution's evidence to have occurred could not possibly have occurred. In the opinion of the Board of Review, the evidence shows beyond a reasonable doubt that accused was inducted on 20 May 1943 and ordered to report at Fort Custer on 27 May 1943. Since he did not report as ordered, he became absent without leave on the latter date and remained so until his apprehension on 3 March 1945, as alleged.

5. The absence without leave being established, it is necessary to determine whether the record of trial is legally sufficient to support the finding of guilty of desertion. Desertion is absence without leave accompanied by the intention not to return to the accused's place of service.

> "The fact that such intent is coupled with a purpose to return provided a particular but uncertain event happens in the future * * * does not constitute a defense. Unless, however, an intent not to return to his place of duty exists at the inception of, or at some time during the absence, the soldier can not be a deserter, whether his purpose is to stay away a definite or an indefinite length of time" (MCM, 1928, par. 130a).

According to the accused, he intended to report for duty as soon as his "case" had been settled, and he and his representatives were working to that end during the period of his absence. His letter of 19 July 1943 to Captain Bennett of the Sixth Service Command, and the letter of 15 March 1944 from Reuther to the accused, tend to support his contention. If in

fact he intended to report for duty after the final determination of the "case", we do not believe that he was guilty of desertion, for he was justified in expecting a reasonably expeditious determination by the Government and such determination cannot be regarded as an "uncertain event" within the language of the Manual for Courts-Martial quoted above. The prosecution did not show that his case had been settled and there is no reason to doubt his statement that it had not been.

In this state of the evidence it becomes important to consider certain rulings made by the law member. Among other matters, the defense offered to prove attempts by accused to reopen his "case" after the denial of his appeal in March 1943, and offered to submit "documents" received from various official sources up to and including 22 February 1945, showing the progress of the case as reopened. The law member sustained an objection to this line of evidence upon the ground that it was not material (R. 101-103). In our opinion the ruling of the law member was erroneous. On the issue of intention to desert the service, the proffered evidence was not only material but highly important. Whether the individual documents would have been incompetent on some ground other than materiality we do not know, for the law member's ruling precluded the defense from further attempts to introduce them, and in considering the effect of the ruling, it must be assumed that they were competent.

Subsequently the defense offered in evidence several letters written on various dates between 23 July 1943 and 22 February 1945. These letters evidenced correspondence regarding the accused's case between Under Secretary of War Patterson, Assistant Attorney General (now Attorney General) Tom C. Clark, Rotnem, and Reuther. The letters were "identified" by accused, who neither sent nor received them. The law member excluded them, apparently upon the ground of immateriality (R. 127-132). They were clearly material, for they related to the status of accused's "case" and indicated that a determination of it by the Government had not been made. The letters are attached to the record of trial, marked Defense Exhibits 6, 7, 7-A, 8, 9, 10, and 11, for identification.

Although the letters were not properly identified, "failure to object to a proffered document on the ground that its genuineness has not been shown may be regarded as a waiver of that objection" (MCM, 1928, par. 116b). In connection with his objection to the document marked Defense Exhibit 11 for identification, the trial judge advocate contended that accused, by whom all the documents were "identified", was "not in a position to state whether or not that letter was sent, or how it was received or how it was sent" (R. 128). In our opinion the language used by the trial judge advocate amounted to an objection upon the ground that the genuineness of the document had not been shown, and, consequently, the document was properly excluded. The trial judge advocate gave no reason for his objection to the letters marked Defense Exhibits 6, 8, 9, and 10 for identification, and therefore waived the matter of proof of genuineness. Neither did he state his reason for objecting to 7 and 7-A except to say that he had no

objection to 7-B (which was introduced at the same time) inasmuch as 7-B was a letter received by accused and therefore properly identified by him. Whether this constituted an objection to 7 and 7-A upon the ground that genuineness was not proved, need not be determined, because in any event the other letters, except the one marked 11, should have been admitted.

In the opinion of the Board of Review the erroneous exclusion of the evidence referred to above was prejudicial error insofar as the conviction of desertion is concerned, for the proffered evidence was calculated to show that accused and his representatives were still trying to have his case settled and that it was under consideration by the Government. Although these facts do not constitute a defense to the charge of absence without leave, they do bear upon the accused's intent to return to the service, and the proffered evidence should have been before the court. Upon the whole record, it is our opinion that only a finding of absence without leave can be sustained. In view of our decision, there is no need to discuss other rulings by the law member, the correctness of which is doubtful.

6. The Charge sheet shows that accused is 38 years of age and was inducted into the service on 20 May 1943.

7. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves a finding of absence without leave from 27 May 1943 to 3 March 1945 in violation of Article of War 61, and legally sufficient to support the sentence.

Fletcher R. Andrews, Judge Advocate

[illegible], Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 279842 1st Ind.

Hq ASF, JAGO, Washington 25, D. C. JUL 25 1945

TO: Commanding General
Sixth Service Command
Army Service Forces
Chicago 6, Illinois

1. In the case of Private Arthur P. Potens (36854399), 1612 Service Command Unit, Reception Center, Company B, Fort Sheridan, Illinois, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that only so much of the findings of guilty of the Charge and the Specification be approved as involves a finding of absence without leave from 27 May 1943 to 3 March 1945, in violation of Article of War 61. Upon compliance with the foregoing recommendation, and under the provisions of Article of War 50½, you will have authority to order the execution of the sentence.

2. From the record of trial and the documents attached thereto which were offered in evidence but excluded by the law member, it appears that during the whole period of his absence the accused and his representatives were engaged in a controversy with various officials and agencies of the United States in an attempt to clear the accused of certain unspecified charges brought by the Government against the accused prior to 20 May 1943. Apparently by reason of those charges, the accused had been barred from the privilege of working in plants producing goods for the war effort, and his character and reputation were stigmatized. Under the circumstances, it is believed that the sentence is excessive and it is recommended that the period of confinement be reduced to three years.

3. Inasmuch as the record of trial is held legally sufficient to support absence without leave only, for which offense penitentiary confinement is not authorized, it is recommended that a United States Disciplinary Barracks be designated as the place of confinement.

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

(CM 279842).

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.

SPJGH-CM 279843

17 MAY 1945

UNITED STATES	THE INFANTRY SCHOOL
v.	Trial by G.C.M., convened at Fort Benning, Georgia, 19 April 1945. Dismissal.
Second Lieutenant HAROLD SAMUELS (0-1846212), 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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War

Specification: In that Second Lieutenant Harold Samuels, 4th Infantry, Fort Benning, Georgia, did, at Columbus, Georgia, on or about 12 March 1945, feloniously take, steal, and carry away one pistol, value about $40.00, the property of Mr. Ed Wohlwender, Jr., Columbus, Georgia.

He pleaded not guilty to and was found guilty of the Charge and the Specification. No evidence of any previous conviction was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved only so much of the sentence as provides for dismissal, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

On or about 12 March 1945, Edward Wohlwender, Jr., a civilian resident of Columbus, Georgia, owned a 38-caliber Smith & Wesson, Special,

pistol. He customarily kept it in the glove compartment of his 1940 model Ford coach. On Saturday, 17 March 1945, he made a search of his car for the weapon and discovered that it was missing. The weapon was returned to him by his secretary, Miss Maude Bledsoe, on 22 March 1945 (R. 6-8). He had given no one permission to take it (R. 11).

Mr. Wohlwender granted Miss Bledsoe permission to use his car on 12 March 1945 (R. 13). She and a girl friend were sitting in the car in front of the 8:30 Club, in Columbus, Georgia, at about 8 p.m. that day when the accused drove up alongside of them in his car. They were acquainted with him and asked him to get into their car and sit with them, which he did. The accused asked "Whose car is that?" and Miss Bledsoe said "Mine." After a few minutes conversation they all decided to go to the Maytag Club. Miss Bledsoe drove Wohlwender's car to her home and parked it in the street in front of the house. Accused followed in his car, and from Miss Bledsoe's house the entire party, including an additional girl, proceeded to the Maytag Club in accused's car. They left the Maytag Club at about midnight. Accused first drove the other two girls to their homes and then drove Miss Bledsoe to her home. He walked to her door with her and a few moments later was observed by her to be getting out of the Wohlwender car. She thereupon walked out to the street and locked the car, while accused got into his own car (R. 20-21). Accused stated at the time that "he was looking for some cigarettes" (R. 26). She did not make any search of the inside of the car at that time (R. 27).

Nine days later, on the evening of 21 March 1945, Miss Bledsoe, having meantime learned that Wohlwender's pistol was missing from his car, went to the accused's home in company with five other people to inquire about the pistol. When the subject of their call was mentioned to accused he, at first, said "What pistol?" But after a few minutes conversation he admitted having taken the pistol and stated that if Miss Bledsoe and her companions would return in 45 minutes he would give it to them. They returned as requested and he gave the pistol to them (R. 22). The weapon was introduced in evidence and identified by both Wohlwender and Miss Bledsoe (R. 11, 23; Pros. Ex. 1).

On the following day, 22 March 1945 Wohlwender questioned accused in the office of the Provost Marshal at Fort Benning. Accused was duly advised that he was not required to make any statement. No promise of reward for the making of a statement was held out to him and no violence or force was used against him. He made a voluntary statement, under oath, in which he admitted that he took the pistol from the glove compartment of Wohlwender's car shortly after midnight on the night of 12 March 1945. In the same statement he stated that he opened the glove compartment in search of cigarettes, that Miss Bledsoe did not know of his taking of the pistol and that he was "slightly intoxicated" at the time (R. 10, 11; Pros. Ex. 2).

On cross-examination Miss Bledsoe testified that when accused joined her party on the evening of 12 March 1945 he had a quart of whiskey with him, that during the evening he took "quite a few" drinks and that "he was just a little tight." She declared, however, that he was able to drive his car and could "walk all right"; also, that he was "a perfect gentleman all evening" (R. 23, 24, 30).

A dealer in pistols, having qualified as an expert witness, testified that the weapon in question had a value of $50 on 12 March 1945 (R. 35-39).

4. Evidence for the defense:

Accused, after his rights as a witness were explained to him by the court, elected to testify under oath in his own behalf. He is 26 years of age, married and has one child. He has been in the Army 3½ years and has been a commissioned officer 23 months. He has had three dates with Miss Bledsoe. She knew that he was married. On the evening of 12 March 1945, he attended the Maytag Club in company with Miss Bledsoe and two other girls, taking them in his car. He had a quart of whiskey with him, from which he took about 10 one-ounce drinks during the evening. The girls drank the balance of the quart. Also, he had two or three additional drinks at the bar. Shortly after midnight he drove all of the girls home, taking Miss Bledsoe home last. After walking with her to her door he returned to his car. Discovering that he was out of cigarettes, he decided to look for some in the glove compartment of the Wohlwender car, believing it to be Miss Bledsoe's car. He found no cigarettes, but noticed a pistol and took it. He had taught pistol in training courses in the Army and desired to fire this weapon on the range. When he picked it up he thought that it was a 45 caliber gun, for which he knew he could obtain ammunition. But on the following day he discovered that it was a 38 caliber gun. Being unable to obtain ammunition that would fit a 38 caliber pistol he placed the weapon in his footlocker in his quarters in the Harmony Church area of Fort Benning. It remained there until the evening of 21 March 1945, when Miss Bledsoe came to his house in Columbus, Georgia, and demanded the weapon. He requested that she return 45 minutes later. During that interval of time he drove to Harmony Church and returned with the pistol (R. 41-47). On cross-examination he testified that he had the pistol from 12 March until 21 March but told no one about it. Miss Bledsoe did not give him permission to take it and he knew that he had no permission to have it (R. 51, 52). Although he lived in Columbus and knew Miss Bledsoe's address in the same city, he made no effort to communicate with her during the nine days that he had possession of the pistol.

Captain Julian Turner, called as a witness for the defense, testified that he is accused's company commander, that he has been acquainted with accused since 1 November 1944, that accused's reputation

for truth and veracity is "good" and that his character is "excellent" (R. 53).

It was stipulated that if Captain Howard C. Aylesworth were present in court he would testify that he is acquainted with accused and with others who know accused and that among his acquaintances accused's general reputation and his reputation for truth and veracity are "good" (R. 54).

5. The uncontradicted evidence shows that accused deliberately and stealthily took the pistol in question and secreted it in his possession for nine days, knowing that he had no permission from anyone to possess it. The circumstances under which the weapon was taken and the length of time it was held secretly by accused amply warranted the court in drawing the inference that accused took the weapon intending permanently to deprive the owner of it (CM 228091, Simone, 16 B.R. 69; CM 232732, Cook, 19 B.R. 177; CM 235445, Maturo, 22 B.R. 75).

The fact that accused may have believed that the weapon belonged to Miss Bledsoe, as he impliedly contends in his testimony, is no defense against the crime of larceny alleged. He admitted that he had no permission from her to take it. It is sufficient that accused had the intent permanently to deprive the true owner of the weapon (Wharton's Criminal Law, Twelfth Edition, Sec. 1122; MCM, 1928, par. 149g).

Nor does the evidence show that accused was too drunk to entertain the specific intent required to establish the offense of larceny (MCM, 1928, par. 126a). While it appears that he had consumed a considerable quantity of whiskey during the evening, there is no showing that he was not fully cognizant of the nature and character of his acts at the time of the alleged theft. The evidence requires an inference to the contrary. He was able to walk "all right" and to drive his car, and his personal behavior was gentlemanly. Moreover, his contentions in his own testimony as to his thought processes at the time he took the pistol credit him with good use of his powers of discrimination at that time. He claims that he took the weapon for the purpose of firing it on the range. He thought at the time he took it that it was a 45 caliber pistol and he knew that ammunition of that caliber was available. It was not until the following day that he discovered it to be a 38 caliber pistol, for which ammunition was not readily available. Consequently, he was unable to fire it on the range and he tossed it into his footlocker. Such rational thinking at the time of the theft is not consonant with the existence at that time of a state of intoxication sufficient to preclude accused from possessing the requisite specific intent necessary to establish larceny (CM 241176, Petty, 26 B.R. 213).

The Board of Review is of the opinion that all of the elements of the larceny alleged are fully established by the record of trial.

6. The records of the War Department show that accused is 26 years of age and married. He is a high school graduate and has had one year of college training. In civilian life he was employed as a laborer in the coal mining industry for 3½ years, ending in 1941. He was inducted into the Army in November 1941 and was commissioned a second lieutenant, Infantry, AUS, upon graduation from OCS in May 1943.

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

Thomas N. Jaffy, Judge Advocate

William H. Trumbell, Judge Advocate

Robert C. Trevelian, Judge Advocate

SPJGH-CM 279843 1st Ind

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 Harold Samuels (0-1846212), Infantry.

2. Upon trial by general court-martial this officer was found guilty of the larceny of a pistol, of the value of $40, in violation of the 93rd Article of War. He was sentenced to dismissal and total forfeitures. The reviewing authority approved only so much of the sentence as provides for dismissal, and forwarded the record of trial for action under Article of War 48.

3. 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 and the sentence and to warrant confirmation of the sentence. I concur in that opinion. On the night of 12 March 1945 the accused attended a night club in Columbus, Georgia, in company with Miss Maude Bledsoe and two other persons. Shortly after midnight he drove Miss Bledsoe to her home in his own car. Upon leaving her house he stealthily removed a revolver from the glove compartment of her employer's car which was parked in front of her house. Accused knew that this car belonged to a Mr. Wohlwender who had loaned it to Miss Bledsoe for the evening. During the succeeding nine days he secretly held the weapon in his possession in his quarters at Fort Benning, Georgia, telling no one about his having taken it. He admitted on cross-examination that he did not have permission from anyone to take or possess the weapon and that during the time that he possessed it he made no effort to communicate with Miss Bledsoe about it, although he was constantly in the city of Columbus and knew Miss Bledsoe's address in that city. Finally on the evening of 21 March 1945 when confronted by Miss Bledsoe with circumstances indicating his guilt he admitted having taken the weapon and he shortly thereafter produced it. There appear to be no extenuating or mitigating circumstances. Accused's conduct demonstrates beyond any doubt his moral unfitness to continue as an officer. I recommend that the sentence, as approved by the reviewing authority, although inadequate, be confirmed and carried into execution.

4. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation 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 reviewing authority confirmed. G.C.M.O. 284, 5 July 19
5 July 1945).

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

SPJGK - CM 279968

22 MAY 1945

UNITED STATES	)	THE INFANTRY SCHOOL
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 24 April 1945. Dismissal.
Major HENRY A. FLORANCE (0-363832), Infantry.	)	

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

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

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

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

Specification: In that Major Henry A. Florance, Academic Regiment, The Infantry School, being at the time an instructor in the Weapons Section, The Infantry School, did, at Fort Benning, Georgia, on or about 3 March 1945, feloniously embezzle by fraudulently converting to his own use about 400 whistling torpedoes of the value of about $22.00, the property of the United States, furnished and intended for the military service thereof, entrusted to him, the said Major Henry A. Florance, by The Infantry School.

CHARGE II: Violation of the 84th Article of War.

Specification 1: In that Major Henry A. Florance, * * *, did, at Columbus, Georgia, on or about 11 March 1945, unlawfully sell to Wilmer R. Crews, Columbus, Georgia, about 50 whistling torpedoes of the value of about $2.25, to Winfred M. Mathis, Columbus, Georgia, about 125 whistling torpedoes of the value of about $6.875, to John H. Amerson, Columbus, Georgia, about 24 whistling torpedoes of the value of about $1.32, and to Oscar Bowman, Columbus, Georgia, 1 whistling torpedo of the value of about $0.055, said torpedoes being issued for use in the military service of the United States and having a total value of less than $20.00.

Specification 2: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 2 of Charge II and guilty of all other Specifications and both Charges. With the consent of the accused and of the court, the Specification of Charge I was amended by deleting the date "3 March 1945" and substituting therefor "11 March 1945". No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge I as found the accused guilty of the embezzlement at the time and place and from the owner as alleged, of three hundred (300) whistling torpedoes; value less than twenty dollars ($20.00), and only so much of the sentence as provided for dismissal, and forwarded the record of trial for action under Article of War 48.

3. Summary of Evidence.

a. For the Prosecution.

On or about 26 February 1945, 4,125 whistling torpedoes, belonging to the United States, purchased for The Infantry School, Fort Benning, Georgia, for use in tactical training, were issued to accused, who was an instructor in the Weapons Section, The Infantry School, for use on certain Infantry School problems (R. 7 and 11). The purchase of this type of pyrotechnics had been discontinued by order of the Army Ground Forces, and while accused was told by the acting supply sergeant that the torpedoes were going to be destroyed, no orders for their destruction had been received, they were still being issued, and none were actually destroyed (R. 8,10,12). The value of each torpedo under the bulk purchases made by the Government was 5-1/2 cents. No torpedoes of this type were being sold or were available for sale at the time to civilians (R. 7, Stip., R. 40, Pros. Ex. 4). On Sunday evening, 11 March 1945, Wilmer R. Crews, Winfred M. Mathis, John H. Amerson, Oscar Bowman, Marcine Bowman, and George Alsey, all around 16 years of age, drove to accused's residence in Columbus, Georgia, in a Model-T Ford, the purpose of their visit being to permit one of the group to consider the purchase of a Model-A Ford belonging to accused. As they drove up, accused exploded a torpedo under the car in which they were riding, and later offered, either on his own initiative or in response to a request of some of the boys, to sell some of the torpedoes to them (R. 14,15,22,23,33,34,37). Several of the boys thereupon made purchases from him. Wilmer Crews bought three boxes for $2.00 (R. 16), and Winfred Mathis five for $3.75, each box containing 25 torpedoes (R. 23,35). Oscar Bowman bought one torpedo for 10¢, that being all the money he had, and John Amerson bought the remaining 24 for 65¢ (R. 23,24,35,38). George Alsey bought a "couple of boxes" for $1.50 (R. 23,24,38). A day or so later Wilmer Crews and Winfred Mathis were arrested in Columbus for firing or exploding torpedoes, and those which they had left were confiscated by the civil authorities (R. 18,19,24,25,38,40). The confiscated torpedoes were introduced in evidence as Exhibits 1, 2 and 3, and were identified as being identical with those issued to accused on 26 February 1945 and sold by him to the several young boys (R. 8,9,29,30,31,

32,40). On 14 March these torpedoes were turned over by the civil authorities to Captain Frederick O. Tilney, Jr., in the Intelligence Office, Headquarters, The Infantry School.

On the night of 16 March, Lieutenant Colonel John J. Deane, who had been appointed by the Commandant of The Infantry School to investigate "a certain alleged misappropriation of Government property by Major Florance," accompanied by Captain Tilney and three local civilian officers, met accused when he alighted from a train in Columbus, notified accused of his mission, and warned him of his rights under Article of War 24 (R. 41, 42). They proceeded to accused's home, where Colonel Deane again informed accused of his mission and read to him Article of War 24. In answer to questions by Colonel Deane, accused, after having been "placed under oath", denied that he had sold any whistling torpedoes to any boys in Columbus, but stated that he had access to such torpedoes for use in connection with problems, just like other officers, and that he might have brought some of them home from a problem (R. 43,44,45). On 17 March, Colonel Deane recalled accused for further questioning, reminded him that he was still under oath, and warned him again of his rights under Article of War 24. Having been advised that certain young men in Columbus had made statements that accused had sold them torpedoes, accused again denied any such sales, contending that he had chased a group of boys from his home because he did not want them hanging around and that he had once suggested to the employer of one of the boys that he be discharged (R. 46,47). In the morning of 19 March accused called to see Colonel Deane and expressed a desire to make a confession with regard "to the allegation of misappropriation of Government property." After having again been advised of his rights, accused voluntarily and without any threat, force, or promise of reward, thereupon made and signed a statement, received in evidence as Exhibit 5 (R. 47,48). The pertinent part of the statement is as follows:

> "A. I am guilty of the alleged accusations of selling Government property to some boys in Columbus, Georgia. About 1 March 1945 I visited Hook Range in connection with experimenting with some TNT to improve the safety feature of our problems. I was told at that time that they had a number of explosives, fire crackers and dago bombs, that were going to be thrown in a pit and blown up. I asked them not to do that, telling them that we used them on problems every day. I was told that I could draw this equipment. About two days later I took my car, went to Hook Range and helped put five or six large boxes of dago bombs and whistling torpedoes in it. I then went to Harmony Church with the fire works, unloaded it from my car, and turned it over to personnel to be used on TRF TIS problems. Some of the boxes were not full and were torn, and in unloading the car there were about ten or twelve small boxes containing twenty-five whistling torpedoes each left on the floor in the back of my car - I don't know whether they fell out of the torn boxes or whether the man

who helped me load the car set them in there loose. I paid very little attention to them; I didn't go to the trouble of unloading them and just left them in my car and they stayed in there for several days. One Sunday some boys came by my home and I merely picked one of the whistling torpedoes up, lit it, and threw it toward them in a joking manner. Immediately, one of the boys asked me about selling him some of them, and I, not thinking of the seriousness of the offense, sold several boxes of whistling torpedos to the boys. In fact, I sold them all of the ten or twelve boxes of whistling torpedoes I had. I don't know definitely how many boxes I had exactly, but all the whistling torpedos I had were sold to this same bunch of boys.

"Q. Major Florance, did this sale take place about Sunday, 11 March 1945?
"A. Yes, Sir, it did.

"Q. Do you remember the names of any of the boys to whom you sold whistling torpedos on or about 11 March 1945?
"A. Only one of the boys. Wimpy is the only name I know him by.

"Q. Could that boy Wimpy be a Mr. Winifred Mathis, who worked for you at your garage?
"A. Yes, Sir, it was.

"Q. Is there anything further you wish to say?
"A. Yes Sir, there is. Since these fire crackers, together with a number of other explosives, were definitely going to be blown up and destroyed, I considered them practically as valueless. There were about twenty wooden cases of small torpedos that explode by coming into contact with hard obstacles and I was offered these and tried to figure out a way that I could use them on problems. Not being able to figure out a way to use them, I let them stay in the building at Hook Range. If I had had any intentions of getting these fire works for my own personal use or for personal gain to myself I would have taken those twenty cases and sold them. At the time I drew them I merely thought I was being helpful in making use of Government property that would otherwise be disposed of. On the date that I was checking up on the TNT we were using on our problems with Mr. Laquier, he and the enlisted men working at Hook Range told me that these fire works were going to be blown up; that about two weeks ago they had blown up a large pit full of explosives. Mr. Laquier told me the next day that it was all right to go there and get the above-mentioned fire works for use on our problems at the TRF TIS. Captain Angelo called me a day or two later and asked me if I could use any more of them. He said that he could deliver them to Bartow Range for me and our men could draw them from Bartow Range. In addition to the above I wish to say that the total amount that I received for the

whistling torpedos that were sold to the boys in Columbus, Georgia, was about nine dollars."

b. For the Defense.

Accused elected to testify as a witness in his own behalf, and repeated in substance the statements made by him in his confession. In explanation of his action in denying to Colonel Deane that he had sold the torpedoes he stated that when he returned to Columbus "as tired as we could be" on 16 March 1945, after having been observing problems for several days, during which he and his fellow officers had had virtually no sleep, he was greeted by "an excess number of civilian and military policemen - probably more than would have been necessary to catch Al Capone" (R. 67,68). The military investigators and the civil authorities proceeded to his home, which they "completely wrecked" in searching for Government property. His wife, who was pregnant,was greatly upset. His only thought, therefore, was to get rid of every one. Accused did not get any sleep that night so that when he called to see Colonel Deane the following morning he had had practically no rest for four days. Returning home that evening he decided he would tell Colonel Deane everything. However, the latter was not at his office, and realizing that it was Saturday and that Colonel Deane would probably not be in later he left without seeing him. He was unable to locate Colonel Deane the following day but did seek him out on Monday morning and made a full statement. He considered that he had saved the Government about $200 in using the torpedoes which would otherwise have been destroyed, and he had no idea of taking the small amount which he had placed in his car for his "own use or gain." The only reason he could think of for selling the torpedoes "to those children" was -

> "* * * either because one of them mentioned selling them to them, and in addition to that, I was raised on a farm and my father, who died only a short time ago, never gave anything away and he taught me that people don't appreciate what you give them; that you might just as well sell it to them - and that goes back to my early training" (R. 70).

Captain Frederick O. Tilney, who went with Colonel Deane to the train to interview accused and later to accused's home, testified that he heard Colonel Deane advise accused at the railway station of his mission and of accused's rights. There was considerable confusion at the station as well as at accused's home, as there was an unnecessarily large number of civilian officers in addition to the military personnel and the guests who were present. Every effort was made by Colonel Deane to prevent any undue embarrassment (R. 56,57,58,59).

Warrant Officer Francis E. Laquer, Assistant Munitions Officer of the Weapons Section, The Infantry School, testified that on 26 February

1945, at accused's request, he had ordered the issuance of 4,125 whistling torpedoes to accused for use on some problems. He had previously told accused that the stock of these torpedoes was to be destroyed, although none had as yet been destroyed. He had heard the Munitions Officer offer accused the supply of "obsolete or surplus commercial fire crackers for use on his problems," and some of the obsolete items had been destroyed (R. 64,65,66). Like other instructors accused had the right to draw ammunition and pyrotechnics needed in connection with problems (R. 53).

Three officers testified to accused's qualifications, ability and good character and reputation (R. 52,61 and 62). It was stipulated that four other designated officers would testify to the same effect if they were present (R. 55).

4. a. Charge I - Embezzlement of torpedoes. - As approved by the reviewing authority, accused stands convicted of having embezzled 300 whistling torpedoes, value less than $20, the property of the United States, furnished and intended for the military service. Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come (MCM, 1928, par. 149h). The proof required to establish guilt of a charge of embezzlement is: (a) that accused was entrusted with certain money or property of a certain value by or for a certain other person, as alleged; (b) that he fraudulently converted or appropriated such money or property; and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent. In addition, where the charge is laid under Article of War 94, there must be proof that the property belonged to the United States and that it was furnished or intended for the military service thereof, as alleged (MCM, 1928, par. 150i).

The record fully establishes accused's guilt. 4,125 obsolete whistling torpedoes, the property of the United States, supplied to The Infantry School, Fort Benning, for military training, were issued by The Infantry School to accused, an instructor in the Weapons Section, authorized to receive them, to be used in connection with military problems that were to be conducted by military personnel under his direction. At least three hundred of these torpedoes, valued at 5-1/2 cents each, were taken by accused to his home and later sold by him to a group of young boys. Regardless of his good faith when he first took the torpedoes to his home, the fact remains that he actually disposed of three hundred or more of them, retained the petty amounts which he received in payment, and twice denied to the investigating officer that he had sold any of them. Assuming, therefore, that he originally had no intention of converting the torpedoes to his own use, the fraudulent conversion was effected when he actually sold them and retained the proceeds. After an embezzlement, even an offer or intent to restore and the actual return of the money does not purge an accused of his guilt or prevent his punishment (CM 247725, Hatchett, 31 B.R.1, citing Clark's Criminal Law, 2d Ed., p. 313). The governing principle, which applies with particular force where the property is actually sold by

a member of the military establishment to whom such property has been entrusted, is aptly expressed in CM 112902, as reported in Dig. Op. JAG, 1912-40, page. 335, as follows:

> "A company commander cannot sell supplies either to another or to himself, except in violation of the regulations.. To sell them at all was an unlawful act, and to sell them to himself was to convert them to his own use unlawfully. No other showing of criminal intent is required, either in law or in reason. It was his intention to purchase these supplies and to purchase them was unlawful. No other intention is required, or permitted to be proved, to make out a case of embezzlement."

b. Charge II - Unlawful sale of torpedoes. - The sale of torpedoes to the four persons described in Specification 1 of Charge II was likewise clearly established. The sole legal feature that requires consideration in connection with this specification is the fact that it is laid under Article of War 84, which is as follows:

> "ART. 84. Waste or Unlawful Disposition of Military Property Issued to Soldiers. - Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct."

Article of War 1, "Definitions," specifically provides:

> "(b) The word 'soldier' shall be construed as including a noncommissioned officer, a private, or any other enlisted man".

In the discussion of Article of War 84 in both the 1917 Manual for Courts-Martial (p. 238) and the 1921 Manual (p. 394), the statement is made: "This article applies to enlisted men only." While this statement was not reproduced in the 1928 Manual, the plain language of the Article, the clear definition of the term "soldier" and the discussion of the Article (par. 144, page 158) leave no doubt that it was not intended to apply to officers.

It cannot be doubted, however, that the unlawful sale of Government property by an officer both brings discredit upon the military service and is prejudicial to good order and military discipline (CM 235011, Goodman, 21 B.R. 243). Consequently, the specification sets forth an offense, properly chargeable under Article of War 96. Accused was fully apprised of the offense with which he was charged, in no way pleaded or intimated surprise, and, in all material respects, admitted his improper conduct as charged. The designation of the wrong article under these circumstances is not material and accused's rights were not injuriously affected thereby (MCM 1928, par. 28; CM 199440, Campbell, 4 B.R. 51; CM 198262, Miller, 3 B.R. 223, CM 227863,

Kiplinger, 15 B.R. 385, 394 (2) Dig. Op. JAG, 1912-40).

5. No contention was made by accused that there was a multiplicity of charges arising from the same transaction. It is the established rule "as to this procedural matter that if conviction of any one of the Specifications supports the sentence in its entirety, it cannot be said that the defective pleading affected the substantial rights of accused" (CM 247391, Jeffrey, 30 B.R. 337). Dismissal, the punishment imposed upon accused, is authorized upon a conviction of either Specification. Consequently, assuming, without so deciding, that accused could successfully have urged unreasonable multiplication of charges, it is the opinion of the Board of Review that his rights were not substantially affected by the procedure adopted in the present case.

6. War Department records show that accused is 29-5/12 years of age and was unmarried on 3 June 1940. The record of trial, however, shows that he is now married. He graduated from the Haymarket High School and from Virginia Polytechnic Institute where he majored in accounting. During the entire four years he was a member of the R.O.T.C. and upon graduation was commissioned a second lieutenant, Infantry, Reserve, as of 31 May 1938. He was ordered into active service on 5 July 1940 and has continued in service since that date. He was promoted to first lieutenant on 27 June 1941, to captain on 1 February 1942, and to major on 2 March 1943. Attached to the record is a letter from the Commandant of the Provost Marshal General's School, dated 17 April 1942, commending accused for his excellent work in connection with the first class at that school. In civil life accused served for ten months as clerk in the office of the County Agent, Manassas, Virginia, and thereafter until his call to active duty, a period of one year and three months, assisted in the operation of his father's feed business in Gainesville, Virginia.

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. 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 its Specification, as approved by the reviewing authority, and only so much of the finding of guilty of Specification 1 of Charge II as involves a finding of guilty thereof in violation of Article of War 96, and legally sufficient to support the sentence, as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of either Article of War 94 or 96.

Judge Advocate.

Judge Advocate.

Judge Advocate.

SPJGK - CM 279968 1st Ind.

Hq ASF, JAGO, Washington 25, D. C. 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 Henry A. Florance (0-363832), Infantry.

2. Upon trial by general court-martial this officer was found guilty of embezzling 400 whistling torpedoes, the property of the United States, of the value of $22.00, in violation of Article of War 94 (Specification of Charge I), and of unlawfully selling two hundred of these torpedoes to four different civilians, in violation of Article of War 84 (Specification 1 of Charge II). He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge I as involved the embezzlement of 300 torpedoes, of a value of less than $20.00, and 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. I concur in the opinion of the Board that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge II as involves a finding of guilty thereof in violation of Article of War 96, and legally sufficient to support all other findings and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence.

This officer, an instructor in the Weapons Section, The Infantry School, Fort Benning, Georgia, was issued 4,125 obsolete whistling torpedoes for use in connection with military problems to be conducted by him. At least 300 of these torpedoes were left or placed in his private automobile and taken by him to his home. He subsequently sold them to a group of young boys. The value of a torpedo, based on the cost to the Government through bulk purchases, was 5-1/2 cents. Accused's unlawful and wrongful conduct came to light when two of the boys to whom he had made sales were arrested for discharging torpedoes in Columbus, Georgia. On two separate days accused denied to the investigating officer that he had sold any of the torpedoes, but eventually sought out that officer and admitted the sales. He sought to excuse his actions on the grounds that the torpedoes were obsolete, that he had saved the Government about $200 by using pyrotechnics that would otherwise have been destroyed, and that he had sold the torpedoes to the young boys because he had been taught by his late father that people did not appreciate things that were given to them.

The conduct of the accused discloses a lack of appreciation of the high standards required of an officer in the Army of the United States, however, in view of the previous excellent record and good character of the

accused I recommend that the sentence as approved by the reviewing authority 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. Consideration has been given to the following:

a. Letters attesting to accused's good character from Honorable Homer Ferguson, Senator from Michigan; Mr. J. R. Sweeney, Director of Research, Vernon-Benshoff Company, Pittsburgh, Pennsylvania; and Major James B. Berry, Infantry.

b. Letters from Brigadier General Nat S. Perrine and Colonel O. C. Kruger, Infantry, requesting clemency, in view of accused's outstanding ability and value to the service, and letter from Dr. James W. Ferguson, Pittsburgh, requesting clemency.

c. Copy of letter of commendation from Colonel Hobart B. Brown, Commandant, The Provost Marshal General's School, dated 17 April 1942, and copy of recommendation of accused for a permanent commission in the United States Army by Lieutenant Colonel Maddrey A. Solomon, G.S.C., dated 9 February 1943.

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
1. Record of trial
2. Form of action
3. Ltr fr Com, Ft Benning, Ga. w/3 incls

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part. Sentence as approved by reviewing authority confirmed, but commuted to a reprimand and forfeitures. GCMO 267, 3 July 1945).

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

SPJGN-CM 280008

UNITED STATES v. Second Lieutenant JAMES D. MOODY (0-691402), Air Corps.	)	ARMY AIR FORCES REDISTRIBUTION STATION NO. 3 Trial by G.C.M., convened at Santa Monica, California, 30 March 1945. Dismissal, total forfeitures and confinement for eighteen (18) years.

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 1: In that Second Lieutenant James D. Moody, O 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 31 August 1944 to about 2 October 1944.

Specification 2: In that Second Lieutenant James D. Moody, O 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 4 October 1944 to about 9 November 1944.

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

Specification 1: In that Second Lieutenant James D. Moody, ***, did, at Wichita Falls, Texas, on or about 25 September 1944, with intent to defraud wrongfully and unlawfully make and utter to the Holt Hotel at Wichita Falls, Texas, a certain check, in words and figures as follows, to wit:

Wichita Falls, Texas, Sept. 26, 1944 No.__

THE FIRST NATIONAL BANK
of Wichita Falls

Pay to the Order of Cash $25.00

Twenty Five Dollars & oo/100 Dollars
Value Received and Charge to Account of with Exchange

TO National Bank of Ft. Sam Houston)
)
San Antonio, Texas)

/s/ James D. Moody Capt.A.C. 0-6191402

3rd A.C. Redistribution Center
Santa Monica, Calif.

and by means thereof, did fraudulently obtain from the Holt Hotel at Wichita Falls, Texas the sum of Twenty-five Dollars ($25.00), lawful currency of the United States in payment of the said check, he the said Second Lieutenant James D. Moody, then well knowing that he did not have and not intending that he should have any account with the National Bank of Fort Sam Houston at San Antonio, Texas, for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check drawn on same bank, dated 26 September 1944, payable to order of Cash, made and uttered to Holt Hotel, Wichita Falls, Texas, and fraudulently obtaining thereby $30.00.

Specification 3: Same form as Specification 1, but alleging check drawn on same bank, dated 28 September 1944, payable to order of Cash, made and uttered to Holt Hotel, Wichita Falls, Texas, and fraudulently obtaining thereby $50.00.

Specification 4: Same form as Specification 1, but alleging check drawn on the National Bank of Ft. Sam Houston, San Antonio, Texas, dated 10 October 1944, payable to order of Cash, made and uttered to Hotel Adolphus, Dallas, Texas, and fraudulently obtaining thereby $20.00.

Specification 5: Same form as Specification 1, but alleging check drawn on the National Bank of Ft. Sam Houston, San Antonio, Texas, dated 12 October 1944, payable to order

of Cash, made and uttered to Hotel Adolphus, Dallas, Texas, and fraudulently obtaining thereby $25.00.

Specification 6: In that Second Lieutenant James D. Moody, O Squadron, 1030th AAF Base Unit, did, at San Antonio, Texas, on or about 4 November 1944, while having a lawful living wife, Betty Moody, wrongfully and unlawfully contract and enter into a bigamous marriage with Andrea Majalacas, without having first obtained a legal divorce from his lawful living wife, Betty Moody.

The accused pleaded guilty to the Specifications of Charge I and Charge I and not guilty to the Specifications of Charge II and Charge II. He was found guilty of both Charges and all of the Specifications thereunder and was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for eighteen 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 Headquarters, Personnel Center, Sixth Service Command, Fort Sheridan, Illinois, issued a special order on 4 August 1944 transferring the accused and several other recent arrivals from overseas to "AAF Redistribution Station #3, Santa Monica, California for processing and reassignment." A delay enroute of twenty-three days was granted, the time and date on which they were to report to their new station being fixed at 2400 31 August 1944 (R. 10; Pros. Ex. 2). Upon the termination of this period the accused did not report to Santa Monica as directed but instead remained absent without leave until he was apprehended by a Provost Marshal in Wichita Falls, Texas, on 2 October 1944. Two days later the accused was released from arrest and was again instructed to report to Redistribution Station Number 3. Disregarding the confidence reposed in him, he made no effort to proceed to California but embarked upon another unauthorized absence in Texas. He was finally apprehended on 8 November 1944 and placed in military custody (R. 9-10, 12, 17-19; Pros. Exs. 1, 3, 4, 11).

When he had departed from Fort Sheridan, he had approximately three hundred and twenty-five dollars in his possession. This sum was apparently rapidly expended, for he soon began to pass a number of worthless checks. Posing as a captain, he executed and cashed three at the Holt Hotel in Wichita Falls, Texas, and two at the Hotel Adolphus in Dallas, Texas. Their respective dates and amounts were as follows:

25 September 1944	$25.00
26 September 1944	$30.00
28 September 1944	$50.00
10 October 1944	$20.00
12 October 1944	$50.00

All of these instruments were payable to the order of cash, were drawn on the National Bank of San Antonio, Texas, and were executed by the accused as "Capt. A. C.". Since he had never had an account with the drawee bank, each of the five checks was dishonored upon presentation for payment. Some time thereafter, prior to trial, he made restitution in full to both hotels (R. 9, 11-17, 19; Pros. Exs. 1, 5, 6, 7, 8, 9, 11).

On 8 September 1943 he had married Mrs. Betty Moody. Although she was still his lawful wife throughout the periods of his unauthorized absences, he purported to enter into another marital union with one Andrea Majalca on 4 November 1944, four days prior to his final apprehension (R. 9; Pros. Ex. 1). This second marriage was annulled on 8 January 1945 by the District Court, 37th Judicial District, Bexar County, Texas (R. 12; Pros. Ex. 10).

4. The accused, after being apprised of his rights relative to testifying or remaining silent, elected to make an unsworn statement. No evidence was adduced on his behalf by the defense.

Upon arriving at the age of eighteen he had immediately enlisted in the Air Corps and had for a time performed the duties of a mechanic. When subsequently the age limit for aviation cadets was lowered, he applied for the training, was accepted, and, after successfully completing that course, was commissioned as a second lieutenant. In February of 1944 he was assigned to the 303rd Bomb Group overseas and began flying on combat missions with them. Since March was "pretty tough" and he was suffering from fatigue, he began to drink to excess. In his own words, "I never did drink very much in my life until we got over there. Started on the days when we could get off over there and really went to extremes". After completing his "tour of combat", he was sent to Chorlee in England for a rest. Not having anything to do for over a month, he drank more than he "should have done". Upon returning to this country "everything seemed so darned wonderful, just so free and everything," that, in his own words, "naturally, I let myself go" (R. 20).

After he left Fort Sheridan, he participated in a long series of drinking "parties" in Milwaukee, Wisconsin, and in Wichita Falls, Dallas, Fort Worth, and San Antonio, Texas. He "kind of lost control" of himself, and his will power collapsed in the face of constant temptation. At the Holt Hotel in Wichita Falls he "ran out of cash" and, to defray his expenses, passed the checks described in the first three Specifications of Charge II. He explained his conduct as follows:

> "I actually figured, I knew the people at the Holt Hotel and I figured I would write the check and by the time the check came back I would be out [in Santa Monica] and get the travel pay and would have time and the money to make those checks good. All the time I wrote those checks I had that in mind. I know that's not the way to do business, but that's how I figured at the time" (R. 21).

Upon being released from his first arrest he went to Dallas to obtain passage at Love Field on an airplane bound for the west coast. His experiences there were narrated by him as follows:

> "I ..... ran into two friends of mine from Tarrant Field that were over there visiting and who came over to see the Texas-Oklahoma football game. They said why don't you stay over and see the football game Saturday afternoon. I thought I might as well. So we got us three rooms in the Adolphus Hotel. So we threw quite a party up there with the kids from the colleges around town. The town was full of people with the holiday spirit. I stayed around there until after the football game. I ran out of money, so I went down and thought I'll write one check for $20.00 and that will do me until I can catch a plane on out to Santa Monica. Every day I thought I'll go and I'd get to drinking and running around, and run into some kind of a party, and forget about it until the next day. I wrote this check to the Adolphus. I signed my correct name, serial number and also this address, Santa Monica. Saturday afternoon after the football game everybody wanted to go out to the Cotton Club, so I wrote another check for $50.00."

The accused never did board a plane for the west coast. Instead he went first to Fort Worth and then to San Antonio, Texas. He intended to stay in the latter town only a day or two but he attended some "pretty good parties" at the home of a friend and he "happened to meet" Andrea Majalca whom he had known when he was a cadet. Under the influence of these unforeseen attractions he again postponed his journey to Santa Monica (R. 22). Having attended parties with Andrea on two successive nights, he went with her to a third on the following afternoon. What then occurred was described by him in the following words:

> "One of the boys and another girl was going to get married and they changed their minds, and we had everything set up, food and everything. So we ran down to the courthouse and the next thing I knew, that was just part of the party, and after that we had the marriage" (R. 23).

Shortly thereafter he was apprehended for the second time and, because of his condition, was immediately hospitalized. He was given sedatives, vitamins, and "some kind of shots" but, when he "sobered up", he was in "sad shape". For his previous conduct he had no explanation whatever. In his own words, "I just blowed my top". He has since tried to "make restitution on all the wrongs" which he had committed, and his wife has forgiven him (R. 23).

5. Specifications 1 and 2 of Charge I allege that the accused "did, without proper leave, absent himself from his station ... from about 31 August 1944 to about 2 October 1944" and again "from about 4 October 1944 to 9 November 1944". Both offenses were laid under Article of War 61.

The accused departed from Fort Sheridan under orders to report to a new station in Santa Monica, California, by 2400 o'clock on 31 August 1944. Unmindful of his instructions and of his obligations as an officer and soldier, he embarked upon a series of drinking bouts which effectively diverted him from his proper objective. When his bacchian adventures were temporarily interrupted by his first apprehension, he evidenced neither remorse nor an intention to reform. No sooner had he been released under orders to proceed directly to Santa Monica than he once again sought the dubious pleasure of continual drunkenness. It was only after he had been arrested a second time and charges had been brought against him that he displayed signs of contrition. His repentance unfortunately was tardy. The specifications are clearly sustained by the evidence and the pleas of guilty.

6. Specifications 1, 2, 3, 4, and 5 of Charge II allege that the accused, on or about 25 September, 26 September, 28 September, 10 October, and 12 October 1944, did "with intent to defraud wrongfully and unlawfully make and utter" five checks in the respective sums of $25.00, $30.00, $50.00, $20.00, and $50.00, "and by means thereof, did fraudulently obtain" their face values in cash, "he the said /accused/ then well knowing that he did not have and not intending that he should have any account with the National Bank of Fort Sam Houston at San Antonio, Texas, for the payment of said" checks. These acts were set forth as violations of Article of War 96.

The accused executed the five checks mentioned and obtained the full face value of the first three from the Holt Hotel of Wichita Falls, Texas, and of the remaining two from the Hotel Adolphus of Dallas, Texas. All of them were drawn upon the National Bank of Fort Sam Houston of San Antonio, Texas, in which he had never had any account whatsoever. From this factor alone the intent to defraud may be reasonably deduced. As was said in 22 BR 271, CM 236069, Herdfelder,

> "The passing of checks by an officer in uniform, drawn on banks in which he did not have an account, and on a bank in which he must have known did not contain sufficient funds to cover his checks, and the obtaining of value for said checks, constitutes a set of circumstances from which fraudulent intent may properly be inferred by the court."

From the same circumstances the intent not to establish an account may also be inferred. 20 BR 391, CM 234458, Williams. The fact that the accused ultimately made restitution in full will not exonerate him. 19 BR 329, CM 233148, Swanson; 20 BR 77, CM 233722, Growdon; 24 BR 31, CM 237522, Duggan. Specifications 1, 2, 3, 4, and 5 of Charge II have been proved beyond a reasonable doubt.

7. Specification 6 of Charge II alleges that the accused did, "on or about 4 November 1944, while having a lawful wife, Betty Moody,

wrongfully and unlawfully contract and enter into a bigamous marriage with Andrea Majalacas, without having first obtained a legal divorce from his lawful living wife, Betty Moody." This was also stated to be in contravention of Article of War 96.

The evidence for the prosecution and the testimony of the accused leave no doubt that he entered into a bigamous marriage with Andrea Majalca. The ridiculous, almost frivolous, explanation given by him for his infamous act requires no serious consideration. Beyond question he has committed a flagrant violation of Article of War 96. CM 276576, Pilger.

8. The accused, who is married, is about 22 years of age. After attending high school for three years, he entered the Army as a private on 23 October 1942 and served in an enlisted capacity until 30 August 1943 when he was commissioned a second lieutenant. While overseas in 1944, he earned the Distinguished Flying Cross and the Air Medal with three Oak Leaf Clusters.

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 either Article of War 61 or Article of War 96.

Abna E. Lipscomb, Judge Advocate.

Robert J. Hamer, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 280008 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
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 James D. Moody (0-691402), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, absenting himself without leave from 31 August to 2 October 1944 and again from 4 October to 9 November 1944, in violation of Article of War 61; and pleaded not guilty to, and was found guilty of, wrongfully and unlawfully making and uttering with intent to defraud five worthless checks and wrongfully and unlawfully contracting and entering into a bigamous marriage, 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 eighteen 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.

At the end of a delay enroute of twenty-three days, the accused did not report to the new station to which he had been assigned but absented himself without leave for a period of some thirty-three days which was ultimately terminated by his apprehension. Two days later he was released from arrest upon the understanding that he would proceed directly to his new post. Violating the trust reposed in him, he again absented himself without leave for some thirty-five days at the termination of which he was again apprehended and returned to military custody. In the meantime, to finance his meanderings about the State of Texas and his prolonged drinking parties with various friends along the way, he executed and cashed some sixty-two worthless checks for only five of which he was tried in the instant case. During the course of his drinking adventures he married for the second time while a former marriage was still in full force and effect. The only excuse given by him for these various derelictions was that "I just blowed my top". The day after his trial accused escaped from confinement and remained absent without leave for 15 days during which time he impersonated a captain and passed a number of other worthless checks. Although his offenses were extremely flagrant and aggravated, he deserves some clemency because of his excellent combat record for which he was awarded the Distinguished Flying Cross and the Air Medal with three Oak Leaf Clusters, because of his youth and immature sense of personal responsibility, and because of his apparently sincere attempts to make restitution of some of the monies wrongfully obtained by him.

I accordingly recommend that the sentence be confirmed but that the forfeitures and confinement imposed be remitted and that the sentence as thus modified be ordered executed.

4. Consideration has been given to a telegram, letters, and a brief submitted by Mr. O. O. Franklin, a civilian attorney retained on behalf of the accused; to letters from the Honorable R. E. Thomason and O. C. Fisher, members of the House of Representatives, Mr. Thomas C. Hogan, and Mr. & Mrs. Emmett M. Moody; to a memorandum from the Honorable Albert Thomas, member of the House of Representatives; to various clinical records pertaining to the accused; and to a record of the proceedings of a board of medical officers convened for the purpose of determining the mental accountability of the accused.

5. The clinical records show that on 15 November 1944 the accused was diagnosed as being in a "constitutional psychopathic state, criminalism". The findings of the board of medical officers subsequently convened on 4 August 1945 were as follows:

"a. That 2nd Lt. James D. Moody at the time of the alleged offenses was so far free from mental defect, disease and derangement as to be able concerning the particular acts charged, to distinguish right from wrong.

b. That 2nd Lt. James D. Moody at the time of the alleged offenses was so far free from mental defect, disease and derangement as to be able concerning the particular acts charged, to adhere to the right.

c. That 2nd Lt. James D. Moody at the time of his trial was sufficiently sane intelligently to cooperate in his defense.

d. That 2nd Lt. James D. Moody does exhibit at this time a mild degree of anxiety reaction incident to 30 combat missions over Europe, manifested by tension, insomnia, tremors of hands, and battle dreams.

e. That this anxiety reaction mentioned in par. d above, was in all probability of greater severity during the latter months of his overseas duty and continued upon his return to the United States, and may have been, at least in part, responsible for the instability of behavior which resulted in the events that led up to his arrest."

6. 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

13 Incls
Incl 1 - Record of trial
Incl 2 - Form of action
Incl 3 - Ltr. fr. Hon. O.C. Fisher
Incl 4 - Memo fr. Hon. Albert Thomas
Incl 5 - Ltr. fr. Hon. R.E. Thomason
Incl 6 - Two letters fr. Mr. O.O. Franklin
Incl 7 - Telegram fr. Mr. O.O. Franklin
Incl 8 - Brief submitted by Mr. O.O. Franklin
Incl 9 - Ltr. fr. Mr. T.C. Hogan
Incl 10 - Two letters fr. Mrs. E. M. Moody
Incl 11 - Ltr. fr. Mr. & Mrs. E.M. Moody
Incl 12 - Clinical records
Incl 13 - Report of a Bd. of Medical Officers

(Sentence confirmed but forfeitures and confinement remitted. GCMO 462, 11 Oct 1945).

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

14 MAY 1945

SPJGV-CM 280010

UNITED STATES	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	)	
Captain ROBERT E. BAIR (0-725400), Air Corps.	)	Trial by G.C.M., convened at San Angelo, Texas, 26 April 1945. Dismissal and total forfeitures.

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. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Robert E. Bair, Air Corps, having been restricted to the limits of his post, did, at San Angelo Army Air Field, San Angelo, Texas, on or about 7 April 1945, break said restriction by going to the city of San Angelo, Texas.

Specification 2: In that Captain Robert E. Bair, Air Corps, having been restricted to the limits of his post, did, at San Angelo Army Air Field, San Angelo, Texas, on or about 9 April 1945, break said restriction by going to the city of San Angelo, Texas.

Specification 3: In that Captain Robert E. Bair, Air Corps, did, at San Angelo Army Air Field, San Angelo, Texas, on or about 11 April 1945, with intent to deceive Lieutenant Colonel Oscar E. Lanctot, officially state to the said Lieutenant Colonel Oscar E. Lanctot, that he was not in the city of San Angelo, Texas, on Saturday night, 7 April 1945, or words to that effect, which statement was known by the said Captain Robert E. E. Bair to be untrue.

He pleaded not guilty to and was found guilty of the Charge and Specifications. He was sentenced to be dismissed the service and to forfeit all pay

and allowances due or to become due, the court considering one previous conviction by general court-martial under Article of War 94. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

As a result of a duly approved sentence of a general court-martial the accused, inter alia, was restricted to the limits of his post for one month, the sentence having been adjudged 16 March 1945 (Ex. A). The Post Executive Officer, Lieutenant Colonel Lanctot, on 5 April 1945, called the attention of the accused to the general court-martial order which directed the execution of this sentence. Lieutenant Colonel Lanctot then asked the accused if he realized what that sentence meant and received an affirmative reply (R. 8). He thereupon asked Staff Sergeant Bristow, the sergeant major at the post, when the general court-martial orders were received at the post, and was told they were received on 3 April 1945. Lieutenant Colonel Lanctot then said that he would give the accused the benefit of the two days and make the restriction date from the third (R. 10).

Despite the restriction thus imposed upon the accused, Captain Seldon J. King, A.C., testified that he saw Captain Bair at Steve's Ranch House in San Angelo at about 8 p.m. on the evening of 7 April 1945 (R. 11) accompanied by another officer and two women (R. 12). Captain Fetter, who had known the accused personally for more than three years saw the accused at about the same time and at the same place. Captain Fetter nodded to accused. He noted that the accused sat at his table awhile after the nods of recognition were exchanged and then paid his check and left (R. 13).

On the 9th of April Captain Finkel was coming out of the San Angelo bank at about 1 p.m. He saw a car pass by in which he saw Captain Bair who was the only occupant (R. 15). The two officers exchanged nods (R. 16).

On the 11th of April 1945, Lieutenant Colonel Lanctot, the executive officer of the post, testified that he asked the accused if he was familiar with Article of War 24, to which he received an affirmative reply. The witness then testified further that he asked accused if he had been to town on Saturday morning or Saturday night (7 April). When asked if he further discussed this matter, he replied:

> "A. He told me he had not been to town Saturday morning but had been to town Monday morning, which was the 9th.

I repeated the question of whether or not he had been to town Saturday and he again said he had not." (R. 17).

On redirect examination the witness again stated that he had asked accused if he had been in town Saturday night (7 April) and the accused said he had not (R. 19). Accused then told Lieutenant Colonel Lanctot that the reason he went to town on Monday was for either license plates or repairs to his car. The witness categorically denied that accused had received any permission to leave the field to renew his license plates or to attend to any other matter dealing with his car (R. 18); and that before accused went to town for any purpose he would have to receive permission.

The accused took the stand in his own defense (R. 20). He testified that on 28 or 29 March he was told he was to be transferred to a gunnery school in Florida. He started "clearing the field" as he was told to do. He had sent his things on ahead. A half hour before he completed this clearing of the field (presumably on 4 April) he was notified to report to the personnel section. There he was told that he was to remain at the field until 14 April, and that "the previous orders said the 3rd". Realizing that this would give him little time to go home before reporting to his new station, he asked if it would be any good to see Lieutenant Colonel Lanctot or Colonel Poe about "having the restriction transferred". He saw Colonel Poe who told him it couldn't be done. Not having anything to wear, since his clothes had been sent on ahead, he asked Lieutenant Colonel Lanctot if he could go to town and get some clothing. The accused further stated:

"* * * he said I could do that and any time an emergency came up to come in and see him or the adjutant and they would see Col. Palmer about getting permission for me to go to town." (R.22).

Accused then went into town about 6:30 on 7 April to get some clothes and then went to Steve's Ranch House and had something to eat, since he knew the mess hall would be closed by the time he got back to the field. On Monday (9 April) he went into town to get the clothes he had bought and a new license plate put on the car. The accused admitted that on 11 April, Lieutenant Colonel Lanctot asked him if he was acquainted with the 24th Article of War and further inquired if he had been in town Saturday morning and night to which the accused said that he had not been in town on Saturday night (R. 22). On cross-examination he stated that he knew he was restricted. He insisted, however, that he had permission to go to town for a specific purpose, i.e., to buy clothes, that that permission was given to him prior to 7 April 1945. It was accused's understanding, He testified, that he could go on this errand at any time (R.25)

and that if an emergency arose (apparently aside from the question of, buying clothes) he had to ask special permission. As to the clothes purchases, he had already asked and obtained permission (R. 27).

The accused further admitted that "Saturday night" commonly means from 7 until midnight. He finally admitted under cross-examination that he was in town Saturday night, and that he told Lieutenant Colonel Lanctot that he was not in town Saturday night (R. 32).

In rebuttal Lieutenant Colonel Lanctot was recalled. He stated that he never gave the accused permission, express or implied, to leave the field (R. 33-35).

4. It would be difficult to imagine a case more clearly and competently tried and proven. The accused was restricted to the limits of his station by a court-martial order. The order was approved by the reviewing authority. So there could be no doubt about it at all, the accused was shown a copy of the order and asked to sign an acknowledgment of a receipt thereof. He was told by the post executive officer on 5 April, that his sentence of restriction would begin to run from 3 April. The restriction was for a period of one month. It was ordered executed on the 29th day of March 1945.

It has been held that a court-martial sentence imposing a restriction becomes effective on the date it is ordered executed (Bull. JAG, Vol. III, p. 289, sec. 454(21)) notwithstanding the rule announcing administrative policy as contained in paragraph 17b, AR 600-375, 17 May 1943.

The accused was therefore under restriction from 29 March and not from 5 April, the date the order was brought to his attention; or 3 April, the date the order was received at the field. Lieutenant Colonel Lanctot had no authority to change the date upon which the commanding general ordered this sentence into execution. His attempt to do so does not affect the effective date of the sentence one iota. However, the dates of the alleged breaches of restriction (7 April and 9 April) are well within the one month period regardless of whether the effective date of the sentence is 29 March, 3 April or 5 April.

The evidence of Captains King and Fetter unmistakably place the accused outside the field on the evening of 7 April. The evidence of Captain Finkel unmistakably places the accused in the City of San Angelo and off the limits of the post to which he was restricted on the day of 9 April. It is also equally clear from the testimony of Lieutenant Colonel Lanctot he did not give the accused permission to leave the field, beginning with 5 April at the least, at any time. In fact it is seriously

questionable if any authority short of that of the commanding general who was reviewing authority could have given such permission. We are not called upon, however, to decide that question in this case, for apparently no permission was given the accused to leave the limits of his restriction. Despite the restriction and a lack of any permission whatever, the accused willfully and deliberately committed two breaches thereof with the barest of excuses, and no legal or moral justification whatever. His subsequent denial of having left the post on Saturday evening is difficult to understand, since he must have known he was seen by at least two officers. It may be that he did not believe these officers' knowledge had been imparted to Lieutenant Colonel Lanctot. In any event when questioned he did deny he had been in town on Saturday night.

Actually Lieutenant Colonel Lanctot testified that he had asked the accused if "he had been to town Saturday morning and Saturday night" (R. 17) to which the accused replied he had not "been to town Saturday morning, but he had been to town Monday morning". When the accused took the stand in his defense, he attempted to show that he had not denied having been to town Saturday night, but merely denied having been there Saturday morning. From his reply, the inference that he was saying he had not been in town Saturday night is clear. He cannot hide behind so transparent a subterfuge. Such bare-faced deceit and bad faith poorly hidden behind apparent candor, avails the accused nothing. As a matter of fact and record, he finally admitted, under rather stern cross-examination, that he had said he was not in town on Saturday night. On page 32 of the record of trial there appears these questions and answers:

> "Q. You were in town on Saturday night between 7:00 and midnight, weren't you?
> "A. Yes.
> "Q. But you told Col. Lanctot you weren't in town Saturday night?
> "A. That's correct."

The accused's testimony throughout indicates that his answers were often not in point, that he made a poor witness generally, that his defense was based upon evasion and deceit and that it was not in good faith.

That the statement of accused to Lieutenant Colonel Lanctot was made with intent to deceive is too obvious to need comment. What makes a statement "official" is that it be made during an official inquiry (CM 244159, Camp). For example, where a nurse asks a field officer a question regarding his possession of anything that might interfere with

his medical treatment, and the field officer makes an untruthful reply, that reply is a false statement within the meaning of Article of War 95 (Dig. Ops. JAG 1912-40, sec. 453(18)). In this case it is clear that the statement was made "officially", as alleged. Simple proof of this fact is that Lieutenant Colonel Lanctot first made sure that the accused was acquainted with the provisions of the 24th Article of War before he put the question to him. Despite this, and knowing it to be a deliberate lie, accused said he was not in town Saturday night. It is sufficient to constitute an offense if the statement, as in this case, is shown to have been both official and false (CM 233722, Growdon).

While a breach of restriction is not, inherently, so serious an offense per se as to merit dismissal, a false official statement is conduct which is not, and never has been, tolerated in an officer of the Army.

5. The accused, according to War Department records is past 26 years of age. He spent 4 years at Franklin and Marshall College, but failed to take a degree. He spent a year in selling and advertising. Thereafter, in June of 1941, he was appointed a flying cadet. He was commissioned a second lieutenant, Air Corps, ORC, on 23 May 1942 and entered on active duty at that time. He was promoted to first lieutenant 16 October 1943 and to captain on 24 September 1944.

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

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

SPJGV-CM 280010 1st Ind

21 JUN 1945

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

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 Robert E. Bair (O-725400), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of two breaches of restriction and with the making of a false official statement, in violation of Article of War 96. 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.

This officer was restricted for one month to the San Angelo Army Air Field, Texas, as the result of the approved sentence of a previous general court-martial effective on 29 March 1945. Despite this restriction, on two separate occasions, 7 April and 9 April 1945 he left the field and went to the nearby city of San Angelo. When asked 11 April by the Executive Officer of the San Angelo Army Air Field, his superior officer, whether he had gone to town on 7 April, he denied having done so, knowing full well that his denial was false.

I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof.

I recommend that the sentence be confirmed but the forfeitures adjudged be remitted 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

MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incls
1 Rec of Trial
2 Form of Action

(Sentence confirmed but forfeitures remitted. GCMO 263, 3 July 1945).

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

SPJGK - CM 280014

18 MAY 1945

UNITED STATES v. Captain LOUIS C. KNIGHT, JR. (O-1292540), Infantry.	INFANTRY REPLACEMENT TRAINING CENTER Camp Fannin, Texas Trial by G.C.M., convened at Camp Fannin, Texas, 20 April 1945. Dismissal.

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

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Captain Louis C. Knight, Jr, Headquarters, Sixty-eighth Training Battalion, Fourteenth Training Regiment, was, at Camp Fannin, Texas, on or about 8 April 1945, found drunk while on duty as Battalion Duty Officer.

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

3. Evidence for the prosecution. The evidence for the prosecution showed that the accused was in the military service of the United States, on the date alleged in the Specification and at the time of trial, with the rank of captain. He was the Executive Officer of the 68th Battalion, 14th Regiment, IRTC, Camp Fannin, Texas (R. 5,11). On 15 February 1945 Colonel Frank H. Barnwell took command of the 14th Regiment and within a few days thereafter called a meeting of all of its officers. At that meeting, among other things, he told the officers that he was "rabid against any officer drinking while on duty" (R. 5-6). On Sunday evening 8 April 1945, he was reading in the officers' club of the Regiment. The radio was playing. The radio stopped and he heard someone snoring. Upon investigating he found an officer, slumped over a pin-ball machine, asleep and snoring. Colonel Barnwell sat down again and continued to read. He heard a commotion. The officer had fallen to the floor and lay there unconscious. The officer

proved to be the accused. Upon ascertaining his name and organization, Colonel Barnwell telephoned 68th Battalion Headquarters to get the Duty Officer to have accused removed to his quarters. He was informed by the corporal in charge of quarters that the accused was the Duty Officer. Colonel Barnwell thereupon summoned the Battalion Commander from Tyler, Texas. That officer and three others came in and carried the unconscious accused on a stretcher out of the club to an ambulance. Colonel Barnwell ordered that the accused be taken to the hospital and subjected to a blood test (R. 6,7,15). In the opinion of Colonel Barnwell, Major F. M. Coombs, the Battalion Commander, and Lieutenant Arch M. Jack the accused was drunk (R. 8,15,28). At Dispensary No. 3, where the accused was taken, Major L. E. Standifer observed the accused unconscious on the stretcher and examined him (R. 29). He was not able to state whether the accused was drunk by his observation of him (R. 30). He had accused sent to the Station Hospital and requested that a blood test be made (R. 30). Lieutenant L. S. Trovato, a member of the house staff of the station hospital, who actually took charge of the accused, examined and treated him, stated that accused was unconscious when he was first brought into the hospital and that in his opinion the condition of the accused was due to the influence of alcohol, that he was drunk, and that he was incapable of performing any duties (R. 32-33). Accused recovered in about twenty minutes after arrival at the station hospital (R. 34).

The duty station of a battalion duty officer included any place within the regimental area. The officers' club was within that area (R. 11, 14).

In the 68th Battalion there were six officers regularly scheduled as battalion duty officers, the four company commanders, the adjutant, and the executive officer. A daily bulletin was issued showing the name of the officer designated as duty officer. The bulletin for 7-8 April 1945 showed accused to have been designated duty officer from noon 7 April to noon 9 April. Accused assumed that duty at the time specified and received special instructions from the battalion commander (R. 13,20; Pros. Ex. 1). In the opinion of the Battalion Commander, Major Fred M. Coombs, who had assumed command of the battalion on 15 March 1945, a battalion duty officer may not be relieved from duty without the consent or permission of the battalion commander (R. 17).

The Battalion Adjutant, Lieutenant B. W. Wilhelmson, who was absent during the week end, testified that it was a practice in the battalion to change duty officers without notifying the battalion commander. Such changes were permitted by him as adjutant or by the executive officer. No instructions to the contrary had ever been issued by Major Coombs. His predecessor in office, Major J. R. Riddle, had authorized him (the witness) to effect changes and he thought that he still had that authority. He, the adjutant, had not authorized any change in the instant case, but the accused himself was the executive officer of the battalion (R. 21,22). It was the battalion's

policy to permit the executive officer to permit a change (R. 22), but it was also the battalions' policy to appoint only the company commanders, the adjutant, or the executive officer as duty officer (R. 23). There was no rule or regulation prohibiting the appointment of other officers (R. 23).

Corporal W. G. Garelik, the non-commissioned officer in charge of quarters of the 68th Battalion Headquarters over the week end of 7-8 April, answered Colonel Barnwell's telephone call and informed Colonel Barnwell that the accused was duty officer because his name appeared in the bulletin posted on the bulletin board (R. 25-26). During his tour of duty he had no occasion to call the battalion duty officer (R. 27).

4. Evidence for the defense. The accused elected to remain silent (R. 47). Captain Charles R. Helton testified that there were no written or oral regulations in the 14th Regiment prohibiting the exchanging of duty officers in the battalions nor specifying the required rank of the officer to fulfill the post. It was a function under the control and supervision of the battalion (R. 35).

About midnight of 7 April 1945, accused asked Second Lieutenant Delmar G. Mote, an officer of the 65th Battalion, to accompany him to the quarters of Lieutenant E. G. Lassiter, an officer of the 68th Battalion. Lieutenant Lassiter was asleep. Accused awakened him and asked him to "take over" as duty officer for the accused as he wanted to go home. Lieutenant Lassiter said he would (R. 36-39). Lieutenant Lassiter testified that he was visited by the accused and a Lieutenant Mote at his quarters after midnight of 7 April 1945. Accused asked him to take over as duty officer for him as he wanted to go home. He said he would. The following morning Lieutenant Lassiter went to the battalion headquarters and told Corporal Garelik, the non-commissioned officer in charge of quarters, that he was taking over as battalion duty officer and left with him his barracks and apartment number. Lieutenant Lassiter performed the duties of duty officer for the battalion during that day. He inspected the breakfast, noon, and evening meals. He was never relieved of his duty as battalion duty officer (R. 40-42). Over the same week end he was also duty officer of his company, which required him to be available to check the charge of quarters and inspect the mess halls. He was under the impression that his duty as battalion duty officer would expire when accused returned to the Post. He saw the accused in one of the mess halls on Sunday about 1230, but accused did not see him so he continued his duties (R. 43-44). Corporal Garelik corroborated Lieutenant Lassiter that the latter came in to the battalion headquarters on the morning of the 8th and told him that he "was taking over duty officer" for the accused (R. 44-45) and where he could be found if needed. Neither officer told him subsequently that Lieutenant Lassiter had been relieved of that duty. Lieutenant Lassiter had not been relieved of that duty. Lieutenant Lassiter "dropped in at battalion headquarters during the afternoon and evening of Sunday 8 April 1945" but no change was made on the bulletin board (R. 45). Corporal Garelik stated that the reason

he gave Colonel Barnwell the accused's name as duty officer when he called that evening was "because his name was on the duty roster" (R. 47).

5. The Manual for Courts-Martial (1928), paragraph 145, page 160, with reference to the proof required to sustain a finding of guilty of being found drunk on duty in violation of Article of War 85, provides:

> "(a) That the accused was on a certain duty, as alleged, and (b) that he was found drunk while on such duty."

It was clearly established beyond any doubt that the accused was found drunk on the evening of 8 April 1945 in the Regimental Officers' Club at Fannin, Texas. This was proved by the testimony of numerous witnesses including a medical officer who treated accused and observed his recovery. The issue raised, however, is whether accused was on duty as the battalion duty officer, at the time he was found drunk. The offense of which he has been charged is a serious one and if committed in time of war carries with it a minimum sentence of dismissal (AW 85).

It was shown without contradiction that accused was appointed battalion duty officer at noon 7 April 1945. He undertook his duties as such at that time. His appointment was to continue until noon of 9 April 1945. The battalion duty roster for 7 April 1945 signed by the adjutant for the battalion commander established accused's appointment and its duration. A duty officer is an officer detailed to be constantly available for call in emergencies during a specific period (TM 20-205, p. 95).

The battalion commander had been with the battalion only for a short period of time before the occurrence complained of and was of the opinion that a duty officer could not be relieved of that duty once he undertook it without his authority or consent. He himself was in Tyler, Texas, previous to the occurrence. The adjutant, who was also absent from the camp, testified that it had been the custom for officers of the battalion to change duty officers after appointment without notifying the battalion commander. It was "commonly done" by him as adjutant and by the battalion executive officer. The accused himself was the executive officer. There were no regimental regulations governing the subject. The weight of the evidence therefore favored the conclusion that it was a custom in that battalion that the duty officer appointed for a certain period by the battalion commander could properly be relieved of that duty without obtaining the authority of the battalion commander. No rule, order, custom or regulation was shown to the contrary. The only evidence tending to show a contrary conclusion was the belief or opinion of the recently appointed battalion commander.

It is not necessary, however, to determine whether the accused had the right to relieve himself of his duties as duty officer, or whether, having that right, he properly exercised it by appointing another officer

to take his place who was not within the class of officers usually appointed. The fact is well established by all of the circumstances shown that the accused did leave his post and cease his duties as duty officer shortly after midnight of 7 April 1945. He was not found drunk until the following evening. He had not in the meantime resumed his duties as duty officer. The accused's return to camp on Sunday about noon did not automatically relieve Lieutenant Lassiter from duty as duty officer (CM 240697, 26 B.R. 104). It therefore must necessarily follow that he was not found drunk on duty as duty officer as alleged in the Specification.

In R. 38,425, January 1877, reported in Dig. Op. JAG, 1912, page 148, it was held:

> "LXII C 14. Where an officer, after being specially ordered to remain with his company, absented himself from it and from his duty, and, while thus absent, became and was found drunk, held that he was not strictly chargeable with drunkenness on duty under article 38, but was properly chargeable with drunkenness in violation of the sixty-second article, disobedience of orders, and unauthorized absence."

The Manual for Courts-Martial (1928), paragraph 145, page 160, provides:

> "The offense of a person who absents himself from his duty and is found drunk while so absent, or who is relieved from duty at a post and ordered to remain there to await orders, and is found drunk during such status, is not chargeable under this article." (AW 85)

The case might be likened to the case of a sentry who leaves his post before being regularly relieved and then gets drunk. He may properly be convicted of leaving his post before being regularly relieved but not of being found drunk on duty. Nor is the one offense a lesser included offense of the other.

For the foregoing reasons the conviction of the accused of the Specification and Charge under discussion may not legally be sustained by the record.

The accused, however, is guilty of a lesser included offense. It was clearly established that the accused was drunk in the officers' club on the post. Being drunk on post is a well recognized offense in violation of the 96th Article of War (CM 243753, 28 B.R. 73; CM 261879, Watt). Being drunk under the circumstances was clearly a lesser included offense of being found drunk on duty and therefore the conviction may be legally sustained to that extent. In our opinion only so much of the findings may be legally sustained which finds the accused guilty of being drunk in camp in violation of Article of War 96.

6. War Department records show the accused to be 27 years of age and married. He graduated from high school and for two years attended college,

majoring in journalism. He was employed as a salesman and as an assistant manager of a finance company. On 21 September 1940 he enlisted in the Infantry and served as an enlisted man, reaching the grade of sergeant, until 4 September 1942 when he was commissioned second lieutenant, Infantry, AUS. On June 1943 he was promoted to first lieutenant and on 22 April 1944 to captain. His manner of performance of his duties from 13 September 1943 to April 1944 was graded as "excellent."

7. The court was legally constituted and had jurisdiction over the accused and of the offense. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to sustain only so much of the findings as finds the accused guilty of being drunk in camp at the time and place alleged in the Specification in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK - CM 280014 1st Ind

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 Captain Louis C. Knight, Jr. (0-1292540), Infantry.

2. Upon trial by general court-martial this officer was found guilty of being found drunk on duty in violation of Article of War 85. 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. 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 as finds the accused guilty of being drunk in camp at the time and place alleged in the Specification in violation of Article of War 96 and legally sufficient to support the sentence and to warrant confirmation thereof.

The accused, while stationed at Camp Fannin, Texas, was appointed battalion duty officer for two days. He was the battalion executive officer. About midnight of the first day, in the absence of the battalion commanding officer and the adjutant he had another officer take over and perform his duties as duty officer and left the camp. The next evening he was found drunk in the Regimental Officers' Club in the camp by the Regimental Commander. War Department records show that the accused, now a captain, enlisted in the military service in 1940 and served as an enlisted man, reaching the grade of sergeant, until 4 September 1942, when he was commissioned a second lieutenant, Infantry. The manner in which he has performed his duties is rated as excellent. In view of the previous good record and efficiency of the accused I recommend that the sentence be commuted to a reprimand and forfeiture of $50 pay per month for six months, and that the sentence as thus modified be carried into execution.

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 a reprimand and forfeiture of $50, pay per month for six months. GCMO 241, 19 June 1945).

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

14 MAY 1945

SPJGV-CM 280023

UNITED STATES	)	FIRST AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Morris Field, North Carolina, 24 April 1945. Dismissal and total forfeitures.
	)	
First Lieutenant ROBERT B. HITCHCOCK (O-664598), Air Corps.	)	

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that First Lieutenant Robert B. Hitchcock, Air Corps, Squadron F, 119th Army Air Forces Base Unit (CCTS-L), did, at Morris Field, North Carolina, on or about 31 May 1944, present for payment a claim against the United States by presenting to Major C. L. Johnson, Finance Officer at Morris Field, North Carolina, an officer of the United States, duly authorized to pay such claims, a Pay and Allowance Account voucher (WD AGO Form No. 336) in the amount of $368.40 for pay and allowances, which claim was false and fraudulent in that it included a credit in the amount of $83.33 for additional pay for flying from 1 May 1944 to 31 May 1944, during which month the said First Lieutenant Robert B. Hitchcock had not performed the prescribed aerial flights to entitle him to such flying pay, and which claim was then known by the said First Lieutenant Robert B. Hitchcock to be false and fraudulent.

Specification 2: In that First Lieutenant Robert B. Hitchcock, ****, did, at Morris Field, North Carolina, on or about 31 July 1944, present for payment a claim against the United States by presenting to Major C. L. Johnson,

Finance Officer, Morris Field, North Carolina, an officer of the United States, duly authorized to pay such claims, a Pay and Allowance Account voucher (WD AGO Form No. 336) in the amount of $451.74 for pay and allowances, which claim was false and fraudulent in that it included a credit in the amount of $166.67 for additional pay for flying from 1 June 1944 to 31 July 1944, during which months the said First Lieutenant Robert B. Hitchcock had not performed the prescribed aerial flights to entitle him to such flying pay, and which claim was then known by the said First Lieutenant Robert B. Hitchcock to be false and fraudulent.

Specification 3: In that First Lieutenant Robert B. Hitchcock, ****, did, at Morris Field, North Carolina, on or about 31 August 1944, present for payment a claim against the United States by presenting to Major C. L. Johnson, Finance Officer at Morris Field, North Carolina, an officer of the United States, duly authorized to pay such claims, a Pay and allowance Account voucher (WD AGO Form No. 336) in the amount of $368.40 for pay and allowances, which claim was false and fraudulent in that it included a credit in the amount of $83.33 for additional pay for flying from 1 August 1944 to 31 August 1944, during which month the said First Lieutenant Robert B. Hitchcock had not performed the prescribed aerial flights to entitle him to such flying pay, and which claim was then known by the said First Lieutenant Robert B. Hitchcock to be false and fraudulent.

Specification 4: In that First Lieutenant Robert B. Hitchcock, ****, did, at Morris Field, North Carolina, on or about 30 September 1944, present for payment a claim against the United States by presenting to Major C. L. Johnson, Finance Officer at Morris Field, North Carolina, an officer of the United States, duly authorized to pay such claims, a Pay and Allowance Account voucher (WD AGO Form No. 336) in the amount of $367.00 for pay and allowances, which claim was false and fraudulent in that it included a credit in the amount of $83.33 for additional pay for flying from 1 September 1944 to 30 September 1944, during which month the said First Lieutenant Robert B. Hitchcock had not performed the prescribed aerial flights to entitle him to such flying pay, and which claim was then known by the said First Lieutenant Robert B. Hitchcock to be false and fraudulent.

Specification 5: In that First Lieutenant Robert B. Hitchcock, ****, did, at Morris Field, North Carolina, on or about 31 October 1944, present for payment a claim against the United States by presenting to Major C. L. Johnson, Finance Officer, at Morris Field, North Carolina, an officer of the

United States, duly authorized to pay such claims, a Pay and Allowance Account voucher (WD AGO Form No. 336), in the amount of $368.40 for pay and allowances, which claim was false and fraudulent in that it included a credit in the amount of $83.33 for additional pay for flying from 1 October 1944 to 31 October 1944, during which month the said First Lieutenant Robert B. Hitchcock had not performed the prescribed aerial flights to entitle him to such flying pay, and which claim was then known by the said First Lieutenant Robert B. Hitchcock to be false and fraudulent.

Specification 6: In that First Lieutenant Robert B. Hitchcock, ****, did, at Morris Field, North Carolina, on or about 30 November 1944, present for payment a claim against the United States by presenting to Major C. L. Johnson, Finance Officer at Morris Field, North Carolina, an officer of the United States, duly authorized to pay such claims, a Pay and Allowance Account voucher (WD AGO Form No. 336) in the amount of $367.00 for pay and allowances, which claim was false and fraudulent in that it included a credit in the amount of $83.33 for additional pay for flying from 1 November 1944 to 30 November 1944, during which month the said First Lieutenant Robert B. Hitchcock had not performed the prescribed aerial flights to entitle him to such flying pay, and which claim was then known by the said First Lieutenant Robert B. Hitchcock to be false and fraudulent.

Specification 7: In that First Lieutenant Robert B. Hitchcock, ****, did, at Morris Field, North Carolina, on or about 31 December 1944, present for payment a claim against the United States by presenting to Major C. L. Johnson, Finance Officer at Morris Field, North Carolina, an officer of the United States, duly authorized to pay such claims, a Pay and Allowance Account voucher (WD AGO Form No. 336), in the amount of $368.40 for pay and allowances, which claim was false and fraudulent in that it included a credit in the amount of $83.33 for additional pay for flying from 1 December 1944 to 31 December 1944, during which month the said First Lieutenant Robert B. Hitchcock, had not performed the prescribed aerial flights to entitle him to such flying pay, and which claim was then known by the said First Lieutenant Robert B. Hitchcock, to be false and fraudulent.

He pleaded not guilty to and was found guilty of all the Specifications and the Charge. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement at hard labor for two years. The reviewing authority approved the sentence but remitted the confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence in the case is plain and simple. There was no oral testimony. By stipulation, duly authenticated photostatic copies (in place of the original) of the pay vouchers submitted by the accused to the Finance Officer at Morris Field, on 31 May 1944, 31 July 1944, 31 August 1944, 30 September 1944, 31 October 1944, 30 November 1944 and 31 December 1944 (R. 7; Pros. Exs. 1 to 7 incl.), were admitted. Each of these vouchers show that for the respective months covered, the accused certified that he was entitled to additional pay for flying in the sum of $83.33 per month except that the voucher filed in July 1944 covered flying pay for that month and June as well.

The evidence of First Lieutenant Irwin K. Clisby (admitted by stipulation) shows that he is the training secretary of Operations and Training, Morris Field; that the only records available at that field show that the accused from 1 May to 31 December, inclusive, had a total of only one hour's flying time in July; less than 2 hours in October and two hours and forty minutes of co-pilot time in December. There was also admitted in evidence a statement of the accused (R. 7; Ex. 8) in which he admitted that he realized that in some of the instances in which he is charged with presenting vouchers including false claims of flying pay, he knew they were false, but intended to settle with the Government "at such time as my permanent grounding orders were received". He also stated in this statement that he had been grounded in Italy in December 1943 and was returned to the United States in January 1944. He said further that he was not sure that he had been officially cleared by the flight surgeon but the latter had suggested that he do some flying preferably as co-pilot. He assumed that that was sufficient authority for him to do the little flying he did. The prosecution invited the court's attention to AR 35-1480 and requested that judicial notice be taken thereof (R. 7). Those regulations provide inter alia that a qualified aircraft pilot must not only be required by competent authority to participate regularly and frequently in aerial flights, but must make 10 or more flights totalling at least 3 hours or be in the air at least 4 hours during one calendar month or make at least 20 flights totalling at least 6 hours, or be in the air at least 8 hours during two consecutive calendar months (pars. 2 and 10 (a & b), AR 35-1480, 10 Oct. 1942).

For the defense, the accused himself took the stand and testified under oath. He detailed his overseas duty, and related that he arrived at Morris Field 4 May 1944 and took over the duty as assistant public relations officer, subsequently becoming public relations officer. He stated further that he had no intention of keeping the money representing his flight pay (R. 9) and intended to repay it at the time his "permanent grounding papers" returned from Washington. He admitted on cross-examination that he was aware of current regulations regarding flying time and that his request to the finance officer for deductions from his monthly pay was made after the discrepancy was noted by the Air Inspector's Office. His explanation follows (R. 11):

"A. As far as I know that is true; Major Johnson, the Finance Officer, called me and asked me to come over there and told me I had erroneously overdrawn certain amounts and I signed the letter and left it with him; that is all I heard about it."

He further explained to the court:

"A. It was brought to my attention by Major Johnson and at that time I stopped it, but I thought it would be arranged that way, that they would come up to me and say I was overdrawn on my pay and would have to pay it back; I intended to pay it back and I thought I would get my permanent grounding orders and I intended to take that over to the Finance Officer and pay it back in a lump sum or by the month".

He further admitted acting as assistant defense counsel for a flight officer charged with practically the same offense of which he was accused. He told the court that he believed he was on flying status at the time he put in for his flying in July, October and December; that he was grounded and his original grounding was because of health.

The defense then put Captain I. C. Wagner, Jr., Assistant Air Inspector, on the stand. This witness testified that he was with the accused overseas; that the accused had a general reputation of high moral standing and integrity; that he never "backed" on anything he was required to do; that he was above average in conscientiousness and that he had had malaria and yellow jaundice frequently (R. 14). Lieutenant Colonel Fairfield, the Deputy Commanding Officer of Morris Field stated he knew the accused for more than a year; that the accused carried on his duties in an excellent manner. Ernest Hunter, managing editor of "The Charlotte Observer" testified that he knew the accused for almost a year; that the accused has been cooperative in every way, that the relationship between the witness' paper and Morris Field had improved since Lieutenant Hitchcock had been dealing with them, and that the accused was a credit to the Field. The evidence of Brigadier General R. C. Oliver is as follows:

"* * * I desire to place on record that it is my opinion that 1st Lt. Robert B. Hitchcock is an efficient and trustworthy young officer who performs his duty as Publicity Officer, insofar as his relationship to Wing Headquarters is concerned, in a superior manner. I have known Lt. Hitchcock for the past six months and consider him of excellent character and high moral standing. In my opinion, he will become an officer of considerable value to the service in the post-war period, if he should desire to remain in the regular service. This officer is enthusiastic and intelligent, and with more experience and age should prove to be an outstanding officer in his speciality."

The evidence of Major Vandenberg, Public Relations Officer of the Third Air Force is to the same effect.

4. The offenses of which the accused has been found guilty have been established by the court's taking judicial notice of AR 35-1480 which requires, inter alia, that the accused have at least four flying hours in any one month, and by the duly authenticated copies of the pay vouchers presented by the accused to the Finance Officer at Morris Field, which indicate that he signed each one; that those vouchers claim flying pay for the months from May to December 1944, inclusive, and that the accused did not fly sufficient hours in any of those months to be entitled to flying pay. Those hours which he did fly were unauthorized. He admitted at the trial that he knew his claims to flying pay were unfounded, i.e., false. His explanation that he expected to "settle" the entire matter with the Government at a later date, when he was "officially" and finally grounded is no legal justification for the commission of the offenses with which he was charged. The fact that he actually acted as assistant defense counsel for a flight officer in a similar case to his own should have brought home to the accused the seriousness and the consequences of his acts. He stated in this statement (Ex. 8) that the personnel section made out his voucher, including flying pay; that he told the clerk he was not entitled to flying pay and to leave flying time off the voucher, but when he went to sign the voucher flying time was included and since he needed the money he signed, thinking it would take three weeks to get paid if he made a new voucher (R. 12). It can hardly be said that the above is a valid reason for making a false claim against the Government. At best, it merely shows an inability to resist temptation when presented, which can hardly be called a justification for the commission of an offense as serious as the offenses which the accused was found guilty.

5. It is noted that the actual findings of the court, as well as the sentence, have been entered in pen and ink upon the typewritten transcript of the record of trial in spaces left for the purpose, with no initials appearing to show who made the entries or when they were made. Upon its face this would appear to be questionable. However, the record is properly authenticated by the proper officers, who would hardly sign the record with these spaces in blank. The reason for this apparent irregularity is also obvious. The findings and sentence were both unannounced, and the record apparently prepared before the trial judge advocate entered the recording in longhand. He certified, however, that he personally recorded the findings and sentence as required by paragraph 86b, Manual for Courts-Martial, 1928, on the very paper where he had authenticated the record. This cures the irregularity, if such it be. It would have been better practice to have the findings and sentence typed in originally. Perhaps the failure to do so was to keep the findings and sentence a secret from the reporter, apparently an employee at the field. But the reason for this does not appear.

6. The records of the War Department show the accused to be 29 years of age. He is married. He became an aviation cadet and upon graduation from Foster Field, Victoria, Texas, where he had his advanced training was commissioned a second lieutenant in the ORC (Air-Res) and entered on active duty 6 September 1942. He was promoted to first lieutenant on 15 November 1943 while overseas. He was on overseas duty for a period of one year. During this time he flew 25 missions, was awarded the Air Medal, the Oak Leaf Cluster to the Air Medal, the Presidential citation to the 340th Bomb Group as well as the EAME ribbon with four bronze stars.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGV-CM 280023 1st Ind

Hq ASF, JAGO, Washington, 25, D.C. JUN 26 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 First Lieutenant Robert B. Hitchcock (0-664598), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of a violation of the 94th Article of War in seven separate Specifications, each charging a false claim made by filing a voucher for flying pay not due the accused. 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 two years. The reviewing authority approved the sentence but remitted the confinement and forwarded the record of trial for action under the 48th Article of War.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review.

From May until December 1944 the accused was not authorized to fly, having been grounded. He did not do sufficient flying in any one of the aforesaid months to entitle him to flying pay. Knowing this full well, nevertheless each month for seven months he filed a claim for flying pay, amounting in the aggregate to $666.65.

I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof.

I recommend that the sentence as approved by the reviewing authority be confirmed, but that the forfeitures be remitted, and that as thus modified the sentence 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

MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incls
1 Rec of Trial
2 Form of Action

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. GCMO 278, 5 July 1945).

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TITLE

DATE	BORROWER'S NAME	EXT.