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Judge Advocate General's Department

BOARD OF REVIEW

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Volume 55

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CM 282723 - CM 284729

(1945)

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WAR DEPARTMENT (1)
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK - CM 282723

28 JUL 1945

UNITED STATES	)	EASTERN SIGNAL CORPS TRAINING CENTER
v.	)	Trial by G.C.M., convened at Fort Monmouth, New Jersey, 29 June and 2 July 1945. Dismissal, total forfeitures, and confinement for five (5) years.
First Lieutenant ROBERT E. GARVEY (O-1633877), Signal Corps.	)	

OPINION of the BOARD OF REVIEW
LYON, LUCKIE, MOYSE and SYKES, 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 58th Article of War.

Specification: In that First Lieutenant Robert E. Garvey, Signal Corps Officer Replacement Pool, then of Student Officer Detachment, Eastern Signal Corps Schools, did at Fort Monmouth, New Jersey, on or about 13 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Belmar, New Jersey, and returned to military control on or about 11 June 1945.

He pleaded guilty to the Specification of the Charge except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", to the excepted words, not guilty, to the substituted words, guilty. He pleaded not guilty to the Charge but guilty of a violation of the 61st Article of War. He 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 ten (10) years. The reviewing authority approved the sentence but reduced the period of confinement to five years, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

In September 1944 accused was returned to duty from sick in hospital

and placed in Section 600 of the Student Officers' Detachment of the Signal Center School, Fort Monmouth, New Jersey, "to occupy his time until the next section started; it was 410" (R. 6-1,2). In the early part of October 1944 he was assigned to Section 410 (R. 6-2). The hours of school were from 7:30 A.M. to 6:00 P.M., which included a physical training program in the afternoon (R. 6-6). After 13 October 1944, although his name was regularly called at roll call "nobody" answered to accused's name nor did he "show up" (R. 6-3,5). He was the only member of the class that was absent (R. 6-7). He had no authorized absence after 13 October 1944 (R. 6-3).

First Lieutenant Leslie C. Dolan, Police and Prison Officer, Fort Monmouth, New Jersey, testified that on 13 October 1944 he visited the room of accused, located in the Country Club area, for the purpose of "finding some evidence--some pictures or addresses--which might aid me in locating him" (R. 6-8,9,10). He was not found there (R. 6-10). A subsequent visit by him to accused's room had the same result (R. 6-11).

The maid employed to clean accused's room testified that she did not see him occupy his room after 13 October 1944 and that after that date a padlock was put on his door (R. 6-31).

Accused was not paid at Fort Monmouth subsequent to 30 September 1944 nor did he call for his mail at the "mail shack" after 13 October 1944 (R. 6-25, 32).

Accused was apprehended on 11 June 1945 at the beach at Belmar, New Jersey, by an agent of the Federal Bureau of Investigation (R. 6-42). He was very "placid" during the arrest and offered no resistance (R. 6-15). At the time of apprehension he was dressed in swimming trunks and had with him regulation Army trousers and a three-quarter sleeve shirt (R. 6-42). He and his wife both stated at this time he had not worked during his absence and had always worn his full uniform (R. 6-42).

Lieutenant Colonel George R. MacEachren, investigating officer, testified in part as follows:

> "After warning him about his rights and privileges, and so forth, I explained to him that I was not court martialling him myself, but that I was merely appointed by the Commanding General to investigate the charges impartially, as far as it was within my power to do so, and to determine the truth of the matter as stated in the charges. In the course of the conversation I asked him why he had absented himself and stayed away for such a long period of time, and he stated that fundamentally he did not want to come to the school in the first place; that he had questioned the orders which took him out of his organization, sending him up here; that after he got here he still did not like it and he had gone up to see various officers, in Russell Hall, to see if he couldn't either get out of the school or have his course changed.
>
> "He stated that primarily his job was that of a Wire Officer and he had no interest in his assignment on the post. In the course

of my conversation, when I asked him why he had stayed away for such a long time, he said he thought that if he did stay away from the school or post it would compel the military authorities to make some change in his status as a student. I asked him where he had been during this period of time. He didn't answer specifically but stated generally that he had spent his time between Newark and Belmar. I asked him if he had intended to desert the service. He said, 'No,' that he had not. I asked him why he had not turned himself in before the time that he was apprehended, and he said that his wife had been sick, at various times, and that he had to take care of her. That is about the gist of it." (R. 6-36,37)

On cross-examination witness testified that accused stated that he had seen the Secretary of the School, Colonel Wright, and that he had also mentioned Colonel Gillespie's name, both with reference to being relieved of his assignment. Witness added, without objection by the prosecution, that he (witness) had verified the fact accused had asked Colonel Wright for relief from the school and that nothing had been done about it (R. 6-37,38).

On recross-examination the following questions and answers were admitted:

"Q. Did Lieutenant Garvey state anything to you about the fact that the nine-hour day confinement in school, coupled with the lectures, and, in turn, his physical condition, after having come back from battle, have anything to do with his request for change in assignment?

"A. No, he didn't state about the confinement in the school. However he did state that he had suffered from headaches and various stomach pains from the time of his combat service in Italy. When he told me that I asked him if he would care to go to the hospital and have himself examined; that I would make the appointment for him. He refused. I also asked him if he had received any medical attention overseas, in line with these headaches, and he stated definitely that he had not"(R. 6-38,39).

Witness stated accused did not say anything about being hospitalized for malaria "on the other side" (R. 6-29).

In reply to questions by the court, witness testified that accused did not mention the date he consulted with Colonel Gillespie, but stated

that he had met him accidentally on the post and that he had thought the Colonel might be able to "help him out" (R. 6-39).

4. For the Defense.

Captain Cloyd H. Johnson testified that he was the Post Salvage Officer at Fort Monmouth (R. 6-45). On 19 April 1945, pursuant to the provisions of paragraph 8b(2), AR 605-300, he conducted an auction sale of the "goods and effects" of accused (R. 6-46,52). Numerous items of clothing and toilet articles were disposed of (R. 6-48,49; Def. Ex. D-1), the proceeds of the sale totaling $44.21 (R. 6-52).

Major Herman B. Snow, MC, Chief, Neuropsychiatric Section, Regional Hospital, Fort Monmouth, New Jersey, conducted a psychiatric examination of accused on 26 June 1945 (R. 6-57, Def. Ex. D-2).

The written report he submitted containing the history and findings in the case was admitted in evidence and read in its entirety by him to the court (R. 6-56, Def. Ex. D-2). The report is as follows:

"1. This officer was examined from a psychiatric standpoint 26 June 1945 at the verbal request of the Post Commander.

"2. Psychiatric examination revealed the following: This officer is now almost 31 years of age. He is a high school graduate. He had 4½ years of military service as an EM and during that time served for 24 months from 1938 to 1940 in Hawaii. He was commissioned in July of 1942 and since then served in combat from September 1942 until June 1944. He was returned from overseas on rotation and gives no history of any injury or wound but does give a history of certain symptoms which will be referred to later.

"This individual denies any overindulgence in alcoholics. He denies that he was ever arrested in civilian life. He had the

usual childhood diseases and has never had any serious illnesses. He denies that he ever had any lapses of memory or that he has ever taken any drugs. He was first married in 1941, lived together with his wife until April 1942 when he attended Officer Candidate School and his wife returned to Salt Lake City. Shortly thereafter he found out that she was married and never divorced and that her husband was living. He wrote her asking her to get an annulment, but he states that he took it for granted that his marriage was illegal and he has never heard from her since then. He remarried in 1945 feeling that it was not a bigamist marriage.

"This officer states that while in combat in Sicily in September 1943 he began to notice that he was rather irritable and slept poorly. Gradually other symptoms appeared as the months passed. He began to have headaches which were usually preceded by 3-4 days by dizzy spells. The headache itself would come at varying intervals from 1-3 times a month. Following the headaches he was left weak. He complained of nausea in the morning with very little actual vomiting. Later he began to weaken at night with a choking sensation in his throat. During the day he noticed his heart beat and a certain amount of shortness of breath. In September of 1944 he was sent to Fort Monmouth to attend the Message Center School and shortly after this the confinement at work for 9 hours a day made him very restless and irritable. He felt under constant tension and then he states he began to realize that he could not concentrate as good as he used to. He states that he went AWOL and then returned from this 9-day AWOL period and after talking to someone he promised to try to continue his school work. However, in October 1944 he became very apprehensive and irritable, his appetite was extremely poor and he states that he was unable to relax or sleep properly, that his headaches were very annoying, disagreeable and it was at that time that he again left the service. During the months that he was away he states that he became very moody at time and that he was very 'blue'. He stated that he realized it was wrong to be away and wanted to return and that being away in itself made him more irritable and depressed. During the period that he was away he states that he had dizzy spells in which he thought he was going to fall but never actually fell. During this time he got married and states that his wife was sick on several different occasions. He claims he was always in uniform and that he didn't work because his wife had sufficient funds for both of them. He denies any suicidal tendencies at any time. He states that shortly before his apprehension he and his wife rented a cottage at Belmar with the idea that she would be close to camp when he returned, however, the day he started out to return to camp he claims he got dizzy, felt like vomiting so he went home again, instead of returning to camp. This officer also further gives a history of 3 attacks of malaria, the first one occurring in Sicily and during this attack he was delirious for 24 hours.

"On examination today this officer gave the following history

in a coherent manner. He was mentally alert but appeared somewhat depressed and tense. There was some tremors of his fingers. There was no disturbance in the stream of mental activity, there was no delusion or hallucinations.

"3. This officer is not psychotic. He is sane and responsible for his actions, knows the difference between right and wrong and is aware of the consequences of his actions.

"4. This officer is suffering from a psychiatric disability, ie, Diagnosis: Anxiety state, severe, precipitated by combat duty (September 1942 to June 1944, ETO) with no predisposition and manifested by irritability, inability to concentrate, mild depression, emotional tension, gastric upsets, apprehension and inability to relax, with moderate incapacity. This diagnosis does not intimate that this individual is psychotic but merely that he is suffering from a severe emotional disturbance which began as far as the history can be elicited in September 1943 while he was in Sicily and that the emotional disturbance has been progressive."

On cross-examination Major Snow testified that accused was sane when he examined him and there was no indication he was not sane at the time of the commission of the alleged offense (R. 6-60). He was mentally responsible for his actions and knew the difference between right and wrong (R. 6-60,65).

Upon redirect examination witness stated, "this man is sanely responsible but is suffering from an emotional disturbance, and the emotional disturbance in itself does not make him irresponsible" (R. 6-61). The emotional disturbance might possibly "retard" accused's voluntary return to the service "because of his apprehension and depression and worry. He might be fearful of the outcome of his return" (R. 6-61).

In reply to questions by the court,witness stated that "in speaking to him" he could uncover no precipitating cause except combat (R. 6-63). No attempt was made to verify the history as given by accused (R. 6-62). The answers were evaluated by the manner in which accused spoke and his general "status" during examination (R. 6-62).

The accused, having been fully advised of his rights to testify, elected to remain silent (R. 6-66,67).

5. The Specification alleges that accused on or about 13 October 1944 at Fort Monmouth, New Jersey, deserted the service of the United States and remained absent in desertion until he was apprehended at Belmar, New Jersey, on or about 11 June 1945. The elements of the offense and the proof required for convictions thereof, according to applicable authority, are as follows:

"(a) That the accused absented himself without leave *** from his place of service, organization or place of duty, as alleged; (b) that he intended at the time of absenting himself or at sometime during his absence, to remain away permanently

from such place *** (c) that his absence was of a duration and was terminated as alleged; and (d) that the desertion was committed under the circumstances alleged ***" (MCM, 1928, par. 130).

The absence without leave for the period alleged is conclusively shown by accused's plea of guilty to such absence and the other competent evidence introduced by the prosecution. The only issue remaining in the case is the question whether accused intended, at the time of absenting himself or at sometime during his absence, to remain away permanently from his station.

A When it is considered that the accused was absent from his organization for a period of almost eight months; that at the time of his departure he had expressed dissatisfaction with his assignment and had made unsuccessful attempts to have it changed; and that the absence was terminated only upon apprehension by an agent of the Federal Bureau of Investigation, it is clear the evidence presented to the court was sufficient to justify it in inferring an intent on the part of the accused to remain away permanently from his station. Accused's explanation that he thought that by leaving the school he would compel the authorities to change his "status as a student" was a fanciful contention which loses any merit it might seem to warrant when it is considered that although he resided in the vicinity of Fort Monmouth he remained away from his organization for eight months and then returned to military control only upon apprehension by an agent of the Federal Bureau of Investigation. Where the absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent (par. 130 (a), MCM, 1928).

The accused disavowed any intention not to return and stated that he wore his full uniform and did not work during his absence. These however are but circumstances which the court may regard as a basis for an inference that he did intend to return and are not compelling. B

The defense produced evidence tending to show accused was suffering from a psychiatric disability diagnosed as "Anxiety state, severe", but it was clearly shown that accused was not psychotic and knew right from wrong and was mentally responsible for his actions. The Board of Review is of the opinion, therefore, that the legal evidence of record establishes, beyond a reasonable doubt, accused's guilt of the Specification and the Charge.

6. War Department records disclose that this officer will be 31 years old on 5 August 1945, is married and a high school graduate. In civil life he was employed for five years as a pipefitter. He enlisted in the service on 8 November 1937 and served until 2 August 1940. On 6 August 1940 he again enlisted in the service and on 13 July 1942, upon attendance and successful completion of the Officer Candidate Course at the Eastern Signal Corps School, he was commissioned a temporary second lieutenant in the Army

of the United States. He served overseas for one year and nine months, participating in operations at Kasserine Pass, El Guettar, Sened, Hill 609, Djebel, Ang, Sicily, and Cassino Line. On 17 September 1943, while serving in the North African Theater of Operations, he was promoted to first lieutenant. On 30 September 1944 a forfeiture of $50 was imposed on him under the provisions of Article of War 104 for absence without leave from 16 September 1944 to 24 September 1944, a period of nine days.

7. A brief and affidavits (containing for the most part essentially the same facts as were presented to the court) submitted on behalf of the accused by Wallace M. Norton, 810 Broad Street, Newark, New Jersey, special counsel for the accused, have been carefully considered by the Board of Review in so far as they relate to the legal sufficiency of the trial. The assertions of fact set out in the affidavits and brief which are not contained in the record have not been considered by the Board, since consideration of those matters would be outside of the province and authority of the Board.

8. The court was legally constituted and had jurisdiction of the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed by the court during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 58.

Irving G. Zom, Judge Advocate

Charles E. Luckie, Judge Advocate

(On Leave), Judge Advocate

Warren S. Sykes, Judge Advocate

SPJGK-CM 282723 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 First Lieutenant Robert E. Garvey (O-1633877), Signal Corps.

2. Upon trial by general court-martial this officer was charged with desertion from 13 October 1944 to 11 June 1945. He pleaded guilty to the Specification of the Charge except the words "desert" and "in desertion," substituting therefor, respectively, the words "absent himself without leave from" and "without leave," to the excepted words, not guilty, to the substituted words, guilty. He pleaded not guilty to the Charge but guilty of a violation of the 61st Article of War. He was found guilty of the Charge and 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 ten years. The reviewing authority approved the sentence but reduced the period of confinement to five years, and forwarded the record of trial for action under Article of War 48.

3. 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 the findings and sentence and to warrant confirmation of the sentence.

On 13 October 1944, accused, a student of the Signal Center School, Fort Monmouth, New Jersey, absented himself without leave from his station. Prior to his unauthorized departure he made unsuccessful attempts to have his status as a student changed. Accused remained absent until he was apprehended by an agent of the Federal Bureau of Investigation on 11 June 1945. At the time of apprehension he was residing in Belmar, New Jersey. He wore his full uniform and was not employed during his absence.

Desertion in time of war is a serious military offense. While there is nothing in the record which justifies his actions, it is indicated that at the time of his departure, although he was sane and mentally responsible for his actions, he was suffering from an emotional disturbance, expressed by the psychiatrist as follows:

"This officer is suffering from a psychiatric disability, ie, Diagnosis: Anxiety state, severe, precipitated by combat duty

(September 1942 to June 1944, ETO) with no predisposition and manifested by irritability, inability to concentrate, mild depression, emotional tension, gastric upsets, apprehension and inability to relax, with moderate incapacity. This diagnosis does not intimate that this individual is psychotic but merely that he is suffering from a severe emotional disturbance which began as far as the history can be elicited in September 1943 while he was in Sicily and that the emotional disturbance has been progressive."

War Department records show accused has been in the service since 8 November 1937, and has served overseas for one year and nine months, participating in operations in Kasserine Pass, El Guettar, Sened, Hill 609, Djebel, Ang, Sicily and Cassino Line.

In view of the psychiatrist's report and accused's long and honorable service, including his combat experience, I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that the period of confinement be reduced to two years, and that the sentence as thus modified be carried into execution. This recommendation is made after giving due consideration to a letter dated 5 July 1945, inclosed with the record of trial, from Brigadier General S. H. Sherrill, the reviewing authority, addressed to The Judge Advocate General, wherein he states:

"1. After careful consideration of the record of trial in the case of First Lieutenant Robert E. Garvey, O-1633877, Signal Corps Officer Replacement Pool, Fort Monmouth, New Jersey, I have approved the sentence and reduced the period of confinement to five (5) years.

"2. I feel that my action in this case is within the spirit of present War Department policy with regard to sentences for desertion. In taking this action I have considered the following factors:

(a) The excellent military record of the accused as an enlisted man and as an officer overseas.

(b) The report of the Neuropsychiatrist who indicates that accused's actions were, at least, in part motivated by his mental condition occurring after prolonged and honorable overseas service, but nevertheless that he was aware of the difference between right and wrong and responsible for his actions."

4. Consideration has been given to a brief and affidavits submitted on behalf of the accused by Wallace M. Norton, 810 Broad Street,

Newark, New Jersey, special counsel for the accused. These documents, containing therein assertions of fact for the most part essentially the same as presented before the court, accompany 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.

MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls
1. Rec of trial
2. Form of action
3. Brief on behalf of accused
4. Affidavits

(Sentence as approved by reviewing authority confirmed but forfeitures remitted and confinement reduced to 2 years. GCMO 420, 28 Aug. 1945).

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

SPJGN - CM 282876

U N I T E D S T A T E S v. Second Lieutenant CHESTER A. WEST (0-741068), Air Corps.	))))))))	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Kingman Army Air Field, Kingman, Arizona, 23 June 1945. Dismissal, total forfeitures and confinement for seven (7) 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 58th Article of War.

Specification: In that Second Lieutenant Chester A. West, Squadron B, 3018th Army Air Forces Base Unit, did, at Kingman Army Air Field, Kingman, Arizona, on or about 2 March 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Omaha, Nebraska, on or about 29 May 1945.

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

Specification 1: In that Second Lieutenant Chester A. West, Squadron B, 3018th Army Air Forces Base Unit, Kingman Army Air Field, Kingman, Arizona, did, at Minneapolis, Minnesota, on or about 20 April 1945, with the intent to defraud, wrongfully and unlawfully make and utter to The Dayton Company, a certain check in words and figures as follows:

(14)

Minneapolis, Minn., April 20 194 5

Pay to The Order Of THE DAYTON COMPANY $ 35.00

THIRTY FIVE & no/100- - - - - - - - - - - - Dollars

For Cash

To Valley Nat'l Bank) /s/ Chester A. West

) Signed 0741068

Town Kingman) K.A.A.F.

) Address

State Arizona) Kingman, Arizona.

A4098

and by means thereof, did fraudulently obtain from said Dayton Company, the sum of Thirty-five ($35.00) dollars, lawful money of the United States, he the said Second Lieutenant Chester A. West, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Kingman, Arizona, for the payment of said check.

Specification 2: Similar to Specification 1, but alleging check dated 21 April 1945, in the amount of $40.

Specification 3: Similar to Specification 1, but alleging check dated 23 April 1945, in the amount of $45.

Specification 4: Similar to Specification 1, but alleging check dated 24 April 1945, in the amount of $40.

Specification 5: Similar to Specification 1, but alleging check dated 27 April 1945, made and uttered to King Cole Hotel, in the amount of $35.

Specification 6: Similar to Specification 1, but alleging check dated 30 April 1945, made and uttered to King Cole Hotel, in the amount of $40.

Specification 7: Similar to Specification 1, but alleging check dated 1 May 1945, made and uttered to King Cole Hotel, in the amount of $19.90.

Specification 8: Similar to Specification 1, but alleging check dated 6 April 1945, made and uttered to Hotel Nicollet, in the amount of $40.

Specification 9: Similar to Specification 1, but alleging check dated 7 April 1945, made and uttered to Hotel Nicollet, in the amount of $45.

Specification 10: (Finding of guilty disapproved by reviewing authority).

Specification 11: Similar to Specification 1, but alleging check dated 24 April 1945, made and uttered to Hotel Radisson, in the amount of $26.18.

The accused pleaded not guilty to Charge I and its Specification, but guilty to the lesser included offense of absence without leave for the alleged period, in violation of Article of War 61. His pleas of guilty to Charge II and the Specifications thereunder were changed, at the direction of the law member during the course of the trial, to pleas of not guilty. The accused was found guilty of the Specification of Charge I except the figures and words "2 March 1945", "desert", and "in desertion", substituting therefor, respectively, the figures and words "8 March 1945", "absent himself without leave", and "without leave"; not guilty of Charge I but guilty of a violation of Article of War 61; and guilty of Charge II and the Specifications thereunder. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for ten years. The reviewing authority disapproved the findings of guilty of Specification 10 of Charge II; approved only so much of the sentence as provided for dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for seven years; and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that, on 1 March 1945, First Lieutenant John W. White, acting in his capacity as Assistant Trial Judge Advocate at Kingman Army Air Field, Kingman, Arizona, served a copy of court-martial charges on the accused (R. 13, 14). The latter was present for duty during the first seven days of March, 1945, but, on the eighth day of that month, he absented himself without leave "from his command" at Kingman Army Air Field (Pros. Ex. 1). By the stipulated testimony of Captain P. R. Padgham, Corps of Military Police, it was shown that, on 29 May 1945, the accused was taken into custody at Omaha, Nebraska, at a distance of over sixteen hundred miles from his station at Kingman, Arizona (R. 19; Pros. Ex. 2).

Prior to his apprehension he cashed two checks at the Hotel Nicollet, in Minneapolis, Minnesota, one for $40.00 on 6 April 1945, and one the following day for $45.00 (Pros. Exs. 4, 4A, 4B). From 20 April 1945 to 24 April 1945, inclusive, at the Dayton Company, in Minneapolis, he negotiated four checks, one for $35.00, two for $40.00 each, and one for $45.00 (Pros. Exs. 5, 5A, 5B, 5C, 5D). In the same city he likewise cashed a check in the amount of $26.18 at the Hotel Radisson, on 24 April 1945, and three additional checks at the King Cole Hotel, as follows: one for $35.00 on 27 April 1945, one for $40.00 on 30 April 1945, and one for $19.90 on 1 May 1945 (Pros. Exs. 3, 3A, 3B, 3C, 6, 6A). Since these checks were drawn on the Valley National Bank, Kingman, Arizona, at a time when his account was overdrawn, they all were dishonored upon presentation (R. 20; Pros. Exs. 3-7A).

4. The defense, by the stipulated testimony of the Communications

Officer at Kingman Army Air Field, established that the accused, on 7 March 1945, effected two long distance telephone calls to St. Petersburg, Florida, one to Mrs. O. A. West and the other to "anyone at phone number 70412" (R. 24).

The accused, after his rights relative to testifying or remaining silent had been explained, elected to make a sworn statement in his own behalf. Because he had not heard from his wife for "a couple of weeks", he called his mother at St. Petersburg, Florida, on 7 March 1945, by long distance telephone to ascertain the reason. He experienced quite a shock when told that his wife was planning to procure a divorce. By telephone conversation that same evening and in a letter received the following morning, his wife confirmed her intention to divorce him. As a result of this stunning news, he "blew up momentarily", "lost /his/ head", "went to pieces", and, feeling compelled "to get away and think it over", boarded a train for Los Angeles. He became "pretty drunk" and remained in a state of inebriation during the entire period of his absence until a few days prior to his apprehension in Omaha, Nebraska (R. 15). He then "got a hold of /himself/ and- - - planned to come back of /his/ own accord". He had left all his personal belongings at the Base, had taken with him only the uniform he wore, and had not suggested to anyone that he planned not to return. He had not been dissatisfied but liked the work and the personnel at the Field (R. 16). The service of court-martial charges on him did not influence his decision to leave, but his departure was the result of "an emotional upset" occasioned by the news conveyed to him over the telephone by his wife and mother (R. 17, 18).

Although "tight" at the time, the accused remembered cashing the checks and using his "AGO card" for identification purposes. He passed no checks from 1 May 1945 until the time of his apprehension on 29 May 1945. Realizing that he "ought to do so as soon as /he/ can", he planned to restore as much of the money as possible (R. 22, 23).

5. The Specification of Charge I, as modified by the findings of the court, alleges that the accused did, "at Kingman Army Air Field, Kingman, Arizona, on or about 8 March 1945, absent himself without leave from the service of the United States and did remain absent without leave until he was apprehended at Omaha, Nebraska, on or about 29 May 1945". This was found to be a violation of Article of War 61.

The evidence established beyond any peradventure of doubt, and the accused by his plea of guilty admitted, the commission of the above alleged offense. The fact that he might have been genuinely and deeply concerned over domestic difficulties cannot, of course, in any way justify an unauthorized absence of some eleven weeks, terminated by apprehension at a point about sixteen hundred miles from his station.

6. Specifications 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11 of Charge II allege that the accused did, during the period of 6 April 1945 to 1 May

1945, inclusive, "with intent to defraud, wrongfully and unlawfully make and utter" to various business establishments in Minneapolis, Minnesota, certain checks, aggregating $366.08, "and by means thereof, did fraudulently obtain" their face value, either in money or services, "well knowing that he did not have and not intending that he should have sufficient funds" in the drawee bank for their payment.

The accused pleaded guilty to these offenses and, in his testimony, readily acknowledged the execution and negotiation of these checks, but maintained that he did so while under the influence of alcohol. In view of this statement the law member, striving to protect the accused's rights, directed that the plea be changed to one of not guilty. Although he described himself as "tight all this time", the accused acknowledged his inability to "testify [that he] was really drunk". Since he remembered identifying himself by use of his "AGO card" and was able to recall the other details of the check transactions, it is clear that he was competent to entertain the alleged intent to defraud. That such intent was inherent in his conduct may be gathered from the amount and number of the checks executed at a time when his account in the drawee bank was overdrawn and from his failure to disclaim knowledge of this fact. His testimony indicates that he was cognizant of the account's depleted state, and, in any event, such knowledge is properly chargeable to him. The reasonable inference to be drawn from the record is that, during an episode of reckless living, with complete indifference to the consequences of his conduct, and by making use of the army uniform and his identify as an officer, the accused negotiated the worthless checks to provide funds for liquor, sustenance, and hotel accomodations. Such conduct clearly brought discredit upon the military service and was violative of Article of War 96. The evidence supports the findings of guilty of Specifications 1 through 9 and of Specification 11 of Charge II.

7. The accused is about 29 years old and is married. After studying accounting for two years at the University of Florida and one year at the Walton School of Commerce, Chicago, Illinois, he was employed by the Retail Credit Company, Atlanta, Georgia, from September, 1938, to June, 1942. He enlisted in the Army on 28 May 1942, was appointed an Aviation Cadet on 1 July 1942, and was commissioned a Second Lieutenant in the Air Corps Reserve on 3 March 1943. He has received five ratings of excellent and two of very satisfactory.

8. The court was legally constituted. 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 either Article of War 61 or Article of War 96.

Abner E. Lipscomb, Judge Advocate

Robert J. Clemen, Judge Advocate

Samuel Morgan, Judge Advocate

SPJGN-CM 282876 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War 27 JUL 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 Chester A. West (0-741068), Air Corps.

2. Upon trial by general court-martial this officer pleaded not guilty to the offense of desertion, as alleged in the Specification of Charge I, but guilty to the lesser included offense of absence without leave for the alleged period, in violation of Article of War 61. His pleas of guilty to the making and uttering of 11 worthless checks aggregating $381.11 as alleged in the Specifications of Charge II were changed at the direction of the Law Member to pleas of not guilty. The accused was found guilty of absenting himself without leave for 82 days, in violation of Article of War 61; and of fraudulently making and uttering 11 checks, aggregating $381.11, 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 ten years. The reviewing authority disapproved the findings of guilty of Specification 10 of Charge II involving one check in the sum of $15.03; approved only so much of the sentence as provided for dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for seven years; and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof.

The accused was absent without leave from his station from 8 March 1945 to 29 May 1945, a period of 82 days. Prior to his apprehension at Omaha, Nebraska, about 1600 miles from his station, the accused went to Minneapolis, Minnesota, and there executed and cashed ten checks aggregating $366.08. His account at the drawee bank was overdrawn at the time and the checks, consequently, were dishonored upon presentment. The accused readily admitted these facts but blamed his actions upon the shocking news that his wife intended to divorce him. According to his testimony he was drinking heavily at the time he cashed the checks, but was not "really drunk", and was able to recall the details of the transactions. It seems clear that he was competent to entertain the alleged intent to defraud which, in fact, was inherent in his conduct.

The accused has received five efficiency ratings of "Excellent" and two of "Very Satisfactory". Despite this previous good record, the derelictions established by the evidence are of a serious nature. They reveal a lack of financial integrity as well as the absence of a sense of responsibility both of which are inexcusable when displayed by a commissioned Army officer. I am of the opinion that the sentence of dismissal is appropriate and that while some confinement is warranted, the period approved by the reviewing authority is excessive. I recommend, therefore, that the sentence as approved by the reviewing authority be confirmed, but that the forfeitures be remitted and the period of confinement be reduced to five years, that the sentence as thus modified be ordered executed, and that a United States Disciplinary Barracks be designated as the place of confinement.

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

Myron C. Cramer.

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed but forfeitures remitted and confinement reduced to five years. GCMO 400, 10 Aug 1945).

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

SPJGQ - CM 282913

U N I T E D S T A T E S v. First Lieutenant FRANCIS F. ATKINSON (O-483733), Adjutant General's Department.	))))))))	SAN FRANCISCO PORT OF EMBARKATION Trial by G.C.M., convened at Fort Mason, California, 28 June 1945. Dismissal, total forfeitures and confinement for two (2) years.

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

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

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

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

Specification: In that, First Lieutenant Francis F. Atkinson, AGD, Army Post Office, San Francisco Port of Embarkation, did, at San Francisco, California, on or about 9 July 1943, with intent to defraud, falsely indorse the name of the payee of a certain check in the following words and figures, to wit:

(FACE)

Treasury San Francisco, Calif. July 2, 1943 1,003,364
Fiscal Agent
1 TREASURER OF THE UNITED STATES
15-51

Pay $112 DOLLARS AND .50CTS DOLLARS $112.50

To the
Order of Mr. James B. Stanley
(seal) Btry. 1-96CAAA-APO 96
c/o Postmaster
San Francisco, Calif.

Object for which drawn
Redemption
Public Debt
United States
Savings Bonds

Federal Reserve Bank of San Francisco

/s/
Cashier

17-368

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

(BACK)

NOTICE TO ENDORSERS

This check should be endorsed below in ink or indelible pencil by the payee.
If endorsement is made by mark (X) it must be witnessed by two persons who can write, giving their places of residence in full.

/s/ James B. Stanley
/s/ Francis M. Hawkins Jr
/s/ Francis F. Atkinson

which said writing is of a public nature which might operate to the prejudice of another.

CHARGE II: (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to the Specifications and Charges, and was found guilty of the Specification and Charge I and not guilty of the Specification and Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence, remitted one year of the confinement imposed, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution is as follows:

An employee of the Bank of America, Ninth and Market Branch, San

Francisco, California, identified a United States Treasury Check payable to the order of one James B. Stanley in the sum of $112.50, bearing the endorsements of "James B. Stanley", "Francis M. Hawkins, Jr.", and "Francis F. Atkinson" as having been cashed at this bank on 7 July 1943 (R. 8, 9, 10). The witness testified that he knew the accused, had had business dealings with him, and that the endorsement (of Francis F. Atkinson) upon the back of the check was the signature of the accused (R. 8, 9, 10). The check was introduced in evidence as Prosecution's Exhibit 1 (R. 9).

Raymond A. Bennett, agent of the United States Secret Service, in the course of investigating the alleged forgery of this check took a statement from accused on 18 May 1945 (R. 12, 14). The questioning of the accused lasted about two or two and one-half hours, no break being allowed during that period (R. 15, 21). Lieutenant Colonel Van Meter, Mr. Lummis, also a Secret Service agent, and Captain (now Major) Reagan were also present during the first three-quarters of the time (R. 15). After about an hour and a half of the questioning, accused executed specimens of his handwriting upon three sheets, Form 1607, regular Secret Service mimeograph forms, which were introduced in evidence as Prosecution's Exhibit 2 (R. 19, 22). Accused did not object to furnishing these specimens and appeared quite willing to furnish them (R. 17).

Accused admitted making the third endorsement but denied making the first and second endorsements (R. 19). Bennett did not advise accused of his rights under Article of War 24 nor tell him that he did not have to give a specimen of his handwriting (R. 20). Bennett told accused he was guilty (R. 22) and tried "to induce him to make a full confession" (R. 24). Accused then said "he'd like to know what Colonel Van Meter would say" and when Lieutenant Colonel Van Meter thereafter talked to accused he told accused that if he were guilty "he ought to be man enough to admit it, but that he had been in the army long enough to know that the Colonel could promise him nothing", that he would have to take it up with the Chief of Staff (R. 24).

It was stipulated by the parties that James V. P. Conway, Inspector at the Post Office, San Francisco, California, was an expert on handwriting. Mr. Conway testified that he had made an analysis and comparison of the handwriting upon Prosecution's Exhibits 1 and 2 (R. 26) and, in his opinion, each of the three endorsements upon the check was in the same handwriting as that appearing on the specimens of the handwriting of accused (R. 27). The witness testified at length as to the characteristic construction of the letters in the writing and the pictorial form and appearance of the writing, in order to demonstrate the reasons for his opinion that one and the same person executed them (R. 27-31). Upon cross-examination of this witness, four photostatic copies of pay vouchers of accused, each bearing his signature, were introduced in evidence as Defense Exhibit A (R. 31). In Conway's judgment, the endorsements upon the check were not copied from a pattern (R. 34).

A stipulation was received without objection that if James B. Stanley,

a member of the armed forces in overseas service, were present, he would testify that he was the payee of the check in question (Pros. Ex. 1); that he did not sign any of the endorsements appearing upon the back thereof; that he did not authorize the accused or any other person to do so for him; and that he did not receive, directly or indirectly, any money as payee of said check (R. 36).

Captain Dennis, Investigating Officer, testified that he saw accused on or about 22 May 1945, that he explained to accused his rights under the 24th Article of War, making it clear that accused did not have to talk to him unless he wished to do so (R. 38, 39, 40), and that thereafter accused gave a statement to which he subscribed and swore (R. 39). This statement was admitted in evidence as Prosecution's Exhibit 3 (R. 42, 44). The statement, in substance, showed that accused on 7 July 1943 wrongfully removed "from the directory section, Army Post Office, San Francisco Port of Embarkation, a letter addressed to James B. Stanley, Btry I-96 CAA - APO 96, c/o Postmaster, San Francisco, California", and that he took from the letter a check (Pros. Ex. 1) drawn on the Treasurer of the United States, serial number 1,003,364, dated 2 July 1943, in the sum of $112.50. The statement further showed that accused thereafter and on 9 July 1943 endorsed the name of the payee, James B. Stanley, the name "Francis M. Hawkins, Jr." and his own name upon the back of the check, presented it to the Bank of America at Powell and Market Streets, San Francisco, California and received the sum of $112.50 thereon. The statement also recited that accused had "previously confessed doing this to Raymond A. Bennett, agent of the United States Secret Service" (R. 42, 43; Pros. Ex. 3).

4. The evidence for the defense is as follows:

The Commanding Officer of accused, Lieutenant Colonel John H. Van Meter, testified that on 18 May 1945 he was present at an investigation concerning accused and "a check" (R. 45). He did not advise accused of his rights under the 24th Article of War (R. 46, 48). After the two Secret Service agents had talked with accused for about an hour, Lieutenant Colonel Van Meter talked to accused, saying in part, "*** You have been in the Army long enough to know that I can't make you any promises. If you are guilty, my advice to you would be to come clean and tell the truth" (R. 46, 47). The accused then wrote a statement based in part upon what Bennett wanted written (R. 45, 47). Bennett "started most of the sentences" and accused "finished them" (R. 48). This statement was identified and introduced in evidence as Defense Exhibit B (R. 47). The statement recited that accused took the check (Pros. Ex. 1) from the Directory Section, forged the names of James B. Stanley and Francis M. Hawkins, Jr. thereon, cashed it and used the proceeds for personal expenses (R. 47). Before the statement was written, Lieutenant Colonel Van Meter asked accused a few questions (R. 48).

After being advised as to his rights to testify generally, accused

was sworn to testify solely as to the circumstances surrounding the taking of this statement (Def. Ex. B). Accused testified that he was cross-examined with respect to this check for two hours or more (R. 52). No opportunity to smoke or rest was given. Mr. Bennett said that where a confession was given, the normal procedure was "probation in the civil court". Accused had not admitted anything until after talking to Colonel Van Meter toward the close of the investigation (R. 53). The latter told him it would be best to go ahead and confess; that he (the Colonel) could not promise anything but would "try to intercede with the General to see if he could get some compensation or lifting of the sentence". Bennett then dictated and accused wrote and signed the statement introduced as Defense Exhibit B. Accused was not advised as to any rights he may have had under the Fifth Amendment or the 24th Article of War and he was not told that anything he might say or write might be used against him, nor advised that he could "get counsel" (R. 54). Accused has read the Articles of War, has read them to enlisted men, but was not aware that under the 24th Article of War he might remain silent if he wished to do so (R. 55).

The wife of accused testified that she had been married to accused two years, that he had been steady in his habits (R. 58) and had provided well for the baby and her (R. 57), that he had been in the Army for seven years, had been overseas thirteen months, and that he had, quite a number of times, expressed a desire to remain in the Army and make it a career (R. 58).

Upon being further advised as to his rights as a witness, the accused elected to remain silent (R. 58, 59).

5. Separate and apart from the two confessions which were received in evidence and which will be considered hereafter, the evidence sustains the findings of guilty of Charge I and the Specification thereunder . The accused was convicted of forging the name of the payee upon a check dated 2 July 1943, drawn upon the Treasurer of the United States, payable to one James B. Stanley in the sum of $112.50. The evidence showed that the payee did not receive the check nor any of the proceeds therefrom, that the payee did not sign any of the three endorsements appearing upon the back of the check, nor did he authorize the accused or any other person to endorse the instrument in his behalf. The check was presented to a bank and cashed. The name of the payee appeared as the first of the three endorsements; the name of "Francis M. Hawkins, Jr." apparently a fictitious person, appeared as the second endorsement; and the name of the accused constituted the third and final endorsement. Expert testimony was convincing that all three endorsements were written by the accused. This evidence clearly established all essential elements of the offense of forgery (MCM, 1928, par. 149j).

Counsel for the accused objected to the introduction in evidence of the specimens of the handwriting of accused (Pros. Ex. 2), upon the ground that they formed a part of a confession which had been illegally obtained because accused was not advised of his rights under the Fifth Amendment to

the Constitution and the 24th Article of War (R. 13, 15, 16). The objection was properly overruled (R. 18, 19).

The testimony of Mr. Bennett was that accused "appeared quite willing" to furnish these specimens (R. 17). There was no evidence of threats or compulsion to obtain them. In 20 American Jurisprudence 623, 624, it is stated:

> "The weight of authority is to the effect that a writing made out of court by a person accused of crime, at the request of a public officer, is admissible at his trial for comparison with a writing the authorship of which is in dispute, provided it was obtained without duress". (See also People v. Molineaux, 168 NY 264, 61 NE 286).

As an accused may be compelled to try on clothing or shoes, or place his bare foot in tracks, or submit to having his fingerprints made, all without violating the rule against self-incrimination (MCM, 1928, par. 122b, p. 130), so it is no infringement upon this constitutional privilege to obtain specimen handwriting from an accused to be used at the time of his trial. As the genuineness of the handwriting of the accused upon the check in question was involved, the proved specimens of his writing were competent evidence as a basis for comparison by witnesses and by the court to prove such genuineness (MCM, 1928, par. 116b, p. 120).

The statement executed by the accused before the Investigating Officer (Pros. Ex. 3) was also introduced in evidence over the objection of defense counsel. It was contended that the statement was based upon the prior statement illegally procured from the accused on 18 May 1945 by the Secret Service agents and that, as the first statement was illegally obtained, any subsequent statement based thereon would likewise be illegal and inadmissible in evidence. The evidence showed that accused was questioned continuously by these two agents and by Lieutenant Colonel Van Meter, his commanding officer, for a total period of from two to two and one-half hours, no break or rest period being allowed during that time (R. 21). After the Secret Service agents had questioned accused for an hour or more (R. 22, 46, 47), accused wrote the specimens of his handwriting (R. 15, 22; Pros. Ex. 2). Lieutenant Colonel Van Meter then told accused that he could not make any promises to accused but if he (the accused) were guilty he should "come clean and tell the truth" (R. 24, 46, 47). Accused then wrote a statement in which it was recited that he took the check from the Army Directory Section, forged the name of the payee and another thereon, and cashed it (Def. Ex. B). During this questioning, accused was not advised of his rights under Article of War 24 (R. 20, 46).

On 21 May 1945 the regularly appointed Investigating Officer took a statement from the accused (R. 38; Pros. Ex. 3) after fully advising accused of his rights (R. 39, 40). Part of this statement, which was a full and complete confession, was taken from the previous statement executed about three days earlier (R. 41), in the sense that the investigating officer got part of the information therefrom, corroborated by the

accused, from which he prepared the new confession for signature (R. 40).

A confession not voluntarily made must be rejected (MCM, 1928, par. 114a, p. 116). Furthermore, if the first confession was illegally obtained and therefore inadmissible, then a second confession based thereon normally would not be admissible (CM ETO 1486 MacDonald and MacCrimmon, 3 Bull JAG 227). The conduct of the Secret Service men and Lieutenant Colonel Van Meter in continuously questioning accused over a period of two to two and one-half hours without a break and culminating in the advice of Lieutenant Colonel Van Meter to accused to "tell the truth", all without advising accused of his rights against self-incrimination, is to be condemned. By their own admission (R. 23), these agents, with the help of the commanding officer of accused, were undertaking to get the accused to make a full confession and without any apparent concern that accused be fully acquainted with and accorded his rights as a witness.

Where a confession is made to a military superior or to the representative or agent of such superior, further inquiry into the circumstances under which the statement is made must clearly show its voluntary nature, otherwise it will be rejected (CM 233543, McFarland, 20 BR 15, 21). These circumstances in the instant case show that accused was a commissioned officer with seven years service in the Army, the last three of which were in commissioned status. He had read the Articles of War and had read them to enlisted men, although at the trial he disclaimed any knowledge of the provisions of Article of War 24 (R. 55). Furthermore, accused testified that before he admitted anything, he asked Lieutenant Colonel Van Meter for his advice (R. 53) and was told that nothing could be promised him (R. 54). Under these and all other attendant circumstances, it does not appear that accused was misled or imposed upon in making his confession to the investigating officer. The objectionable confession to the Secret Service Agent was not introduced in evidence by the prosecution, and the valid confession was in no way dependent upon it, the accused being then free from any compulsion which previously may have been exercised and fully advised of his rights.

But in any event, the evidence apart from either of the confessions is of such quantity and quality as to compel in the minds of conscientious and reasonable men the finding of guilty, and therefore no substantial rights of accused were injuriously affected by the admission of this evidence, even if it be considered to have been admitted in error (CM 206090, Koehler and Skillin, 8 BR 249, 253).

6. War Department records disclose that accused is 28 years of age and married. He is a high school graduate. In civil life he was employed as a postal clerk, checker and cancellation supervisor from 1932 to 1937 at the United States Post Office, Detroit, Michigan. He served in enlisted status in the Regular Army from March 1938 to 19 July 1942, on which date he was discharged to accept a commission in the Army of the

United States. He was immediately ordered to active duty as a Second Lieutenant, The Adjutant General's Department. He was promoted to the grade of First Lieutenant on 5 January 1943. He served overseas for a few months during the latter part of 1942, being returned to the continental United States in January 1943 for medical attention involving an arthritic condition in his left hip. His commissioned service appears to have been as postal officer at various camps and stations.

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, as modified by the reviewing authority, and to warrant confirmation thereof. Dismissal is authorized under Article of War 93.

Fletcher R. Lawrence, Judge Advocate

_____, Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 282913 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 31 [illegible]

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 Francis F. Atkinson (0-483733), Adjutant General's Department.

2. Upon trial by general court-martial this officer was found guilty of forgery in violation of Article of War 93. 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, remitted one year of the confinement imposed, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. 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, as modified by the reviewing authority, and to warrant confirmation thereof. I concur in that opinion.

On 7 July 1943 the accused removed a letter from the directory service of the Army Post Office, San Francisco Port of Embarkation, the letter being addressed to James B. Stanley, Battery 1, 96 CAAA-APO 93, c/o Postmaster, San Francisco, California. The accused opened the letter and took from it a check payable to the addressee, dated 2 July 1943, drawn upon the Treasurer of the United States in the sum of $112.50. On 9 July 1943 the accused wrongfully endorsed the names of the payee and of "Francis M. Hawkins, Jr.", upon the back of the check, added his own name, presented the check to a branch of the Bank of America, San Francisco, and received the sum of $112.50 thereon which he used for personal expenses.

The Staff Judge Advocate's review discloses that in January 1945 the accused was reprimanded under Article of War 104 for "kiting" checks.

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 Penitentiary, McNeil Island, Washington, be designated as the place of confinement.

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

Myron C. Cramer,

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

MYRON C. CRAMER
Major General
The Judge Advocate General

((Sentence as approved by reviewing authority, is confirmed but forfeitures are remitted. GCMO 403, 11 Aug 1945).

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

SPJGH-CM 283124

20 JUL 1945

UNITED STATES v. First Lieutenant GEORGE W. PHILLIPS, JR. (0-572959), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Kingman Army Air Field, Kingman, Arizona, 12 June 1945. Dismissal and total forfeitures.

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

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant GEORGE W. PHILLIPS, Junior, Air Corps, 3018th Army Air Forces Base Unit, Kingman Army Air Field, Kingman, Arizona, did, at Kingman, Arizona, on or about 1 December 1943 wrongfully borrow one hundred dollars ($100.00) from Sergeant Ray A. Watters, an enlisted man.

Specification 3: In that First Lieutenant GEORGE W. PHILLIPS, Junior, * * *, did, at Kingman Army Air Field, Kingman, Arizona on or about 3 May 1945 in his testimony before George C. Howard, Major, Air Corps, Acting Assistant Inspector General, an officer detailed to conduct an investigation, on being asked, in substance whether he owed anything as of the date of the investigation on his debt of One Hundred Dollars to Sergeant Watters, answer under oath, in substance as follows: "I don't believe so.

I haven't received a statement from him. It's some time now," which answer he, the First Lieutenant George W. Phillips, Jr., did not then believe to be true.

CHARGE II: Violation of the 93rd Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

Accused pleaded not guilty to all Charges and Specifications and was found guilty of Charge I and Specifications 2 and 3 thereof and not guilty of all other Specifications and of Charge II. No evidence of any previous conviction was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to show that in June or July 1943, accused and Sergeant Ray A. Watters first became acquainted while both were serving in the squadron of which accused was Adjutant (R. 58, 59). Sergeant Watters' wife lived in Kingman, Arizona, where she owned and operated a gasoline filling station (R. 62). During the period from about August 1943 to June 1944 accused purchased gasoline and other automotive supplies at that station, paying cash for a portion of them and receiving the balance on credit. In December 1943, accused requested Sergeant Watters to loan him $100 and the sergeant did so.

On 2 April 1945, Sergeant Watters wrote accused at Yuma Army Air Field, Yuma, Arizona, stating that he was soon to be transferred and he requested accused to repay the loan and also discharge his indebtedness to the gasoline business. The total amount accused then owed, both on the loan and on his charge account, was $249.89, and the sergeant so stated in his letter (R. 59, 61, 63, 64; Pros. Ex. 1). Accused had originally owed the filling station more than $149.89 but during the period from March 1944 to July 1944 four payments aggregating $24 had been made by accused to Sergeant Watters at the gasoline station. The sergeant credited these payments against accused's indebtedness to the gasoline business inasmuch as when he made these payments accused instructed the sergeant to credit them "on my account." No part of the $100 loan had been repaid up to the time of trial (R. 63-65, 68).

In reply to the sergeant's letter of 2 April 1945, requesting payment, accused wrote on 9 April 1945 stating in part: "Am working on a deal whereby I can pay you in a lump sum but won't know for sure until the 16th or 17th" and "Will keep in touch with you and as soon as possible will get this straightened up" (R. 60, 61; Pros. Ex. 2).

On or about 3 May 1945, Major George E. Howard of the Air Inspector's Section, Special Investigation Branch, officially questioned

accused, after advising him fully of his rights, concerning certain statements made by accused in his resignation which had previously been submitted. Accused "was sworn and testified under oath" to the questions propounded to him by Major Howard. During the interview accused was asked if he had ever borrowed any money from Sergeant Watters and he replied that he had borrowed $100 in "small amounts." When asked if anything was owed on that indebtedness accused replied, "I don't believe so. I haven't received a statement from him. It's been some time now" (R. 53-55).

4. The defense introduced certain evidence which is not here summarized inasmuch as it related to offenses of which accused was found not guilty. In addition thereto, accused's counsel made an unsworn statement for him reciting that accused was born 19 February 1913 and completed high school in 1933. He worked as an automobile mechanic from 1930 to 1936, as an inspector of portable tools, gauges and machinery from 1936 to 1940, and as a railroad brakeman and switchman from 1940 until he enlisted in the Army in 1942. After completing Officer Candidate School, Miami Beach, Florida, accused was commissioned a second lieutenant, Air Corps, on 20 January 1943. On 3 January 1944 he was promoted to first lieutenant. He had received one efficiency rating of "Satisfactory", four of "Very Satisfactory", and two of "Excellent", having served in various organizations as Mess Officer and Adjutant (R. 132, 133).

5. The evidence fully establishes that accused solicited and obtained a loan of $100 from an enlisted man who was serving in the squadron of which he was Adjutant. It is well settled that for an officer to borrow money from a noncommissioned officer in his organization is conduct prejudicial to good order and military discipline within the meaning of Article of War 96 (CM 221833, Turner, 13 B.R. 239, 1 Bull. JAG 106). Such conduct tends to weaken authority, impairs the integrity of required relationships and may result in improper favors and concessions (CM 230736, Delbrook, 18 B.R. 29, 2 Bull. JAG 144). Although such a financial transaction might be excused under certain exceptional circumstances, there are none such present in this case (CM 230938, Carvill, 18 B.R. 127, 2 Bull. JAG 191). Accordingly, the record is legally sufficient to sustain the finding of guilty of Specification 2 of Charge I.

The record further discloses that on 9 April 1945, accused knew that he owed a total of $249.89 on the loan made by Sergeant Watters and on the charge account at the gasoline station. Even if he had intended his total payments on account of $24 to be credited against the loan that debt still remained unpaid in the amount of $76 on 3 May 1945

when accused was questioned under oath by Major Howard. Possessed of such knowledge accused was content, however, to state under oath to Major Howard, when asked if anything was owed on the $100 loan, "I don't believe so. I haven't received a statement from him [Sergeant Watters]. It's been some time now." That statement was clearly false. He had been advised of the exact amount of his total indebtedness less than a month before and had acknowledged it. No person knowing what accused knew could fairly and honestly state that he believed the loan had been paid. Indeed, all the facts known to accused established just the contrary. As an officer detailed to conduct a military investigation, Major Howard had power to administer an oath to accused before questioning him (AW 114). Accused's conduct thereafter in testifying falsely under oath to matters propounded by Major Howard was conduct prejudicial to good order and military discipline in violation of Article of War 96 (Dig. Op. JAG, 1912-40, sec. 451 (52)). The evidence sustains the finding of guilty of Specification 3 of Charge I.

6. Accused is 32 years of age and is married. After graduating from high school he worked successively as an apprentice mechanic, an inspector in a concern manufacturing mining machinery, a salesman of automotive supplies and finally as a railroad switchman. In January 1942 he entered military service and on 20 January 1943, after successfully completing the course of instruction at Officer Candidate School, Army Air Forces Technical Training Command, Miami Beach, Florida, he was commissioned a second lieutenant. On 3 January 1944 he was promoted to first lieutenant.

7. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings 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

[illegible], Judge Advocate

_____, Judge Advocate

SPJGH-CM 283124 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 First Lieutenant George W. Phillips, Jr. (0-572959), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of borrowing $100 from an enlisted man in his organization and of false swearing, both 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 of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. In December 1943, accused borrowed the sum of $100 from Sergeant Ray A. Watters, an enlisted man in accused's organization. On 3 May 1945 while this loan was still outstanding accused falsely swore during an official investigation that he had received no statement of his indebtedness from the sergeant and that he believed he owed nothing on the loan. As a matter of fact but a month before Sergeant Watters had written accused requesting payment thereof and accused had replied promising to take care of his indebtedness.

I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be 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 confirmed but forfeitures remitted. GCMO 399, 10 Aug 1945).

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

SPJGK - CM 283142

17 AUG 1945

UNITED STATES	)	FIRST AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Mitchel Field, New York, 11,27,28 and 29 June 1945. Dismissal, total forfeitures and confinement for two (2) years.
	)	
Major WALTER V. RADOVICH (0-416891), Air Corps.	)	

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

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

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

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

Specification 1: In that Major Walter V. Radovich (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

Specification 2: In that Major Walter V. Radovich * * *, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

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

Specification 1: In that Major Walter V. Radovich ***, Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United

States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

Specification 2: In that Major Walter V. Radovich ***, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

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 years. The reviewing authority approved the sentence but remitted one year of the confinement and forwarded the record of trial for action under Article of War 48.

3. Charges were preferred against accused on 10 August 1944. The report of investigation is dated 24 August 1944. Charges were served on accused 30 May 1945. Accused was tried in June 1945. After arraignment and before pleading to the general issue, accused entered a special plea to the jurisdiction of the court on the ground "that the Convening Authority in this case was the accuser and the prosecutor of this case" (although his name was not signed to the Charge Sheet) and stated that "we stand ready to prove that plea." The prosecution argued that "this case has been referred to this court for trial and that the court has no other choice than to proceed with the trial." The law member then ruled on the plea as follows:

"Subject to objection by any member of the court, the plea to the jurisdiction is denied."

There was no objection by any member of the court (R. 20).

The foregoing transpired after the accused had entered another special "plea in bar" that the investigating officer had not made the investigation required by Article of War 70 and that the case was referred to trial without previously having been thoroughly and impartially investigated, which plea was denied without the opportunity afforded accused to introduce evidence in support thereof, although "an offer of proof" was specifically made (R. 17-19).

After the prosecution had rested its case on the general issue, counsel for defense stated that certain "witnesses" whose attendance had been requested by a letter before trial to the trial judge advocate including "Colonel Stewart" who preferred the charges, and "General Hunter," the convening authority, would not be needed for the defense because of the denial of the special pleas of accused (R. 218). Prosecution stated that all of the witnesses requested were available (R. 219). Before defense introduced any witnesses whatever, the law member stated that "the court would permit evidence in support of those proffers of proof at the time the defense puts in its case." Defense counsel stated that he had not "contemplated" the introduction of proof because he assumed that the overruling of his special pleas had been final. The case was then adjourned until the following day. No evidence was adduced relating to the special pleas. (R. 223-225)

Considering only the plea that the convening authority was actually the accuser, a plea in bar to the jurisdiction of the court (see AW 8), the question presented is whether or not the ruling of the law member in overruling the plea without permitting accused the right to adduce proferred evidence in substantiation of the plea vitiates the record of trial.

The Manual provides that before "passing on a contested special plea the court will give each side an opportunity to introduce evidence and make an argument. A decision on a special plea is a decision on an interlocutory question" (MCM, 1928, par. 64a). TM 27-255, Military Justice Procedure, paragraph 86-B, provides that where "the accused has made a special plea to a particular specification or charge, that plea must be disposed of before the accused is required to plead to the merits of the case." This rule of criminal procedure is well established and recognized in practically all state and Federal jurisdictions.

The Supreme Court, in the case of Thompson v. United States, 155 U.S. 271, said:

> "As the matter of the plea puis darrein continuance, setting out the previous discharge of a jury after having been sworn, and the plea of not guilty were not inconsistent with each other, it accorded with the rules of criminal pleading that they might stand together, though, of course, it was necessary that the issue under the first plea should be disposed of before the cause was disposed of under the plea of not guilty. Commonwealth v. Merrill, 8 Allen, 545; 1 Bishop on Criminal Procedure, sec. 752)." (Underscoring supplied.) (See also Ford v. United States, 273 U.S. 593.)

In another case it was stated (dictum) by the same court:

"So if, upon the hearing of the written motion to quash the

panel of the petit jurors, facts stated in that motion had been proved, or if the opportunity to establish them by evidence had been denied to the accused, the judgment would be reversed" (Martin v. Texas, 200 U.S. 316).

This dictum was approved in Edwards v. United States, infra.

In United States v. Hopkins, 228 Fed. 173, the court said:

"It may first be noted that the plea of autrefois acquittal or conviction should not be tendered simultaneously with the general issue - It is the rule in criminal law, as it was at common law on the civil side, that defenses both dilatory and peremptory, if they did not go to the merits of the controversy, should be pleaded first, in order that judgment (if against defendant) might be respondeat ouster. This practice arose after the severity which directed final judgment against defendant on overruling a plea in bar (Rex v. Taylor, 3 B. & C. 502) had been modified."

The basis for the rule is stated in Earle v. State (Ind. 1924), 142 N.E. 405. In discussing the "right at common law" to plead specially "in bar" the defense of "former acquittal or conviction" the court said:

"The right to so plead may be very important, but it may be just as important to have the issue thus presented tried separate and distinct from the question of guilt or innocence. These are rights which the accused may insist upon - For by such procedure his special plea would be tried according to legal rules, and uninfluenced by a trial at the same time of the general issue. That he may waive these rights we have no doubt (Toney v. State, 10 Ala. App. 220, 65 South. 92), but, unless he does so, it would be error to compel him to go to trial on both the general and special issues at the same time. In Commonwealth v. Merrill, 8 Allen (Mass.) 545, it is said:

'But the defendant had a right to a trial of his special pleas according to legal rules, and, as he did not waive that right, a majority of the court are of opinion that he has suffered a legal injury by being deprived of such trial.'"

To similar effect is Foster v. State (Ala. 1864), (39 Ala. 229) where the accused had before the court pleas of autrefois acquittal and of not guilty and the issues were tried together. It was held that failure to decide the issue raised by the special plea prior to that raised by the general issue constituted error. The prosecution's argument that, regardless of the error, it was apparent from the record as a whole that accused suffered no injury thereby, was answered by the court as follows:

"The principle is, that injury must be presumed, unless it is clearly seen that no injury resulted. We cannot see that the defendant sustained no injury by the submission of the two issues together to the jury. On the contrary, we can conceive that the defendant may have been seriously injured by such a course of proceeding. The multiplicity of issues to be simultaneously considered may have confused the jury, and embarrassed the defendant, *** may have caused the jury to be influenced in finding a verdict of guilty upon one issue, by testimony which contributed to show guilt under another. *** In cases of this magnitude which are made felonies by statute, involving the liberty of the citizen, the court will not be astute in speculating upon the chances of injury to the accused, in order to sustain a conviction effected under such circumstances."

The same rule is recognized in Federal courts (Kirven v. Chemical Co., 145 Fed. 291).

Tested by the foregoing authorities, it is clear that the aforesaid ruling of the law member was erroneous and injuriously affected the substantial rights of accused. Since accused was precluded from exercising his right to adduce proferred evidence to substantiate his plea in bar he was under no legal obligation to submit such proof after his plea had been arbitrarily rejected and after the prosecution had completed its case on the general issue, although the opportunity to do so was then offered him. He was entitled to have the evidence supporting his plea considered by a court which was "uninfluenced by a trial at the same time of the general issue." Furthermore, his plea had already been denied, which fact would additionally tend to deny him the impartial decision to which he was fundamentally entitled. As to whether accused might affirmatively have waived his right to the erroneous procedure (see Earle v. State, supra; Toney v. State, 65 So. 92) is immaterial since the record shows that he did not do so.

Although the Board of Review may feel that he is guilty of the alleged offenses, the accused was entitled to a fair, legal and orderly trial. The error is deemed to be substantial and prejudicial, and was not cured by the action of the law member, after the prosecution had rested, in then offering accused the opportunity of presenting evidence on a plea in bar previously denied. Article of War 37 is not, under the circumstances, sufficiently comprehensive to justify holding that the belated action of the law member purporting to correct his previous erroneous ruling cured the defective procedure. To hold that the mere opportunity afforded an accused to introduce evidence at a late stage of a case on a preliminary issue previously denied him without hearing testimony thereon in effect cures the error would deny to accused any right whatever as to established and

orderly procedure. As said by the Supreme Court in Edwards v. United States, 312U. S. 473:

> "But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions ***. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

In this case, the Board of Review is under the solemn obligation of safeguarding the basic principles of military justice and criminal procedure to the end that an accused may not only have a fair trial but that all who read the record may know that he had a fair trial. That a fundamental mode of established procedure was violated is beyond question. The Board of Review considers the error to be a prejudicial one which vitiates the record of trial.

4. The records of the War Department show the accused will be 26 years of age on 16 November 1945 and is single. The record of trial indicates that accused is married and has one child. He entered the military service as a Flying Cadet on 12 October 1940 and was commissioned a second lieutenant of Air Corps, Reserve, on 29 May 1941 and ordered to active duty effective 30 May 1941. He was promoted to first lieutenant, Army of the United States, on 1 February 1942; to captain, AUS (AC) on 5 August 1942; to captain, AUS, on 22 February 1943; and to major, AUS (AC), on 1 March 1944. He served in the India-Burma Sector of the China-Burma-India Theater of Operations and while serving overseas he was awarded the Air Medal and the Distinguished Flying Cross with Oak Leaf Cluster.

5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings and the sentence.

Jerry E. Zoll, Judge Advocate

Charles G. Luckie, Judge Advocate

(On Leave), Judge Advocate

Charles S. Sykes, Judge Advocate

SPJGK - CM 283142 1st Ind August 23, 1945

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

TO: Commanding General, First Air Force, Mitchel Field, New York

1. In the case of Major Walter V. Radovich (O-416891), Air Corps, I concur in the foregoing opinion of the Board of Review holding that the record of trial is legally insufficient to support the findings and the sentence, and for the reasons stated I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (MCM, 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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

(CM 283142).

/S/ MYRON C. CRAMER

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(G.C.M.O. 240, 26 July 1946).

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

SPJGK-CM 283200 21 JUL 1945

UNITED STATES	)	FAIRFIELD AIR TECHNICAL SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Wright Field, Dayton, Ohio, 6 July 1945. Dismissal and total forfeitures.
First Lieutenant EDWARD M. O'CONNOR (0-2048438), Medical Administrative Corps.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Edward M. O'Connor, Medical Administrative Corps, did, without proper leave, absent himself from his station at Patterson Field, Ohio, from about 5 May 1945, to about 11 June 1945.

He pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence was introduced of one previous conviction by general court-martial for absence without leave for two days in violation of the 61st Article of War, and for wrongfully borrowing money from an enlisted woman and failing to obey the order of a superior officer in violation of the 96th Article of War. For these offenses he was sentenced, as approved on 22 November 1944, to three months restriction and to a fine of $300. In the instant case he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved only so much of the sentence as provided for dismissal and forfeiture of all pay and allowances due or to become due, and forwarded the record of trial for action under Article of War 48.

3. For the Prosecution:

Duly authenticated extract copies of the morning reports of the 4100th Army Air Forces Base Unit (Area Command) Squadron A, AC, Patterson

Field, Fairfield, Ohio, were introduced into evidence without objection showing accused as absent without leave from his station at Patterson Field, Ohio from 0800 on 5 May 1945 to 0800 on 11 June 1945 (R. 6; Pros. Exs. 1, 2).

Additional evidence as presented by the prosecution may be summarized as follows:

On 1 January 1945 accused was attached to the Provost Marshal's Section at Patterson Field, Fairfield, Ohio, as Officer in Charge of the Air Security Branch (R. 8, 9). He "worked" for the Provost Marshal who saw him daily prior to 5 May 1945 (R. 8). Between 5 May and 11 June 1945 the accused was not present for duty (R. 9). The Provost Marshal did not see him during this period but if accused had been "there" he would have seen him in the "normal course of his duties" (R. 8). He (Provost Marshal) tried to locate accused by sending an officer and enlisted man to Cincinnati, Ohio, accused's former home, and further by sending out official notices (R. 8).

On 10 June 1945 First Lieutenant Arthur W. Stroot overheard a civilian statement in a bar relative to the whereabouts of "a Lieutenant that had been absent from the field for sometime" which prompted him to go to the Arcade Hotel, Springfield, Ohio (R. 10, 11). Upon arrival at the hotel he found accused in a room (R. 10). Accused was sober but appeared "shaky" (R. 11). Lieutenant Stroot took accused to his (Lieutenant Stroot's) home where accused spent the night "after taking a bath and cleaning" up (R. 11). Accused stated he had been in Springfield the entire time (R. 11). At 0800 on 11 June 1945 Lieutenant Stroot "took" accused to Patterson Field and "turned" him over to Major Gardner (R. 11).

4. Upon being apprised of his rights as a witness, accused elected to make an unsworn statement through counsel as follows:

> "If it please the court, in making this statement I merely wish to give a brief outline of the history of the life of the accused. Lt. O'Connor is now almost forty-two years of age, he had been married, he has two children, he has had a great deal of education, four years in college, three years in law school, in addition to that he has two years special courses at the university at night. He had been working in fire insurance and he had been with one employer for eighteen years working on fire insurance, fire protection and fire prevention; he was inducted into the Army in December 1942. As an enlisted man he arose all the way from the ranks, arose from Private to Master

Sergeant, from Master Sergeant he went to OCS. As an officer from OCS he was at several stations before he came here, during the course of his history in the Army he never had any trouble until he got to this field. As an indication of this fact in June 1944 he was promoted to the rank of 1st Lieutenant. He came here in August of '44 in accordance with a telegram through Washington, he was supposed to come here for special duties in fire prevention. When he got here, however, there seemed to have been some mixup and as a result, from the statement of the Provost Marshal, he was not assigned to this fire prevention work until the 1st of January 1945. It was when he first got here and in the confusion of what he was to do that he first got into a little trouble, and again that trouble was caused, as is so often the case, by the excessive use of liquor. This alone is the cause of any derelictions of which he may have been guilty. That in effect is the story of this accused. I might add at this time he has two children, one fourteen and one fifteen years old, one girl and a boy." (R. 12, 13).

5. The Specification alleges that the accused absented himself without proper leave from his station from about 5 May to about 11 June 1945. The duly authenticated extract copies of the morning reports coupled with the additional competent evidence presented by the prosecution clearly establish beyond a reasonable doubt that accused was guilty of absence without proper leave for the period alleged. No defensive issue was raised by the evidence nor is accused's unsworn statement more than a feeble attempt in mitigation or extenuation.

6. War Department records disclose that this officer will be 42 years of age on 15 August 1945, divorced, and is the father of two children. He graduated from Xavier University with an A.B. Degree, studied law at the same institution for three years not graduating however, and later attended Cincinnati University for one year, majoring in real estate appraisal. In civil life he was employed for 19 years as a fire insurance actuary. He entered the service in December of 1942 and subsequently attended the Medical Administrative Corps Officer Candidate School. On 15 September 1943 he was appointed a temporary second lieutenant in the Army of the United States. On 27 June 1944 he was promoted to first lieutenant. On 12 August 1944 he was reprimanded under the provisions of Article of War 104 for an unauthorized absence from duty from 0600 7 August 1944 to 0810 8 August 1944. On 16 September 1944 he was reprimanded and a forfeiture of $83.33 was imposed on him under the provisions of Article of War 104 for failing to repair to the properly appointed place for duty on 23 August 1944 and each day thereafter until 9 September 1944. Accused was convicted by

a general court-martial on 16 November 1944 for absence without leave for two days in violation of the 61st Article of War and for wrongfully borrowing money from an enlisted woman and failing to obey the order of a superior officer in violation of the 96th Article of War, the sentence as approved on 22 November 1944 providing for three months restriction and a fine of $300. On 25 April 1945 accused tendered through channels a resignation for the good of the service (the 1st indorsement shows accused had failed to report at the fixed time at the properly appointed place of duty and had absented himself without leave from his assigned duties during the period from 6 April to 12 April 1945) which resignation was not favorably considered by the Secretary of War upon request by the Commanding General of Wright Field, Ohio for its return without further action owing to the fact that accused was at that time in a status of absent without leave and that court-martial proceedings were to be initiated upon his apprehension.

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

Terry G. Fox, Judge Advocate

Charles G. Luckie, Judge Advocate

On Leave, Judge Advocate

SPJGK - CM 283200 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 First Lieutenant Edward M. O'Connor (O-2048438), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without proper leave for a period of 37 days in violation of Article of War 61. Evidence was introduced of one previous conviction by general court-martial for an absence without leave for two days in violation of the 61st Article of War, and for wrongfully borrowing money from an enlisted woman and failing to obey the order of a superior officer in violation of the 96th Article of War. The sentence for these offenses, as approved on 22 November 1944, provided for three months restriction and a fine of $300.00. In the instant case he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved only so much of the sentence as provided for dismissal and forfeiture of all pay and allowances due or to become due, and forwarded the record of trial for action under Article of War 48.

3. 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 the findings and sentence and to warrant confirmation of the sentence.

The accused officer absented himself without proper leave from his station from 5 May to 11 June 1945.

Absence without leave by an officer is a serious military offense. The accused was reprimanded on two different occasions and was convicted by a general court-martial on another occasion for similar and other offenses within nine months immediately preceding the commission of the present offense. In addition, the accused was absent without leave for six days in April of 1945 for which he was never tried. His repeated conduct clearly demonstrates that he is not worthy of his commission. I therefore recommend that the sentence as approved by the reviewing authority be confirmed, but that the forfeitures be remitted, and that the sentence as thus modified be ordered executed.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. GCMO 397, 10 Aug 1945).

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

SPJGN-CM 283260

UNITED STATES	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Luke Field, Phoenix, Arizona, 2 July 1945. Dismissal, total forfeitures and confinement for one (1) year.
First Lieutenant ROBERT L. LEMMENES (0-511873), 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 Charges and Specifications:

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

Specification: In that First Lieutenant Robert L. Lemmenes, 3028th Army Air Forces Base Unit, did, without proper leave, absent himself from his squadron at 3028th Army Air Forces Base Unit, Luke Field, Arizona, from 0900, 18 May 1945 to 1000, 19 May 1945.

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

Specification: In that First Lieutenant Robert L. Lemmenes, 3028th Army Air Forces Base Unit, did, at Luke Field, Arizona, on or about 19 May 1945, with the intent to deceive Victor E. Williams, Captain, Air Corps, officially state to the said Victor E. Williams, Captain, Air Corps, that he had sent a Cashier's Check in the sum of One

Hundred Ninety Dollars ($190.00) to the Hotel Tioga "yesterday", which statement was known by the said First Lieutenant Robert L. Lemmenes to be untrue, in that he did not send said Cashier's Check until 21 May 1945.

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

Specification 1: In that First Lieutenant Robert L. Lemmenes, 3028th Army Air Forces Base Unit, did, on or about 9 March 1945, at Merced, California, make and utter to the Blue Room a cafe in Merced, California, a check in words and figures as follows:

"Bakersfield, Calif. 9 Mar 1945
Bakersfield Office 90-141
THE ANGLO CALIFORNIA NATIONAL BANK
Chester Avenue at 18th Street
Pay to the order of Cash $20.00
Twenty 00/100 Dollars

MAAF /s/ R. L. Lemmenes
Lt AC 0511873"

and did thereafter wrongfully fail to maintain a sufficient bank balance to his credit at said Anglo California National Bank at Bakersfield, California, to meet payment of said check.

Specification 2: Identical to Specification 1 but alleging check made and uttered on 24 March 1945.

Specification 3: Identical to Specification 1 but alleging check drawn on same bank, made and uttered to the Tioga Hotel, Merced, California, 2 April 1945, in the amount of $186.

Specification 4: In that First Lieutenant Robert L. Lemmenes, 3028th Army Air Forces Base Unit, being indebted to the Colorado Savings and Trust Company, La Junta, Colorado, in the sum of Thirty Dollars ($30.00), which amount became due and payable on or about 7 May 1944, did, from 7 May 1944 to 11 June 1945, dishonorably fail and neglect to pay said debt.

Specification 5: In that First Lieutenant Robert L. Lemmenes, 3028th Army Air Forces Base Unit, being indebted to the First National Bank of Arizona, Phoenix, Arizona, in the sum of Two Hundred Twenty Dollars and Eight Cents ($220.08) for cash received, upon which there became due and payable the sum of Eighteen Dollars and Thirty-four Cents ($18.34) on the first day of each of the following months, to wit: February, March, April, and May, 1945, did, from 1 February

1945 to 15 June 1945, dishonorably fail and neglect to pay the same.

The accused pleaded guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution presented no evidence but relied entirely upon the accused's plea of guilty. The defense also presented no evidence, but the accused made an unsworn statement in which he reaffirmed his guilt of the offenses alleged and attributed his derelictions to "partly extenuating circumstances". He asserted that about a year ago he was transferred to Greensboro, North Carolina, preparatory to being sent overseas. At that time he made an allotment to a bank and left a power of attorney with a person who was well acquainted with his financial circumstances. His overseas assignment did not materialize and he was returned to Santa Ana, California. A few days later he was transferred at his own request to Luke Field, Arizona, where he had previously served in 1942 as a civilian pilot. After a short stay at that station, he was transferred to Randolph Field, and, after another three weeks, he was returned to Luke Field. After remaining at Luke Field only a few days, he was sent to Merced. From Merced he was sent to Ajo and then back to Luke Field. These numerous changes of station had involved expenditures beyond his means (R. 9-10).

With respect to the money which he had borrowed from the Colorado Trust and Savings Bank he stated that about two months before he was sent to Greensboro he had made known this indebtedness "to a party with the thought that it would be paid". Of this obligation $120 was paid, and it was not until after his final return to Luke Field that he learned that there was still a balance due. At that time he was being billed for the sum of $50 rather than $30 (R. 10). With reference to the debt to the First National Bank he asserted that he had no adequate reason for its nonpayment except that the numerous transfers from station to station required the expenditure of "a great deal of money".(R. 10). Concerning the charge of being absent without leave, the accused explained that he "was at his wits end" and "took a day off and got some money and paid" his bills. He realized that he should have asked for leave (R. 10). As to the charge of making a false official statement, he said, "I was ashamed to admit that I hadn't yet been able to get money when I fully expected to have it that day" (R. 11).

4. The accused's plea of guilty admits the facts alleged in each Specification. CM 235946, Parsons, 22 BR 261, 263. The record states that the law member explained to the accused the meaning and effect of his plea of guilty, and that the accused thereupon reaffirmed his desire to plead guilty. In his subsequent unsworn statement the accused again

admitted his guilt of each offense charged. Since there is no indication in the record that the accused's plea of guilty was improvidently entered, and since he offered no evidence inconsistent therewith, the record is legally sufficient to sustain the findings of guilty and the sentence.

5. The records of the War Department show that this officer is approximately 34 years of age. He attended high school for five years, a military academy for three years, and a business school for one year. Thereafter he was employed as a salesman, and as a managing instructor in a commercial civil flying school. On 25 January 1943 he was commissioned a first lieutenant in the Army of the United States. On 7 August 1944 he accepted punishment under Article of War 104 for the offense of rendering himself unfit for military duty by the excessive use of intoxicating liquor.

6. 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. Dismissal is authorized upon conviction of a violation of Article of War 61 or 96 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Robert J. Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 283260 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 Robert L. Lemmenes (0-511873), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, absenting himself without leave for one day, in violation of Article of War 61; of making a false official statement, in violation of Article of War 95; of fraudulently making and uttering three checks in the sums of $20, $20, and $186, respectively, in violation of Article of War 96; of dishonorably failing to pay a debt in the sum of $30, and of dishonorably failing to pay installments of $73.36 upon an indebtedness of $220.08, 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 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 sufficient to support the findings and sentence and to warrant confirmation thereof.

The prosecution presented no evidence but relied entirely upon the accused's plea of guilty. The defense also presented no evidence but the accused made an unsworn statement in which he reaffirmed his guilt of each of the above described offenses and attributed his derelictions to the heavy expenses which had been imposed upon him as the result of many changes of station. The Staff Judge Advocate's review, however, states that an investigation indicates that the accused's financial difficulties have been occasioned by his heavy expense necessitated by supporting a lawful wife and at the same time supporting another woman as his wife. The accused received punishment under Article of War 104 on 7 August 1944 for rendering himself unfit for military duty by the excessive use of intoxicating liquor. It is obvious from the accused's several offenses that he is unworthy of being retained as an officer. In view, however, of the relatively small sum of money involved in the three checks fraudulently issued by the accused, and since the money so obtained has been refunded by him prior to his trial, I recommend that the sentence be confirmed but that the forfeitures and confinement 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
Incl 1 - Record of trial
Incl 2 - Form of action

(Sentence confirmed but forfeitures and confinement remitted, GCMO 393, 10 Aug 1945).

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

SPJGQ
CM 283261

UNITED STATES v. Second Lieutenant ROBERT W. HAWKE (0-771019), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Douglas Army Air Field, Douglas, Arizona, 25 June 1945. Dismissal and total forfeitures.

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

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

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

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

Specification: In that Second Lieutenant Robert W. Hawke, Squadron N, Douglas Army Air Field, Douglas, Arizona, did, without proper leave, absent himself from his station at Douglas Army Air Field, Douglas, Arizona, from about 8 May 1945 to about 14 May 1945.

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

Specification: (Finding of not guilty.)

The accused pleaded not guilty to the Specifications and Charges. He was found guilty of Charge I and the Specification thereof and not guilty of Charge II and the Specification thereof. Evidence of one previous conviction was introduced, further reference to which will be made hereinafter. 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. Inasmuch as accused was acquitted of Charge II and the Specification thereof, no further reference to it is necessary.

Accused was a member of the 3014th Army Air Forces Base Unit, Douglas Army Air Field, Douglas, Arizona. The evidence for the prosecution relating to the Specification of Charge I shows that accused was granted a leave of absence for ten days, "effective date, 29 April 1945", to go to Biloxi, Mississippi (R. 12). The officers' register at Douglas Army Air Field discloses that accused "signed out" at 1 p.m., 28 April 1945 (R. 13). The morning report of accused's squadron contains an entry showing accused from leave to absent without leave, effective 12:01 a.m., 9 May 1945 (Pros. Ex. B). According to the officers' register, he "signed in" at 11:45 p.m., 14 May 1945 (R. 13), and the morning report contains an entry showing him from absent without leave to duty, effective 11:55 p.m., 14 May 1945 (Pros. Ex. C).

Private First Class William Secoges, on military police duty in Douglas, Arizona, saw accused in the Merchants' Cafe on the afternoon of 13 May 1945. On 14 May, Secoges received a telephone call from an officer at Douglas Army Air Field, directing him to find accused and tell him to return to the field and sign in. Secoges was not ordered to "pick up" accused and bring him to the field (R. 13, 14, 15, 17, 18).

At about 3:00 p.m., 14 May, Secoges found accused "drinking with some folks" at the Merchants' Cafe (R. 14-16, 18). As instructed, Secoges told accused that he had received a telephone call from the field and that accused was supposed to report back to the field and sign in (R. 15-18, 29). Accused replied that he would report back immediately (R. 17, 19, 30). Secoges then left (R. 15, 19).

It was stipulated that the distance from Biloxi, Mississippi, to Douglas, Arizona, by railroad is 1453 miles and that the trip by rail, via New Orleans, takes two and one-third days (R. 30).

4. The accused testified in substance as follows:

He is a rated pilot on flying status and has served as adjutant and supply officer of Squadron B at Douglas Army Air Field (R. 66). He was granted a ten-day leave, the effective date of which was 29 April 1945 (R. 63, 64, 79, 82). At that time he had just completed the transition proficiency course in B-25's and was unassigned (R. 66, 85). His wife, Lieutenant Mildred I. Hawke, Army Nurse Corps (R. 60), had spent her leave at Douglas, and the purpose of accused's leave was to return with her to her station at Keesler Field, Biloxi, Mississippi, and remain there with her during the leave period (R. 63, 64).

Accused signed out on Saturday 28 April, left the base, and "went downtown" (R. 63, 75, 79). His signing out on the 28th to "go on leave" on the 29th was due to the fact that he had no way to get back to the base on the 29th (R. 63). He knew that when he signed out, he had "gone from that base officially"; that the 28th was "the day of duty"; and that the 29th was the first day of leave (R. 75). He did not return to the field prior to departing on his leave, and he and his wife left for Biloxi on "approximately" the 29th (R. 63, 64, 75). Accused knew the rule about counting days of leave, but "under the circumstances" he did not count ten days from the 29th (R. 76). Accused testified that he knew his leave "would be up" on about 8 or 9 May (R. 64), but testified subsequently that he did not know that he was required to be back at the base on 8 May (R. 76).

Accused testified further that his wife was taken sick on the train and had a high temperature, for which reason she was taken to the hospital upon their arrival at Biloxi on "approximately" 2 May. She remained in the hospital until about 24 May (R. 64). Accused stayed with her until he left for Douglas (R. 65).

On 8 May, realizing that his leave was "about up", accused asked a nurse named Lieutenant Albrecht to see whether she could arrange to have him sent back to Douglas Army Air Field by plane (R. 65, 76). Lieutenant Albrecht called "the flier who was capable of getting operations flights out of Keesler Field", and the latter told her that he thought he could "get a ride" for accused and that accused should "stick around" as long as he could or "up until" he had to go (R. 65). Accused expected to come back to Douglas on 9 May (R. 77). The flying time from Biloxi to Douglas is "around" five to seven hours (R. 66). On 9 May, accused did not know he was absent without leave, but thought he was still on leave. He counted up the number of days, but forgot about "the point about signing out" at the base on Saturday the 28th instead of Sunday the 29th (R. 77).

Unable to secure "that plane ride" back to Douglas, and desiring further leave by reason of his wife's continuing illness, accused, on 9 May, wired the Commanding Officer, Douglas Army Air Field, requesting a three-day extension on account of "family illness". A copy of the telegram was received in evidence (R. 64, 65, 66, 76, 77; Def. Ex. 1). Asked why he did not wire a day or two before the 9th, accused replied that "it was just a case of due to the circumstances in just not doing it" (R. 77). On the morning of 11 May, accused received a reply by wire (R. 65, 77, 78). A copy of the wire was received in evidence. The wire stated "Extension denied", and was "filed" at 1:30 p.m., 10 May, and addressed to Lieutenant R. Q. Hawke, Biloxi, Mississippi (Def. Ex. 2). (The accused's middle initial is "W").

Upon receipt of the telegram, accused took the first train out of Biloxi for New Orleans, leaving Biloxi at 3:00 p.m. on the 11th. So far as accused knows, that is the most direct route to Douglas. At New Orleans, trains leave for Douglas (R. 66, 78). Accused arrived in Douglas late in the afternoon of Sunday 13 May, at which time he knew he was absent without leave. He did not go out to the field and sign in that night. On Monday, 14 May, Private Secoges of the military police "came down to" accused and reminded him that he had not signed in at the base. Accused did not come back to the base and sign in until 11:55 p.m. that night. Asked whether he had any excuse for not returning to the base immediately upon his arrival in Douglas on the 13th, accused replied, "There are reasons why I didn't, but there is no excuse to be given on it" (R. 78).

Second Lieutenant Ruth V. Albrecht, Army Nurse Corps, Keesler Field, Mississippi, testified as follows: Lieutenant Mildred I. Hawke was a patient at Keesler Field Hospital from about 1 May 1945 to about 25 May 1945. On or about 8 May, accused asked the witness about getting a plane from Keesler Field to Douglas Army Air Field. Witness consulted Lieutenant Winks, Assistant Operations Officer, about the matter, and Lieutenant Winks said that "he would look into it" and could probably arrange it and that accused "should stick around as long as he could". Witness gave this information to accused. On the afternoon of 9 May, witness told accused that she "would see some of the fellows that night" about the matter. Witness last saw accused at Keesler Field on 9 May. She went on leave the next day (Def. Ex. 3).

Second Lieutenant William B. Winks, Air Corps, Keesler Field, Mississippi, corroborated the testimony of Lieutenant Albrecht concerning their conversation about obtaining a plane ride for accused to Douglas. Witness told Lieutenant Albrecht that he thought he could get a plane ride for accused. No particular date was mentioned. Witness was unable to arrange a flight for accused. A flight from Keesler Field to Douglas Army Air Field would have taken from five to seven hours, barring unforeseen delays (Def. Ex. 4).

Major Samuel F. Marks, Air Corps, testified that during a period of two or three months, accused was on duty as assistant adjutant of Squadron B, of which witness was the commanding officer. Although, at first, accused was "very green" at administrative work, he was very willing, and witness was satisfied with his work and had no complaint. Accused tried his best on all tasks assigned to him (R. 87, 88).

5. Accused was found guilty of absence without leave "from about 8 May 1945 to about 14 May 1945". The evidence shows that he was absent without leave from 9 May to 14 May. Since 9 May clearly falls within the allegation "about 8 May", the finding is proper. Having left the field on 28 April on a ten-day leave, accused was due back

not later than midnight of 8 May (pars. 3c and 18e, AR 605-115, 17 June 1944). Miscalculation on the part of accused, if, indeed, he did miscalculate in good faith, is no defense, and his contradictions and evasiveness as a witness do not lend credence to his claimed ignorance of the proper date for his return. Moreover, considering his testimony in its most favorable light, he must have concluded that he was due back not later than 9 May. Furthermore, after his arrival in Douglas on 13 May, he failed to return to the field until shortly before midnight of the 14th, despite his admitted knowledge that he was absent without leave at the time.

Obviously, his "eleventh-hour" attempt to arrange for transportation by plane and his telegraphic request for an extension of his leave at a time when he was already absent without leave do not constitute a defense. His unauthorized absence was "through his own fault" within the meaning of the Manual for Courts-Martial (MCM 1928, par. 132, p. 145).

6. War Department records show that accused is 29 years old and a native and resident of California. The record of trial shows that he has been married and divorced (R. 39, 57) and that he has remarried (R. 56, 59). He has a son three years old and a daughter two years old (R. 39). War Department records further show that he is a high school graduate and that from May 1938 to October 1942, he worked as a salesman. He served as an aviation cadet from March 1943 until 11 March 1944. On 12 March 1944, having completed the course of training at the Army Air Forces Pilot School (Advanced Two-Engine), Stockton Field, California, he was appointed second lieutenant, Army of the United States. On 8 September 1944, he was convicted by general court-martial of two absences without leave, for one and three days respectively, in violation of Article of War 61. The Staff Judge Advocate states that on 28 April 1945, the accused was punished by a reprimand under Article of War 104. The nature of his dereliction is not given.

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

Fletcher R. Andrews, Judge Advocate

(sick in quarters), Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ-CM 283261 1st Ind

Hq ASF, JAGO, Washington 25, D. C. AUG 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 Second Lieutenant Robert W. Hawke (0-771019), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from his station "from about 8 May 1945 to about 14 May 1945." Evidence of one previous conviction was introduced, further reference to which will be made hereinafter. 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. 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.

The accused was stationed at Douglas Army Air Field, Douglas, Arizona. On 28 April 1945, he left on a ten-day leave to accompany his wife, a lieutenant in the Army Nurse Corps, to her station at Keesler Field, Biloxi, Mississippi, and to remain there with her during his leave. His wife became sick and entered the hospital at Keesler Field on 1 or 2 May, remaining there until about 25 May. On or about 8 May, the last day of his leave, the accused asked a member of the Army Nurse Corps at Keesler Field to see whether she could arrange for his return to Douglas by Army plane. She was unsuccessful in her attempt to make such an arrangement, and on 9 May, when already absent without leave, accused wired his commanding officer for a three-day extension of his leave because of family illness. On 11 May, accused received a telegram stating that his request for an extension was denied, whereupon he took a train for Douglas, arriving there on the afternoon of 13 May. Instead of reporting to the field, he remained in Douglas, where a member of the military police saw him in a cafe on the afternoon of the 13th. On the 14th, the same member of the military police received orders to find accused and direct him to report to the field. He found accused in a cafe at about 3:00 p.m., and

told accused of the verbal order to report. Accused did not report until a few minutes before midnight on the 14th. His name was entered on the morning report as absent without leave from 12:01 a.m., 9 May 1945, until 11:55 p.m., 14 May 1945. The travel time by train between Biloxi and Douglas is two and one-third days and by air is from five to seven hours.

On 8 September 1944, accused was convicted by general court-martial of two absences without leave, for one and three days respectively, in violation of Article of War 61. His sentence to dismissal, total forfeitures, and confinement at hard labor for two years was confirmed but commuted to a reprimand and partial forfeitures. The Staff Judge Advocate states that on 28 April 1945, accused was punished by a reprimand under Article of War 104. The nature of his dereliction is not given. The Staff Judge Advocate states further that accused is reported to be weak in character, indifferent, and irresponsible, and he is of the opinion that accused is not suitable for commissioned status. The accused's indifference and irresponsibility are exemplified by his conduct in connection with the present offense.

I 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

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 424, 28 Aug 1945).

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

SPJGH-CM 283338

1 AUG 1945

UNITED STATES	FIRST SERVICE COMMAND ARMY SERVICE FORCES
v.	Trial by G.C.M., convened at Fort Adams, Rhode Island, 26 June and 11 July 1945. Dismissal.
Captain VICTOR C. LITTLE (0-1040426), 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 Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Captain Victor C. Little, attached unassigned Headquarters and Headquarters Battery, Harbor Defenses of Narragansett Bay was, at Jamestown, Rhode Island, on or about 2 June 1945, drunk and disorderly while in uniform.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. There was introduced evidence of one previous conviction for being disorderly in uniform, in violation of Article of War 96, for which accused was sentenced to forfeit $50 of his pay per month for four months and to be restricted to the limits of his post for three months. In the present case accused was sentenced to dismissal. The reviewing authority returned the record of trial to the court for reconsideration of its sentence in revision proceedings with a view to reduction of the penalty imposed. The court reconvened but adhered to its original sentence to dismissal. Thereafter the reviewing authority approved the sentence but recommended that it be commuted to a reprimand and forfeiture of $50 of accused's pay per month for five months and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to show that at about 10 p.m., 2 June 1945, accused in uniform was drinking in a barroom, known as Tefft's, located in Jamestown, Rhode Island. Technician Fifth Grade Charles V. Rimshaw and his wife were seated at one end of the bar where they were joined by a Mr. Jones who commenced to converse with them. Accused approached the group and conversed for awhile with Mr. Jones who thereafter departed. When Corporal Rimshaw asked accused where Mr. Jones had gone accused replied, "Who are you to ask me where Jonesy went? I don't follow Jonesy around." Corporal Rimshaw then stated that if he had offended accused, he offered his apology (R. 14-15, 17). Apparently they again fell into conversation after this incident and when the corporal asked accused how he liked his organization, referred to in the record as "HECP", accused replied, "What the hell's good about HECP." The conversation then terminated and accused walked to another portion of the bar where he commenced to talk and argue with a discharged soldier and an individual named Paul Bridges (R.16). Accused asked the discharged soldier to exhibit his discharge papers and was thereafter heard to invite Bridges to step outside (R. 19, 21). Corporal Rimshaw suggested to Bridges and the discharged soldier that they move away from accused and refrain from arguing with him whereupon accused stated to the corporal "You're too damn smart" and then asked him to step outside with accused but the invitation was rejected. Thereafter accused walked to the street and as he proceeded outside called to the corporal, "Don't forget, I'm asking you outside" (R. 16, 40). Corporal Rimshaw was of the opinion that accused was drunk because of his belligerent behavior and because his speech was mumbled and partially incoherent and because he walked with a stagger (R. 17, 22).

Sergeant Dwight A. Corey and Corporal James P. Cannon, sergeant and corporal of the guard that evening, were in Jamestown observing the military police patrols and entered Tefft's place as accused walked out (R. 25, 32, 39, 40). It was then sometime between 10:30 p.m. and 11:30 p.m. (R. 39). After talking to Corporal Rimshaw inside Tefft's, Corporal Cannon walked outside to accused who stood near his automobile, saluted him and asked what the trouble was. Without returning the corporal's salute accused proceeded to state that a corporal, presumably Rimshaw, had "no respect for an officer" and had insulted him. Accused also stated he wanted that corporal to step outside so that he could "clean him up" and he gave Corporal Cannon a direct order to go into the cafe and escort the corporal outside (R. 26, 27, 31, 32, 35). Corporal Cannon returned to Tefft's cafe and sent Corporal Rimshaw through the rear door of the cafe on his way to the ferryboat bound for Newport (R. 26).

In the meanwhile Sergeant Corey, several privates of the guard and some members of the Shore Patrol were standing near accused as a civilian conversed with him. Accused proceeded to sneer at Sergeant Corey and the members of the guard saying, "Look at that bunch of punks

and G.I.'s." He also used the word "bastards" several times in referring to the members of the guard. Finally he threw his blouse and cap in the automobile and stated "I could lick the whole bunch of them but there are too many witnesses here" (R. 30, 41)

Major Winston F. Caldwell approached the group shortly after Corporal Cannon returned from having dispatched Corporal Rimshaw through the rear door of Tefft's place (R. 26, 41, 46). The major saw accused and a civilian standing near accused's automobile. Accused was talking loudly and swinging his fists about. Quite a few soldiers and civilians, lined up along the sidewalk, were observing his behavior (R. 46). The major started to converse pleasantly with accused in an effort to quiet him down and induce him to depart. Accused at first started to enter his automobile and then turned to the group on the sidewalk, stating he was "going to clean up those God damn---", but was promptly interrupted by the major who told him if he did not leave he would prefer charges. Thereafter accused drove off in his automobile (R. 47, 52).

Major Caldwell, Sergeant Corey and Corporal Cannon all agreed with Corporal Rimshaw that accused was drunk (R. 29, 33, 34, 43, 47). Corporal Cannon so concluded because of accused's belligerent attitude, the odor on his breath, his stuttering incoherent speech and because of his unusual behavior in instructing the corporal to bring an enlisted man to him so that he might engage in a brawl with him (R. 33, 34).

4. The defense introduced various witnesses who testified as to accused's condition and the state of affairs existing in and about Tefft's on the night in question.

SF 3rd Class Paul L. Sabo, a member of the United States Navy, who was on Shore Patrol in Jamestown on the night in question, saw accused in Tefft's talking to an individual who claimed to be a discharged soldier and later saw accused in front of Tefft's talking to a major but observed no disorder at either time (R. 56, 57).

Storekeeper 2nd Class Salvatore C. Lauricella, also on Shore Patrol on this evening, saw accused in Tefft's and later saw him leave the bar and then saw three or four military police talking to him outside the establishment. He observed no disorder and could not state that accused was drunk (R. 62-64).

Machinist Mate 2nd Class Walter E. Nye, another member of the United States Navy, was in Tefft's from early evening until almost closing time and saw accused there drinking but observed no disturbance (R. 68-71).

Francis I. Jones, identified as a civilian guard, had known accused for some three months (R. 73, 79). On the night in question

he was in Tefft's cafe and noticed accused have "a few words" with some man who had remarked, following accused's conversation with a discharged soldier, that some people "with bars thought they were pretty smart when they wanted to be" (R. 75). When accused left Tefft's, Jones followed him to the street and offered to drive him home. Thereafter a major approached accused, had a "few words" with him and informed him if there was any argument he would have to prefer charges. Jones did not believe accused was drunk (R. 76). On cross-examination he stated he had offered to drive accused home because "I just thought he might not feel like driving home" but on examination by the court he stated his offer was made because he didn't know how much beer accused had consumed and "whether he was capable of driving" (R. 79, 82). He did not see accused swing his fists or hear him make a remark about "cleaning up" on anybody (R. 81).

It was stipulated by the prosecution and the defense that if William Theroux were present he would testify that he was bartender at Tefft's on the night of 2 June 1945 and that he saw no disturbance at the bar and did not believe that accused was drunk (R. 54, 55).

5. At the inception of the trial defense counsel requested a continuance of two days to permit him to interview witnesses outside the presence of the trial judge advocate. Following a brief recess defense counsel stated that "the defense withdraws its request for a continuance and its objection to the refusal of the trial judge advocate to permit us to interview the witnesses without our (sic) presence, in order that we may continue promptly with the trial of the case" (R. 8, 9). Thereafter, the defense objected to the Specification and moved to strike it on the grounds that it was insufficient as a matter of law because, as counsel expressed it, accused "is entitled to be advised of the facts which constitute disorderliness" and the Specification failed to set forth such facts (R. 9, 10). Before ruling on the objection the law member stated:

> "Since the issue has been raised, the Court would like at this time to call upon the accused to state to the Court whether or not the accused feels that he is prepared and satisfied to have this case proceed at this time. The Court would like to have a statement from the accused. Is the accused satisfied that his rights will not be in any way prejudiced by proceeding at this time?"

Accused thereupon stated he was "fully acquainted with the facts, and the Court may proceed with the specification as drawn" (R. 13). Thus was disposition made of the objection without formal ruling by the court.

Attached to the record of trial is a document entitled "Statement of Counsel for Captain V. C. Little" wherein defense counsel requested

that upon review of these proceedings certain matters be considered. The first of these matters concerned the conduct of the court while defense's motion for a continuance was pending. Although it does not appear in the record of trial, defense counsel stated that he was compelled to withdraw his request for a continuance after he was called to the bench during recess and advised by the president of the court that a continuance would be costly to the Government in time and money. Accordingly, the president asked him to reconsider his request. The second matter concerned the defense's objection to the sufficiency of the Specification which has been mentioned above. The third matter raised for consideration does not appear in the record of trial but, according to the statement of defense counsel, at some stage of the trial the court recessed and during it the president of the court informed defense counsel that "in Army Courts Martial we do not engage in tricks or subterfuge but matters are handled in an open manner to the end that substantial justice will be done." Defense counsel contended that these remarks "were wholly unwarranted and were so prejudicial as to constitute a denial of a fair trial." The last point raised related to the law member's instruction to accused concerning his testimonial rights. After accused stated he wished to remain silent, the law member proceeded fully to inform him of his right to make a sworn statement or an unsworn statement or remain silent and then advised "I would recommend that you confer again with your counsel and make your decision as to which of these three choices you elect to make." Defense counsel contended that this closing statement "could have no other effect on the rest of the Court than to indicate that in his [law member's] opinion the accused should adopt some course other than remaining silent."

In so far as the request for continuance is concerned, the action of the court in urging defense counsel to reconsider his motion may have been improper but it did not result in prejudicial error. It does not appear, even from the statement of defense counsel, that there was an improper exercise of authority to constrain defense counsel to withdraw his motion; at most it was merely a request and counsel was free to decline to follow the suggestion. We cannot agree with defense counsel that this request left him no other alternative than to comply with it. Furthermore, on the face of the record it does not appear that prejudicial error would have been committed if the request for a continuance had been refused by the court. It does not appear that defense counsel had not had an opportunity to talk freely to the prosecution's witnesses. It does not appear what material evidence defense counsel was prevented from extracting from these witnesses. Defense does not contend that these witnesses were rigged by the prosecution and influenced to relate other than the truth. If defense counsel wished only to subject them to close cross-examination, he was afforded that opportunity at the trial. Accordingly, we cannot say that the request made by the court resulted in prejudicial error.

The law member did not rule on the defense's motion to strike the Specification in view of accused's statement, in response to the law

member's direct question, that he was fully acquainted with the facts and the court might proceed with the Specification as drawn. It is now settled law that it is unnecessary for a Specification alleging disorderly conduct to detail the particular conduct considered disorderly. It is sufficient if "disorderly conduct" is alleged to have occurred at a particular time and place (CM 232968, McCormick, 19 B.R. 263; See also CM 247391, Jeffrey, 30 B.R. 337). Accordingly, the law member should have held the Specification to be sufficient and should have denied the motion to strike. However, had the objection been well founded, the conduct of the law member in questioning accused might well have constituted fatal error. An accused is represented by counsel for the obvious purpose of protecting his legal rights. Such counsel may urge all legitimate objections to protect those rights and the court is bound to rule upon them without by-passing counsel to indulge in direct conversation with accused. Not only was it most irregular for the law member to discuss the legal objection with accused but for the law member to pose accused the direct question, "Is the accused satisfied that his rights will not be in any way prejudiced by proceedings at this time?" was utterly improper. The accused was not informed he need not answer the question. It does not appear he knew the legal significance of the word "prejudiced" as it relates to military law. Indeed, if the Specification had been defective as a matter of law, prejudice would have had nothing to do with the question before the court. Finally, if an accused may not be compelled to testify at his trial, it is only consistent that the law member be compelled to refrain from extracting harmful admissions from him when he has not offered himself for examination. Therefore, had the original objection been valid we have serious doubts that accused's answer to the law member's question would have operated as a voluntary withdrawal of the objection.

Defense counsel also contended that the statement made to him by the president of the court during recess to the effect that in trials by courts-martial "we do not engage in tricks or subterfuge" was so prejudicial as to constitute a denial of a fair trial. Defense counsel construed the statement to mean that he was being accused of pursuing such tactics. Even if the remark was intended as a reprimand we have no facts before us from which we can determine what occasioned its utterance. Even if the reprimand was clearly undeserved, we cannot say it denied accused a fair trial. It was a purely personal remark addressed to defense counsel during recess and so far as we can determine, had no direct relation to the progress of the trial itself. It did not per se prejudice any substantial rights of accused however much it may have aroused counsel personally. This incident clearly demonstrates, however, that members of courts-martial should exercise extreme care to avoid uttering uncomplimentary remarks to counsel appearing before them or any remarks that might even be so construed. There is little place in such trials for personal recrimination of counsel except in

extreme circumstances where misconduct is obvious. Certainly, there is nothing in the record of trial before us that warranted the use of such language by the president of the court.

The final question raised by defense counsel involved the recommendation made by the law member, after he had advised accused fully of his testimonial rights, that he "confer again" with his counsel to determine what course he should select. We cannot agree with defense counsel that this remark could have no other effect on the other members of the court than to indicate that the law member believed accused should adopt some other course than remain silent. It was most proper for the law member to advise accused of his rights in open court even though they had been previously explained to him by defense counsel and accused had already announced his selection. Not only is it the duty of individual counsel to explain these rights to accused before trial (MCM, 1928, par. 45b) but the court should also do likewise in open session if it has any doubts that accused fully understands them (MCM, 1928, par. 75a). The concluding recommendation that accused confer again with his counsel is one that is made repeatedly by law members when an accused has announced his selection before being publicly advised of his rights by the law member. It is merely to give accused an opportunity to reconsider his original selection in the event he made it without fully understanding all alternatives open to him. Indeed, it is only proper that accused be given an opportunity to reconsider; otherwise the explanation given by the law member following accused's original selection is of little benefit to him. We see nothing irregular in the comment here made by the law member.

When the court reconvened in revision proceedings it adjourned from one day to the next but the trial judge advocate did not sign his name at the end of the record of the first day's proceedings. If the omission constituted error it is harmless since the entire record of the revision proceedings is properly signed and authenticated at the end thereof (CM 228338, Mitchell, 16 B.R. 123). It is unnecessary for us to consider the objection raised by defense counsel to the legality of the revision proceedings inasmuch as the original sentence was not altered thereby.

There was ample evidence in the record to sustain the court's findings of guilty that accused was both drunk and disorderly at the time and place alleged. It was for the court to weigh all of the evidence properly before it and we cannot say on this record that the conclusions it reached were unsupported by the record of trial.

6. Accused is 28 years of age. He graduated from high school in 1935 and thereafter worked as a salesman for a printing and office supply concern. He served as an enlisted man in the Florida National Guard, 265th CA (HD), from 23 July 1936 until 6 January 1941 when he

entered upon active military duty. On 5 June 1942, after completing the course of instruction at The Antiaircraft Artillery School, Camp Davis, North Carolina, he was commissioned a second lieutenant. On 28 December 1942 he was promoted to first lieutenant and on 19 August 1943 he was promoted to captain. On 2 February 1944 he was found guilty by general court-martial of being publicly disorderly in uniform in Balboa, Canal Zone and, as approved by the reviewing authority, was sentenced to forfeit $50 of his pay per month for four months and to be restricted to the limits of his post for three months.

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

Thomas N. Duffy, Judge Advocate

William H. Bandrell, Judge Advocate

Robert E. Trevethan, Judge Advocate

SPJGH-CM 283338 1st Ind

AUG 4 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 Captain Victor C. Little (0-1040426), Coast Artillery Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in uniform in Jamestown, Rhode Island, in violation of Article of War 96. He was sentenced to dismissal. The reviewing authority returned the record of trial to the court for reconsideration of its sentence in revision proceedings with a view to reduction of the penalty imposed. The court reconvened but adhered to its original sentence. The reviewing authority thereafter approved the sentence but recommended that it be commuted to a reprimand and forfeiture of $50 of accused's pay per month for five months 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. After consuming alcoholic beverages in a taproom located in Jamestown, Rhode Island, accused became drunk and invited first a civilian and then an enlisted man, neither of whom had given him offense, to step outside and engage in a fight. After he left he complained to a corporal of the guard that an enlisted man had been disrespectful to him in the taproom and he issued a direct order to the corporal that he bring the enlisted man to him so that he might "clean him up." Accused cursed and abused the enlisted members of the military guard who were there present calling them "punks" and "bastards." He removed his coat, thrashed his arms about and stated that "he could lick the whole bunch of them", referring either to the enlisted military personnel or to civilians who were observing his antics on the street in front of the taproom. His final threat to fight was interrupted when a major appeared and ordered him to leave the scene. Although accused's conduct cannot be condoned, nevertheless, it was not so extreme as to compel the severe penalty here imposed. I concur with the reviewing authority's recommendation as to commutation of the dismissal.

Accordingly, I recommend that the sentence be confirmed but that it be commuted to a reprimand and forfeiture of $50 of accused's pay per month for five months and that the sentence as thus commuted be 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 is confirmed but commuted to a reprimand and forfeitures. GCMO 394, 10 Aug 1945).

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

SPJGK - CM 283352

11 AUG 1945

U N I T E D S T A T E S	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Alamogordo Army Air Field, Alamogordo, New Mexico, 28 June 1945. Dismissal, total forfeitures, and confinement for one year.
Second Lieutenant GEORGE B. TORK (0-780767), Air Corps.	)	

OPINION of the BOARD OF REVIEW
LYON, LUCKIE, MOYSE and SYKES, 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 64th Article of War.

Specification: In that Second Lieutenant George B. Tork, Air Corps, Squadron D, 231st Army Air Forces Base Unit, having received a lawful command from Colonel John W. Warren, his superior officer, to proceed forthwith from his station at Alamogordo Army Air Field, Alamogordo, New Mexico, to Topeka Army Air Field, Topeka, Kansas, reporting thereat 23 May 1945, preparatory to further movement outside the Continental limits of the United States, or words to that effect, did, on or about 23 May 1945, wilfully disobey the same.

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 ten (10) years. The reviewing authority approved the sentence but reduced the period of confinement to one (1) year, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution:

It was stipulated by and between the trial judge advocate, the defense counsel and the accused that on 22 and 23 May 1945, and "on days prior to and subsequent to said dates", Colonel John W. Warren was the Commanding Officer of the 231st Army Air Forces Base Unit, that on said dates the accused was a member of Squadron D of that unit and that Colonel Warren was the superior officer of the accused. It was further stipulated that

> "4. On 22 May 1945, Colonel JOHN W. WARREN issued a special order to 2d Lt. GEORGE B. TORK directing said Lt. Tork to proceed forthwith from Alamogordo Army Air Field, Alamogordo, New Mexico, to Topeka Army Air Field, Topeka, Kansas, and to report at said Topeka Army Air Field not later than 1300 on 23 May 1945; and said Colonel WARREN directed Lt. Colonel DAVID G. RAWLS to read said special order personally to said Lt. TORK, further instructing said Lt. Colonel RAWLS to state to Lt. TORK that said order was preparatory to further movement outside the continental limits of the United States." (R. 7; Pros. Ex. 1).

The prosecution introduced into evidence without objection an extract of Special Orders Number 130, paragraph 21, Headquarters, Alamogordo Army Air Field, Alamogordo, New Mexico, dated 10 May 1945 showing that by order of Colonel Warren, crew number 607 with Flight Officer William E. Scott listed as co-pilot, together with 19 other crews were ordered to report to Army Air Field Topeka, Kansas on 23 May 1945. The order further stated that this was "a movement to an AAF Staging Area, for further movement outside the continental United States" (R. 7; Pros. Ex. 2).

An extract of Special Orders Number 142, paragraph 2, Headquarters, Alamogordo Army Air Field, Alamogordo, New Mexico, dated 22 May 1945 was introduced into evidence by the prosecution without objection showing as follows:

> "2. Par 21, SO 130, this HQ, cs, is amended by the add of '--2D LT (1024) GEORGE L TORK 0780767--' as CP, and further amended by so much as reads '--CP--' for F/O WILLIAM E SCOTT, to read '--Alternate CP--', listed under crew 607. (Sub: O and EM atchd unasgd 272d AAF BU (SS), AAF Topeka, Kans)." (Pros. Ex. 3; R. 8).

The testimony of Lieutenant Colonel David G. Rawls may be summarized as follows:

In May 1945 accused was in the "status" of a co-pilot on a combat crew at Alamogordo Army Air Field, Alamogordo, New Mexico (R. 9). He had completed all of his military, flying and ground training as a co-pilot in a combat crew of the "5-11" class (R. 15). On 22 May 1945 pursuant to instructions of Colonel Warren he read to accused paragraph 2, Special Orders No. 142, which he said in essence, ordered accused to proceed to a staging

area (R. 9). He also explained the order was from Colonel Warren and that the order entailed overseas movement (R. 9, 10). At the time he read the order he explained to accused that he had arranged a flight of an aircraft for the sole purpose of taking him to his assigned station (R. 10). He had in fact personally prepared means of transportation and a plane and pilot were available and ready for dispatch although no flight plan had been made. (R. 9, 10). After reading and explaining the entire order he asked accused if he would obey the order (R. 10). Accused replied in essence "I cannot obey" (R. 10). Upon repeating the question "again and again" accused answered "I cannot" (R. 10).

On cross-examination witness stated a complete crew (crew number 607) had been furnished the staging area but it was not a completely trained crew (R. 13). Flight Officer William E. Scott was the best trained substitute on the base but he was not completely trained nor nearly as well trained as accused (R. 13). He was "the best we had, and I had to meet the commitment." (R. 13). In reply to the question why accused had not been placed on orders prior to 22 May 1945 witness replied,

> "The reason is that I, as Director of Training, and Colonel Warren as the Commanding Officer, are directly responsible for furnishing to the Staging Areas completely trained crews. As Director of Training it is my duty to see that they go to Staging as complete crews. Originally, verbally, Lt. Tork had made the statement that he would not go. It was my job as Director of Training to supply a qualified substitute. That was done immediately to expedite shipment and avoid deleting an entire crew. Then, in order to be assured that Lt. George B. Tork was given every opportunity to change his mind and to obey the order, Special Orders No. 142, paragraph 2, dated 22 May 1945, was written. Does that answer your question?" (R. 13).

The other members of the crew (607) were not on the base on 22 May 1945 (R. 11). Accused could have complied with the order and would have had time to get to Topeka (R. 11).

In reply to questions by the court witness stated accused had been told "numerous times" the date of departure (R. 16). Before the order of 10 May was published accused had stated he could not go (R. 15, 16, 17). When accused said "I cannot obey" it was witness' understanding he would not go, not that he was physically unable to go (R. 16). In reply to the question by defense counsel "Did he say he wouldn't go or he couldn't go?" witness replied "He said he wouldn't go, and I had to substitute another man. That is the only way I know to answer that. He didn't go." (R. 17).

Master Sergeant Donald A. Baldwin testified he saw accused at Alamogordo Army Air Field on 22, 23, 24 and 25 May 1945 (R. 18).

4. <u>For the Defense</u>:

Mr. Irvin C. Smith, pastor of the Assembly of God Church, Alamogordo,

New Mexico, testified he became acquainted with accused in the latter part of February 1945 (R. 19). Accused attended services at his church regularly and has preached there a number of times (R. 19). His church maintains it is contrary to kill, but in time of war it is left up to the individual's conscience, and some members have "taken on" military service and some have refused (R. 20). Military service does not bar fellowship with the church nor does refusal of military service lessen his fellowship (R. 22). Accused is not ordained but has exhorter's papers which is the first of three steps toward ordination (R. 21). Exhorter's papers under the general plan of the church are carried one year. The aspirant is then issued a license for two years and upon completion of this period he is eligible for ordination (R. 21). In witness' congregation of from 40 to 80 persons, only accused and one other person besides himself aspired to become ministers (R. 22). He considers the accused to be of good character (R. 20).

Second Lieutenant Franklin J. Schaaf, Section Gunnery Officer, testified he has known accused since January 1945, having become acquainted with him through attendance at the same church (R. 23). The policy of the church is not to kill, but persons who belong "can have their own idea of that as far as they know the bible" (R. 24). Witness would go into combat if ordered (R. 26). The character of accused is good (R. 24).

Accused, after being apprised of his rights as a witness, elected to take the stand and testify under oath (R. 26). His testimony was substantially as follows:

In the first part of December 1944 he "sought to seek peace with God." He then began to realize that at some future time, owing to his combat position, that he would have to participate in the act of killing. On 6 May 1945, on his own initiative, he went to see Colonel Warren and told him of his religious convictions, that it was wrong to kill, and "sought a solution to (his) problem." Colonel Warren told him that if he had come to him sooner he "possibly could have gotten (him) out of the Army to join the ministry" and then proceeded to tell him that the only thing he knew to do was what he did and that was "to give me an order through Lt. Colonel Rawls with the foreknowledge that I could not fulfill it." Accused then stated, "You see, gentlemen, I wasn't breaking Colonel Warren's or Colonel Rawl's order, I was just following one from higher authority, from my God. I was following an order that God had laid down for me and it seems to me the only reason for that order was to make a case for me, to be rid of this problem." The reason he had not gone sooner to Colonel Warren or to Lieutenant Colonel Rawls and explained his problem was that he anticipated facing a general court-martial and before facing that he wanted to be sure of his decision. He therefore continued with his training in case his decision should be to go into combat. On about 3, 4 or 5 May 1945 he reached the decision that it would be wrong for him to kill and thereupon transmitted these convictions

to his commanding officer (R. 26,27).

On 22 May 1945 he was called into the office of Lieutenant Colonel Rawls who at that time "proceeded to give (him) an order which has been read to the court concerning (his) proceeding and reporting to Topeka, Kansas" (R. 26). The order "entailed duties which would subsequently lead to bombing enemy installations and killing women and children" (R. 30). On 23 May 1945 Colonel Rawls "asked me if I would comply with the order and I answered that I could not comply with the order" (R. 26).

He is not afraid of going overseas but is willing and eager to go as a chaplain but he "must go in that capacity" (R. 28). The fact he was not on flying status and thought that a plane for transportation was not available were not the deciding factors of his disobedience (R. 35). In reply to the question by the court, "Then it was your religious convictions alone which compelled you to disregard the order, is that right?" the accused replied, "Yes, sir." (R. 35).

5. The Specification alleges that the accused on or about 23 May 1945 willfully disobeyed a lawful command from Colonel John W. Warren, his superior officer, to proceed forthwith from his station at Alamogordo Army Air Field, Alamogordo, New Mexico, to Topeka Army Air Field, Topeka, Kansas, reporting thereat 23 May 1945, preparatory to further movement outside the continental limits of the United States, or words to that effect. The Specification is laid under Article of War 64.

The elements of the offense and the proof required for conviction thereof according to applicable authority, are as follows:

> "(a) That the accused received a certain command from a certain officer as alleged; (b) that such officer was the accused's superior officer; and (c) that the accused wilfully disobeyed such command" (MCM, 1928, par. 134b).

The evidence is clear and convincing that on 22 May 1945, Colonel John W. Warren, accused's superior officer, by special order, ordered accused to proceed forthwith to the alleged place, reporting thereat on 23 May 1945, and further that at the direction of Colonel Warren, Lieutenant Colonel David G. Rawls read the special order to accused and explained to him that it entailed overseas movement. It is also quite clear that accused refused to comply with the order and that such refusal was the willful intentional defiance of authority contemplated by Article of War 64. The accused admitted both receiving the order and not complying with it, explaining his noncompliance solely on the basis that it was contrary to his religious convictions to kill and that the orders would subsequently lead to bombing enemy installations and killing women and children. It is well settled that it is no defense that obedience to the command involved-

is a violation of accused's religious scruples (MCM, 1928, par. 134b).

A question presented by the record warranting discussion is the legality of the order. If the order had been given "for the sole purpose of increasing the penalty for an offense" which it was expected the accused might commit the order would have been unlawful and violation thereof not punishable under Article of War 64 (MCM, 1928, par. 134b; CM 219946, Tracz, et al, 12 B.R. 317, 1 Bull, JAG 18). An analysis of this proposition of law indicates that, strictly construed, it applies to a situation where superior authority expects the inferior authority to commit an offense, and in order solely to expose the latter to a punishment greater than that provided for the expected offense, the superior authority issues a direct order. The reason for this rule is clear. It is to prevent the issuance of orders which are solely to persecute military personnel. It is not to prevent the issuance of orders primarily aimed at obtaining performance of military duty or maintaining discipline (CM 281923, Hosford).

The evidence in this case discloses that prior to the issuance of any order to the accused to proceed to Topeka, Kansas, the accused had a conference with Colonel Warren, his commanding officer, and explained to him his "problem" which had arisen by reason of his alleged religious convictions. The conference apparently resulted from accused's expectation that orders would be issued shortly requiring him to proceed to a staging area in preparation for overseas movement. This action on the part of accused with its attending circumstances raises a strong inference that Colonel Warren was advised that if he issued any order contrary to accused's religious convictions the accused intended to disobey such order. No orders were issued to accused at this time and he committed no offenses for which he was punishable. The most that can be said is that by his action accused had advised his commanding officer in advance the position he intended to take if any orders were given him contrary to his interpretation of his religious convictions. Having accused's intended position in mind, and owing to the necessity of immediately sending complete crews to the staging area, the other members of his crew were directed by special orders to report to Topeka, Kansas, and a substitute was sent in place of accused. Colonel Warren was then in the position where if he gave accused a direct order and he refused to obey it the disobedience would not interfere with the other crew members and if accused did obey it the crew would benefit by his long training. Such was the status of matters when on 22 May 1945 accused was ordered to proceed to Topeka, Kansas.

It is apparent that under these circumstances the order to proceed to Topeka was not given to persecute accused but given to obtain performance of duty by accused or his refusal so to do. In a recent Board of Review opinion where a commanding officer after having previously sought by persuasion and tact to induce an accused to perform a military duty and later gave him a direct order that the matter might be brought to a head and grounds furnished for punishing accused if he refused to obey, it was

held that if the order was not issued "for the sole purpose" of exposing accused to greater punishment but was merely to expose him for the first time to punishment if he refused to perform duty properly expected of him, the order was legal (CM 281923, Hosford). To hold otherwise, that such advance knowledge on the part of the commanding officer would preclude him from issuing orders requiring accused to perform military duties for which he had been trained, is contrary to reason and common sense. Taking such holding to its absurdity it would permit a member of the military establishment, who foreseeing the probable issuance of an order odious to him, to advise his superior officer of his intended refusal and thereby escape performance of such order when issued. Accordingly, in our opinion this order was legal and was a proper and necessary exercise of command function.

6. War Department records disclose that this officer is 24 years of age, married and is a high school graduate. In civil life he was employed for 1-1/2 years by a steel manufacturing concern and for six months by the Society for Correct Food Preparation, his duties in the latter position consisting of the demonstration and sale of utensils used in the preparation of food and the giving of health and food preparation lectures. He was inducted in the service on 1 October 1942 and was appointed a temporary second lieutenant in the Army of the United States on 27 June 1944.

7. The court was legally constituted and had jurisdiction of the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed by the court during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 64.

Irving G. Fox, Judge Advocate

Charles G. Luckie, Judge Advocate

(On Leave), Judge Advocate

Charles S. Sykes, Judge Advocate

SPJGK - CM 283352 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 George B. Tork (O-780767), Air Corps.

2. Upon trial by general court-martial this officer pleaded not guilty to and was found guilty of willful disobedience of a superior officer in violation of Article of War 64. 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 ten (10) years. The reviewing authority approved the sentence but 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. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence.

On 22 May 1945, Colonel John W. Warren, accused's commanding officer, to whom he had previously explained his religious convictions and his intent to disobey any order contrary to them, nevertheless directed accused to proceed forthwith to Topeka, Kansas, preparatory to further movement outside the continental limits of the United States, reporting thereat on 23 May 1945. The other members of accused's airplane combat crew had been given the same order on 10 May 1945, but, owing to his previously expressed intention that he would not comply with such order, his name had been omitted from the list. Accused refused to comply with the order, explaining his refusal to obey on the ground that the order would subsequently lead to bombing enemy installations and killing women and children, contrary to his religious convictions.

Willful disobedience of a superior officer is a serious military offense. Accused offered no defense for his disobedience except his alleged religious convictions, and these convictions were asserted only upon completion of a long and expensive period of training and when overseas combat service was imminent. 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 a United States Disciplinary Barracks 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. Record of trial
2. Form of action

(Sentence asapproved by reviewing authority confirmed, but forfeitures remitted As modified executed. GCMO 429, 28 Aug 1945).

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

SPJGN-CM 283357

UNITED STATES	)	THE CAVALRY SCHOOL
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Riley, Kansas, 2 and 3
First Lieutenant MALCOLM	)	July 1945. Dismissal.
DAVIS (O-1030872), Cavalry.	)	

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 93rd Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that First Lieutenant Malcolm Davis, Cavalry, attached unassigned Cavalry Replacement Pool, Cavalry Replacement Training Center, Fort Riley, Kansas, did, at Fort Riley, Kansas, on or about 25 May 1945, with intent to deceive Lieutenant Colonel John F. Snider, IGD, Investigating Officer, officially state to the said Lieutenant Colonel John F. Snider that he had gone to Junction City, Kansas, once on 24 May 1945, at about 2200 hours, which statement was known by the said First Lieutenant Malcolm Davis to be untrue, in that he had, in fact, been in Junction City, Kansas, at or about 1330 hours on said date.

Specification 2: In that First Lieutenant Malcolm Davis, Cavalry, attached unassigned Cavalry Replacement Pool, Cavalry Replacement Training Center, Fort Riley, Kansas, did, at Fort Riley, Kansas, on or about 25 May 1945, with intent to deceive Lieutenant Colonel John F. Snider, IGD, Investigating Officer, officially state to the said Lieutenant Colonel John F. Snider that he did not at any time on 24 May 1945 visit Miller's Bar on East 7th Street, Junction City, Kansas, which statement was known by the said First Lieutenant Malcolm Davis to be untrue, in that he had, in fact, visited said Miller's Bar on said date.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of the Charge and its Specification, but guilty of the Additional Charge and the Specifications thereunder, and 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 May 1945, Lieutenant Colonel John F. Snider, Inspector General, Cavalry Replacement Training Center, Fort Riley, Kansas, in the course of his official duties, made an investigation into certain conduct of the accused which had occurred on the preceding day (R. 72, 73). After being apprized of his right to remain silent or make a statement with reference to the matter under investigation, the accused elected to answer certain questions propounded by Lieutenant Colonel Snider (R. 73). In recounting the events of 24 May 1945, the accused asserted that he attended the boxing matches which were held on the post in the early evening, that he then went to his barracks, spoke to the "orderly clerk", and, about 2200 hours, went for the first time that day to nearby Junction City. The accused further represented that at no time on 24 May 1945 did he visit Miller's Bar in that city (R. 73-75; Pros. Ex. D).

These statements were contradicted by the testimony of several of the witnesses for the prosecution. Mrs. Ethel Mae Roth, who, as owner of Miller's Bar, had cashed several checks for the accused, found him waiting in front of her residence in Junction City at about 1:30 o'clock on the afternoon of 24 May 1945. Together they proceeded to Miller's Bar, where, after taking care of "a check [she] was holding on him", he sat in a booth with "some soldiers" and remained until 4:30 or 5:00 o'clock. Mrs. Roth, in order to fix the date of these events, had "checked everything" and recalled, particularly, that the "little girl" who waited on the accused at the bar worked on 24 May but not on the preceding or following day (R. 82-84). Her statements were verified by Mrs. Florence Davis, the "little girl" referred to, who had noticed the accused enter the Bar a few minutes after four o'clock on the afternoon in question. Mrs. Davis likewise remembered that, on 25 May 1945, she was interrogated with respect to the incidents of the day before (R. 80, 81).

Privates Walter P. Grzanka and Orlen E. Griffin, the soldiers mentioned, recollected that they were in the accused's presence at Miller's Bar for about two hours. The three engaged in conversation and, according to Private Griffin, drank beer together (R. 76, 79). Griffin, who was starting a period of furlough that day, left the others in Miller's Bar, went to the station, and boarded a six o'clock train for his home (R. 79, 80). Shortly after Griffin's departure, the accused and Grzanka left the tavern together. They were later "picked * * * up" by the Military Police and, about midnight, were returned to camp (R. 77, 78).

The accused, around eleven o'clock on the morning of 25 May 1945, called Mrs. Roth by telephone and said, "I wasn't in your place of business yesterday". To her questions "What is wrong? Are you in trouble?", he replied "Yes, lots of trouble" (R. 84).

4. The evidence for the defense concerned his whereabouts on 24 May 1945 and his past character and record. First Lieutenant Pedro J. Contreras, who had first met the accused in Officer Candidate School at Fort Riley in August, 1942, testified by deposition that he was Assistant Athletic and Recreation Officer of the First Regiment at "CRTC" and, on 24 May 1945, was engaged in making arrangements for certain boxing matches to be staged on the post that evening. Lieutenant Contreras saw the accused at Barracks 2003 "two or three times" between 1300 and 1700 hours on that Thursday afternoon and, on one of these occasions, talked with him about acting as referee for one of the matches. About 1955 hours at The Service Club, Lieutenant Contreras again conversed with the accused. The "fights" lasted from 2005 until 2135 and, from a subsequent conversation, Lieutenant Contreras was impressed with the accused's vivid recollection of the details of the matches, such as "the jabs, the decisions, * * * even as to the color of trunks that the person wore, with the exception of the last fight. He had no knowledge of the last fight". Lieutenant Contreras was not prepared to state that the accused was in the "CRTC" at 1300 or any other specific hour on 24 May 1945 (Def. Ex. 1).

Private First Class Wilbur Williams, Orderly for Officers' Barracks 2003, saw the accused at the Barracks "about three times" between one and five o'clock during the afternoon of 24 May 1945 (R. 100). The "rest of the boys" who worked in the Barracks planned to go fishing, and the accused, about 3:45, prepared a map directing them to a certain fishing place (R. 101, 107). While acting as "C.Q." in the Barracks building later that evening, Williams, about ten o'clock, spoke briefly with the accused, who appeared to be "dressed in such a manner to go to town" (R. 102). Because Williams was away from camp on a three day pass on Monday, Tuesday, and Wednesday of that week and substituted as "C.Q." for another soldier on the following day, he could state without equivocation that the events which he related occurred on Thursday, 24 May 1945 (R. 102, 106).

The accused served in Major Byron P. Sadler's organization from March, 1941, to July or August, 1942, and, according to Major Sadler, was

a superior instructor in dismounted drill as well as an excellent platoon sergeant. The accused's reputation was good and, when he applied for Officer Candidate School, Major Sadler approved his application and gave him a rating of excellent (R. 108). The accused's "66-1" Form showed one rating of "Satisfactory", one of "Very Satisfactory", and six of "Excellent" (Def. Ex. 2). Anna Louise Davis testified that she had been married to the accused for seven and a half years, and that four children were born of the union (R. 111).

The accused, after his rights relative to testifying or remaining silent had been explained, elected to make a sworn statement as to Charge I and its Specification and to remain silent as to the Additional Charge and its Specifications. Since he was found not guilty of the Charge and the Specification thereunder, none of his testimony relative thereto will be narrated. He recounted his military record, in effect, as follows:

He enlisted in the Army in 1935 and served as a member of the 14th Infantry for two years in the Panama Canal Zone. After this term of service he re-enlisted in 1938, at Fort Sam Houston, Texas, and served with the 9th Infantry until he received a discharge, by purchase, on 9 September 1939. He obtained civilian employment in San Antonio, Texas, and joined the 12th Cavalry, a National Guard Unit. After its mobilization on 18 November 1940, he served as an instructor of inductees, a section sergeant, "fire closer" sergeant, and, finally, platoon sergeant. He completed Officer Candidate School at Fort Riley in October, 1942, was assigned as platoon leader in Troop "G" of the Fifth Regiment, First Cavalry Division, and, with this organization, went overseas. He remained in Australia for a time, moved to New Guinea, took part in the landing on Los Negros on 29 February 1944, and there engaged in combat with his squadron. Prior to his battle experience he had suffered an attack of meningitis, as a result of which he was hospitalized and offered an opportunity to return to the United States. He urged the Division Surgeon, however, to allow him to take part in combat with his unit. He again entered the hospital "after combat" and was subsequently returned as a patient, with a diagnosis of psychoneurosis, to the States. At Brooks General Hospital he was given an opportunity to retire but, because of his extensive service in the Army which he "hated to lose", he requested that he be retained. His diagnosis was changed to "combat fatigue" and, after a period of limited service for three months, he reverted to general duty status on 27 February 1945. Since his reassignment to Fort Riley, he has experienced recurrent attacks of malaria for which he has taken one atabrine tablet a day. He has been in quarters since 16 March 1945, "not doing anything" (R. 112-114).

5. Specification 1 of the Additional Charge alleges that the accused did, "on or about 25 May 1945, with intent to deceive Lieutenant Colonel John F. Snider, IGD, Investigating Officer, officially state * * * that he had gone to Junction City, Kansas, once on 24 May 1945, at about

2200 hours, which statement was known by the [accused] to be untrue, in that he had, in fact, been in Junction City, Kansas, at or about 1330 hours on said date". Specification 2 of the Additional Charge alleges an identical offense, in that the accused, at the same time and place and to the same officer, falsely stated "that he did not at any time on 24 May 1945 visit Miller's Bar on East 7th Street, Junction City, Kansas * * *". These offenses are set forth as violations of Article of War 95.

The accused, beyond question, made the alleged statements. In addition to Lieutenant Colonel Snider's uncontroverted testimony that, during the course of an official interview, the accused asserted that his only trip, at about 2200 hours, to Junction City on 24 May 1945, did not include a visit to Miller's Bar, the court had before it the accused's sworn statement which included these representations. The only question remaining relates to their truth or falsity.

There is compelling evidence that the accused was, in fact, present at Miller's Bar during the afternoon hours of 24 May 1945. Mrs. Roth, the proprietress, was able to recall in considerable detail the events of that afternoon: how the accused met her in front of her apartment about 1:30; how, after proceeding to her tavern, he took care of a check which she had been holding; and how he remained in her establishment, drinking beer with "soldiers", until 4:30 or 5:00 o'clock. The accused was apparently well known, as "Mickey", to Mrs. Roth and her employees, and there is no reason to doubt their ability to identify him. Nor should any real doubt exist as to the positive character of their statements that these events occurred on 24 May. Because Mrs. Davis worked on that day, but not the preceding or following day, and because she was interrogated on 25 May, she was able to fix the date beyond any peradventure of mistake. Mrs. Roth, in this connection, had "checked everything". She, too, recalled that the "little girl", apparently Mrs. Davis, who "was working for me * * * the day that Lieutenant Davis was in the bar", did not work the day before or after and remembered distinctly that, on the morning of 25 May, "Mickey" called by telephone to warn that, because he was in trouble in connection with the events of the preceding day, nothing should be said to disclose his presence at Miller's Bar. Such circumstances are calculated to impress a particular date on the mind. Also significant in this respect was the testimony of Private Griffin. Since he left for home on furlough on 24 May, it appears highly improbable that he should have been mistaken about the date.

Lieutenant Contreras and Private Williams, witnesses for the defense, asserted that the accused spent a portion of the afternoon and evening of 24 May at camp. Both encountered the accused at his barracks on two or three occasions between one and five o'clock. In the early evening Contreras talked with the accused at the Service Club and later saw him at the camp boxing matches. Williams, who was able to establish the date as Thursday, 24 May, because it followed

his return to camp after a three day pass, again met and briefly conversed with the accused at about 2200 hours. Should the truth of such evidence be conceded, it is not necessarily inconsistent with that adduced by the prosecution. Mrs. Roth stated unequivocally that she and the accused entered Miller's Bar about 1:30 o'clock and was of the opinion that he remained there until 4:30 or 5:00. Since, however, the other witnesses for the prosecution did not see him in the Bar until well after mid-afternoon and since, according to Mrs. Davis, he entered the bar shortly after she reported for work at four o'clock, it is possible that, as contended by the defense, he spent some time during the course of the afternoon at his barracks. Private Grzanka and the accused apparently separated when Grzanka returned to camp "to pick up a girl", and nothing appears to refute the possibility that the accused, too, was at Fort Riley during the evening, as attested by Lieutenant Contreras and Private Williams.

In view of the explicit and convincing character of the prosecution's evidence and after a full appraisal of the facts and inferences suggested by the defense testimony, the Board of Review is impelled to the belief that the record establishes, beyond any reasonable doubt, the presence of the accused in Miller's Bar on the afternoon of 24 May 1945. It follows that the statements which form the bases of the present allegations were falsely made. That the accused's mendacity was intentional is revealed by his telephone call to Mrs. Roth on the following morning to solicit her cooperation in concealing the truth. The alleged intent to deceive was clearly shown. Such conduct, deceitful and perjurious in character and occurring in the course of an official interview with a superior officer, seriously compromised the accused's standing as an officer and gentleman and manifestly violated Article of War 95. Par. 151, M.C.M., 1928. The evidence supports the findings of guilty.

6. The accused is about 31 years of age and is married. He first enlisted in the Army on 16 October 1935 and, after an honorable discharge with a rating of "excellent", re-enlisted on 5 February 1938. From this second enlistment he was honorably discharged on 9 October 1939 with a rating of "very good". After his third enlistment on 18 November 1940, he was commissioned a second lieutenant on 29 October 1942, and was promoted on 12 May 1944 to the rank of first lieutenant. He was awarded the Combat Infantryman Badge, effective 30 June 1944. Hospital records indicate that he suffered from meningitis and malaria while in the South West Pacific. By orders issued on 6 December 1944 at Brooke General Hospital, Fort Sam Houston, Texas, following a diagnosis of neurophysical exhaustion, he was placed on Temporary Limited Service for three 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 mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Robert J. Hannon, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 283357 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 23 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 Malcolm Davis (0-1030872), Cavalry.

2. Upon trial by general court-martial this officer was found guilty of making two false official statements, in violation of Article of War 95. He was sentenced to be dismissed the service. The reviewing authority approved the s entence 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, at about 1:30 o'clock on the afternoon of 24 May 1945, went into Miller's Bar in Junction City, Kansas, and was there seen by several persons. The following morning, during the course of an official investigation by the Inspector General of the Cavalry Replacement Training Center, Fort Riley Kansas, having been warned of his rights under Article of War 24, the accused, in a sworn statement represented that his only trip to Junction City on 24 May 1945 was made at about 10:00 p.m. and did not include a visit to Miller's Bar.

The accused's record shows two periods of enlistment in the Army prior to his current enlistment, resulting in almost nine years of service up to the time of his trial. He was commissioned a second lieutenant on 29 October 1942, served overseas for nearly 15 months with the First Cavalry Division, and engaged in combat in New Guinea and Los Negros. He was awarded the Combat Infantryman Badge, effective 30 June 1944. While in the Southwest Pacific he suffered from meningitis and malaria, and, in late 1944, was returned to the United States as a patient. After a period of three months limited service, he reverted to general duty status on 27 February 1945. Although his conduct in making two false official statements cannot be condoned, his prior meritorious service suggests clemency. I accordingly recommend that the sentence of dismissal be confirmed but suspended during good behavior.

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed , but suspended during good behavior. GCMO 389, 10 Aug 1945)

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

SPJGQ - CM 283366

UNITED STATES	)	ARMY GROUND FORCES REPLACEMENT DEPOT NO 2
v.	)	Trial by G.C.M., convened at Fort Ord, California, 9 July 1945. Dismissal and total forfeitures.
Captain CYRIL V. WETHINGTON (0-1166647), Field Artillery.	)	

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 96th Article of War.

Specification 1: In that Captain Cyril V. Wethington, Escort Section, Headquarters Army Ground Forces Replacement Depot No. 2, Fort Ord, California, was at Monterey, California, on or about 30 June 1945, drunk in his quarters at 284 Laine Street.

Specification 2: In that Captain Cyril V. Wethington, Escort Section, Headquarters Army Ground Forces Replacement Depot No. 2, Fort Ord, California, did, at Fort Ord, California, on or about 30 June 1945, wrongfully unfit himself for the full performance of his military duties by having consumed excessive amounts of intoxicating liquors.

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

Specification: In that Captain Cyril V. Wethington, Escort Section, Headquarters Army Ground Forces Replacement Depot No. 2, Fort Ord, California, did, without proper leave, absent himself from his organization at Fort Ord, California, from about 27 June 1945 to about 30 June 1945.

He pleaded guilty to and was found guilty of all Charges and Specifications. Evidence of one previous conviction by general court-martial was introduced, for failure to repair on four separate days to his place of duty, in violation of Article of War 61, and for failure to obey the lawful order of a superior officer, 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. The accused had been a member of the Escort Section, Army Ground Forces Replacement Depot No. 2, Fort Ord, California, since December 1943 (R. 7). He left with a shipment of troops, on 19 May 1945 (R. 7). He reported in from the trip at the adjutant's office at 0200 on 26 June 1945 (R. 8). At 0615 on 26 June 1945 the accused awakened Captain McLaughlin, who was on the T-6 training committee at the depot, to which the accused was assigned when he was "not absent on shipment" (R. 9). Captain McLaughlin excused the accused from duty on 26 June 1945 at the accused's request so that he might "take care of personal affairs" (R. 9, 10). The accused never reported to the T-6 training committee after 26 June 1945 and Captain McLaughlin did not authorize him to be absent at any other time than 26 June 1945 (R. 10).

On 30 June 1945 First Lieutenant Hanson of the Military Police Company at Fort Ord, California, received instruction from his company commander to go to the "residence" of the accused in New Monterey, arrest the accused, and bring him to the Provost Marshal's Office (R. 10, 11). He arrived at the "residence" of the accused at 1145 and was escorted by the accused's wife to his bedroom (R. 11). The accused was in bed. First Lieutenant Hanson touched the accused, who immediately awoke, and told him that he was under arrest and to get his clothes and come with the arresting officer (R. 11). The accused said, "All right", and came out fully dressed in about five minutes. He rode to the post in First Lieutenant Hanson's jeep (R. 11). The latter officer took the accused to the Depot Provost Marshal's Office, where they arrived at 1210, and then to the Second Regimental Dispensary, where they arrived at 1215, and reported to Lieutenant Colonel Schmitz, the Depot Surgeon (R. 11). First Lieutenant Hanson observed the condition of the accused "at his home", and testified, "His face was flushed, and when he spoke his voice seemed thick. He could understand me. He was able to comprehend. His eyes were bloodshot" (R. 11). In his opinion the accused was drunk but he was not disorderly or troublesome (R. 12).

Lieutenant Colonel Schmitz, Surgeon at the Army Ground Forces Replacement Depot No. 2, saw the accused in his office at approximately 1210 on 30 June 1945 (R. 12, 13). At this time he gave the accused a sobriety test. The accused said that he had had a few drinks that day but was reluctant to let Lieutenant Colonel Schmitz smell his breath. His breath smelled alcoholic. The accused placed his heels together and

his arms out as directed. He then gave a sudden start and asked why he was doing this, and was informed that he was being given a sobriety test. He "pass pointed, *** that is, he missed his nose" when told to touch his nose with his right and then his left index finger. Upon being told to walk down the hall, the accused "made a deliberate gesture, bringing his back rigid and came to a position of attention". He crossed his legs and became tangled doing left about face but succeeded in doing a correct right about face. He staggered and weaved from side to side when told "to walk up a board" in the center of the hall. The accused's eyes were "hemorrhagic"; "the pupils were contracted and reacted sluggishly to light". When asked the date the accused said "29 June". He did not remember Lieutenant Colonel Schmitz. The accused said that he did not remember getting a similar test on another occasion and when asked whether it was in the same office he said "No" and that it was down the hall. In the opinion of Lieutenant Colonel Schmitz the accused was drunk and "not able to perform full military duties" (R. 13, 14, 15). The accused was then placed in confinement under Military Police guard (R. 12).

The Morning Report of Headquarters, Army Ground Forces Replacement Depot No. 2, for 2 July 1945 showed the accused as "Dy to AWOL 0730 as of 27 June 1945" and for 1 July 1945 as "AWOL to conf this depot 1230 as of 30 June 1945 Charged Violation 61st AW awaiting trial" (R. 16; Pros. Ex.1).

4. The accused, after having his rights explained to him, elected to make a sworn statement (R. 18). He is 43 years of age and served in the Army as an enlisted man from 12 January 1923 to 18 December 1925 and from February 1927 until he was commissioned as a second lieutenant in July 1942 (R. 19). As an enlisted man the accused had a permanent warrant as technical sergeant under date of 1 March 1941 (R. 19). He was commissioned upon graduation from Class Number 21 Field Artillery Officer Candidate School, Fort Sill, Oklahoma (R. 19, 20). The accused was promoted to first lieutenant on 19 October 1942 and to captain on 19 April 1943 (R. 20). Since 12 December 1943 he has been in the Escort Section, Fort Ord, California and has made seven trips as Escort Officer (R. 20). He left on the last trip on 19 May 1945 and returned on 25 June 1945 (R. 20). Upon his return from this last trip, the accused signed in at the adjutant's office and was excused from duty on 26 June 1945 (R. 20). He was absent from duty because he "just started drinking and got a little too much, and failed to come back". (R. 20, 21). In 21 years in the Army the accused was only in trouble one other time because of drinking, and has learned a lesson (R. 21). If given an opportunity to continue in the service he would be able to overcome the drinking problem (R. 21). As an officer he has never been punished under Article of War 104 (R. 21). The accused makes his home with his wife in New Monterey, California (R. 20).

Major Koehler, a witness for the prosecution, was recalled and testified for the accused. He is the accused's immediate superior in the Escort Section (R. 16). He has known the accused since March or April 1944

and has been in charge of the Escort Section since April 1945 (R. 16). The reports of the accused's performance of duty on trips have been excellent and "the officers under whom he has served have been more than satisfied with his performance of duty" (R. 16).

Lieutenant Colonel Burton testified that he has been an officer in the Escort Section for 22 months and has known the accused since December 1943 (R. 17). In May and June 1944 the accused was recommended to him as adjutant on a shipment. He selected the accused as adjutant and during the 35 days of the trip "that he was acting as adjutant he did an excellent job and I had no complaint" (R. 17).

The accused's WDAGO Form No. 66-1 was admitted in evidence. It showed efficiency ratings of superior and excellent from 1 September 1942 to 27 November 1944 and very satisfactory from 28 November 1944 to 30 June 1945 (R. 18; Def. Ex. 1). Under date of 3 February 1944 the accused received a commendation from Colonel Lewis F. Acker, Chemical Warfare Service, "for exceptionally meritorious and efficient performance of the essential and arduous duties of Transport Personnel Officer" (R. 18: Def. Ex. 2).

5. The accused officer pleaded guilty to, and was convicted of, being drunk in his quarters, and wrongfully unfitting himself for the full performance of his military duties by consuming excessive amounts of intoxicating liquors in violation of Article of War 96, and of being absent without leave from 27 June 1945 to 30 June 1945 in violation of Article of War 61. The evidence shows that the accused returned from a trip on 26 June 1945 and was excused from duty for the remainder of that day. He was absent without leave from his organization at Fort Ord, California, from 27 June to 30 June 1945. On 30 June 1945 a Military Police officer, acting under orders, arrested the accused in the residence occupied by the accused and his wife in New Monterey, California. At this time the accused was drunk. Upon his return to Fort Ord the accused was given a sobriety test and in the opinion of the medical officer he was drunk and not able to perform full military duties.

Specification 1 of Charge I charges the accused with being drunk on 30 June 1945 "in his quarters at 284 Laine Street", Monterey, California. The drunkenness here charged was caused by the same consumption of excessive amounts of intoxicating liquor which rendered the accused unfit to perform full military duty as charged in Specification 2 of Charge I. It is unnecessary to determine whether this constituted an improper multiplication of charges (MCM, 1928, par. 27), for, in any event, the accused was not prejudiced thereby, since improper multiplication of charges affects only the sentence, not the legality of the findings (MCM, 1928, par. 80a; MCM, 1921, par. 66; CM 251370, Blanton, 33 BR 221, 226), and the sentence in the instant case is authorized for either offense.

With further reference to Specification 1, Charge I, it is not clear

exactly what is meant by "quarters at 284 Laine Street". The evidence fails to show of what these "quarters" consisted, whether they were procured by the Army or were accomodations in a private dwelling which the accused himself had obtained. One witness, the Military Police lieutenant who was sent to arrest accused, twice referred to such place as the accused's "residence" (R. 10, 11). Defense counsel, in examining accused, referred to the place as accused's "home in Monterey" (R. 20). The record is otherwise silent as to the exact character of the place at "284 Laine Street". The allegations and the evidence do show, however, that the place was not on a military post. This factor would not affect the finding of being "drunk in quarters" for in CM 236309 Mason, 22 BR 375, where the accused was also found guilty of such offense, the record shows that his "quarters" consisted of a room in a private hotel which was not assigned to him as quarters and which was not within the command area of his organization. Upon the state of the present record of trial, including accused's pleas of guilty, it is clear that the findings of guilty of this Specification, as well as of the other Specifications and of the Charges, are fully sustained.

6. War Department records show that the accused is 43 years of age, married and has one child. He is a native of Kentucky and a resident of Paso Robles, California. He attended high school for two years but did not graduate. He served in enlisted status in the Regular Army from 12 January 1923 to 18 December 1925 and from 19 February 1927 to 13 July 1942 and attained the grade of technical sergeant. He was appointed a second lieutenant, Army of the United States, on 14 July 1942 upon graduation from the Field Artillery Officer Candidate School, Fort Sill, Oklahoma, and was ordered to active duty in the Field Artillery. He was promoted to the grade of first lieutenant on 19 October 1942, and to the grade of captain on 30 April 1942. On 2 April 1945 he was tried by a general court-martial and found guilty of four Specifications of failing to repair at the fixed time to his properly appointed place of duty in violation of Article of War 61, and one Specification of failing to obey a lawful order in violation of Article of War 96. He was sentenced to forfeit $100 per month for six months. The sentence was approved and ordered executed by the reviewing authority on 5 April 1945.

7. The court was legally constituted and had jurisdiction of the accused and the offense charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is authorized for a violation by an officer of either Article of War 61 or Article of War 96.

Fletcher R. Andrews, Judge Advocate

(sick in quarters), Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 283366 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 Captain Cyril V. Wethington (0-1166647), Field Artillery.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, being drunk in quarters and unfitting himself for the full performance of his military duties by having consumed excessive amounts of intoxicating liquor, in violation of Article of War 96, and of absenting himself without leave for a period of three days from his organization, in violation of Article of War 61. 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. 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.

The accused, stationed at Fort Ord, California, was excused from duty on 26 June 1945 for that day only. He did not return to his station and at about noon, 30 June 1945, was found drunk in his quarters in New Monterey, California, where he lived with his wife. By reason of excessive consumption of alcoholic liquors he was unfit for the full performance of his military duties. The accused explained his failure to return to his station as being due to excessive drinking.

Two officers testified to the excellence of accused in the performance of his duties in the past. Between 1 September 1942 and 27 November 1944 his manner of performance ratings were superior and excellent. Thereafter, they were very satisfactory. On 3 February 1944 he received a commendation for the performance of his duties as Transport Personnel Officer.

On 2 April 1945 the accused was convicted by a general court-martial on four Specifications of failing to repair at the fixed time to his properly appointed place of duty in violation of Article of War 61 and one Specification of failing to obey a lawful order in violation of Article of War 96. He was sentenced to forfeiture of $100 pay per month for six months. The Staff Judge Advocate states that the prior offenses, like the present offenses, arose from the excessive use of alcohol by the accused and that there is reason to believe that this "difficulty" is habitual. Despite the efficient service rendered by the accused in the past, it is apparent that his growing inability to control his desire for liquor so

interferes with his duties and responsibilities as to make his retention as an officer undesirable. I 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
1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. GCMO 431, 28Aug 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of the Judge Advocate General
Washington 25, D.C.

SPJGH-CM 283457

8 AUG 1945

UNITED STATES v. Second Lieutenant NICHOLAS B. STALLWORTH (0-556555), Field Artillery.	)))))))	7TH HQ AND HQ DETACHMENT SPECIAL TROOPS, FOURTH ARMY Trial by G.C.M., convened at Camp Bowie, Texas, 23 June and 2 July 1945. Dismissal and total forfeitures.

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

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

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

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

Specification: In that, Second Lieutenant Nicholas B. Stallworth, Service Battery, 783rd Armored Field Artillery Battalion, did, without proper leave, absent himself from his organization in the vicinity of North Camp Hood, Texas, from about 26 May 1945, to about 27 May 1945.

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

Specification: In that Second Lieutenant Nicholas B. Stallworth, Service Battery, 783d Armored Field Artillery Battalion, did, on or about 26 May 1945, wrongfully take and use without authority a certain motor vehicle, to wit: one quarter-ton truck of a value of more than fifty dollars ($50.00) property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Second Lieutenant Nicholas B. Stallworth, Service Battery 783d Armored Field Artillery Battalion, did, in the vicinity of Camp Bowie, Texas, on or about 10 June 1945, wrongfully participate in a card game for money with Technician

Fourth Grade Robert A. Schwandt, Technician Fifth Grade George W. Taylor, and Private Ralph J. Williams, all of Service Battery, 783d Armored Field Artillery Battalion.

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

3. Evidence for the prosecution:

On 26 May 1945 the accused was the Assistant S-4 and Ammunition Officer of the Service Battery, 783d Armored Field Artillery Battalion, then on bivouac near Camp Hood, Texas. At about 2 p.m. on that day, which was a Saturday, accused asked permission of his battery commander to take or send the ammunition section of the battery swimming for the afternoon. Such permission was granted on the understanding that either the accused or the senior noncommissioned officer would be in charge (R. 10, 14, 18).

At about 3 p.m. the same day the battery commander, needing the vehicle which had been used by accused during that week, and being unable to find it, caused a thorough search to be made of the battery area without finding any trace of the vehicle. The search was repeated at 5:30 p.m., after the swimming detail returned, and at 7:30 p.m., the same day with the same result. Simultaneously, searches were made in the bivouac area for the accused without success (R. 11).

The morning report of accused's organization showed him absent without leave from 3 p.m. on 26 May 1945 until 11 p.m. on 27 May 1945 (Pros. Ex. A). His battery commander testified that accused had no authority to be absent during that period (R. 12).

Although completely without authority to use the vehicle for other than routine duties (R. 24, 29), accused directed the driver assigned thereto, T/5 Arnold E. Kister, on the afternoon of 26 May 1945 "to be sure the jeep had plenty of gas and to see that the extra gas can in the back was filled", explaining that they were supposed to go to Brownwood, Texas. At 3 p.m. that afternoon accused and Kister departed from camp in the jeep bound for Brownwood, arriving there at 8 p.m. Kister dropped accused at his house, was instructed to pick him up the next day (Sunday, 27 May) at 2 p.m. for the return trip, and proceeded in the jeep to his own house in the same city. They arrived back at the bivouac area at 5 p.m. Sunday, refueled and departed almost immediately for Gainsville, Texas, where they remained until 10 p.m., returning to camp at

11 p.m. Kister had authority from no one other than accused to be away from camp (R. 19, 20, 21). Comparison of mileage readings made on Saturday morning and Monday morning showed that the jeep had been driven 402 miles over the weekend (R. 16). The vehicle was a one-quarter ton truck of a value of more than $50, property of the United States (R. 12, 13; Pros. Ex. B).

Accused was thoroughly acquainted with the fact that he had no authority to take the jeep on a pleasure trip. The policy on the use of vehicles in the battalion had been fully discussed at officers' meetings attended by accused, and was well known both to officers and to enlisted men of the battalion (R. 29, 30). Upon their return to camp at 11 p.m. on 27 May accused cautioned Kister "that in case anybody said anything we should say we just came back from an errand or something" (R. 20).

While accused had no authority to be away from camp over the weekend in question, it was a fact that the regular weekend "pass allowance" in the battery was 50 per cent, applied to officers and enlisted men alike, and more than 50 per cent of the officers of the battalion were in camp over that particular weekend. (R. 16, 17).

On the evening of 10 June 1945 accused's battery commander, in walking about the battery area, came upon a poker game in which accused and three enlisted men of his battery, T/4 Robert A. Schwandt, T/5 George W. Taylor and Private Ralph J. Williams, were participating. Money was being bet by accused and by the various enlisted men. There was at least $1.20 in cash on the table during the hand observed by the battery commander. He voiced no objection to the game at the time, but simply watched it a few minutes and then walked away. The game had a 10 cent limit (R. 12, 13, 15, 32-37).

4. Evidence for the defense:

Accused, after having his rights as a witness explained to him, elected to testify under oath. The battalion moved out from Camp Bowie to a bivouac area near Camp Hood on 21 May. Accused had been designated Assistant S-4 a few days previously, and, upon arrival at the bivouac area, he was assigned the additional duties of ammunition officer. A jeep was made available to him by the motor officer for use in the performance of his duties, being the same jeep he used on 26 May. From Monday, 21 May, until Saturday, 26 May, he "put 1000 miles on it" in the performance of his duties as ammunition officer. At noon Saturday he asked permission of his battery commander to send the ammunition section swimming. On Saturday afternoon the place was deserted, so he "wrote a letter and took off." Returning Sunday he found "the place deserted and hearing rumors that there were no orders that had to be put out I went to the USO in Gainesville and returned about 10:30 Sunday

night" (R. 38-40). On cross-examination accused admitted that without permission of anyone he went to Brownwood, Texas, in the jeep on 26 May (R. 40). On examination by the court accused stated that his trip to Brownwood "was combining business with pleasure." On Saturday evening, 26 May, he and his wife took a bus from Brownwood to Camp Bowie where they visited the Officers' Club, and while at Bowie he went to the BSO and picked up a "couple of papers" which he needed for the preparation of his ammunition report due 1 June (R. 41-43). Accused first testified that he picked these papers up Saturday "afternoon," but later stated that the time was 9:30 p.m. He admitted that he did not ordinarily have possession of a key to the building in which the papers were kept and stated that on this occasion he obtained a key from either the "tech sergeant or the staff sergeant, Sgt. Schwartz," he did not remember which one.

5. Rebuttal evidence for the prosecution:

T/5 George W. Taylor testified that his assignment for the month of May 1945 in the 783d Armored Field Artillery Battalion was that of clerk in the battalion supply office. He had held that assignment for six months and had prepared the monthly ammunition report each month during that time. Prior to May 1945, when accused came to the battery, these reports had been prepared under the supervision of "Lieutenant Burley." None of the information necessary for the preparation of the report for May 1945 was missing from the bivouac area at or about 26 May 1945 (R. 44, 45). He did not, however, prepare the report for May 1945, nor did he discuss the preparation of it with accused (R. 46-48).

6. Accused's absence without leave alleged in the Specification of Charge I was fully established by the prosecution's evidence and was admitted by the accused. The fact that accused apparently had no particular duties to perform at camp during the weekend of his absence supplies no defense to the charge of AWOL. A finding of guilty of this offense was required by the record of trial.

The Specification of Charge II alleges the wrongful taking and using, without authority, of a Government vehicle of the value of more than $50, in violation of Article of War 96. Accused admitted that, at the time and place alleged, he took and used the vehicle for the making of an extended trip. He also admitted that he had received no permission from anyone so to do. He claimed, however, that in doing so he was "combining business with pleasure," in that it was necessary for him to pick up a "couple of papers" at the distant point he visited. The papers, he contended, were needed by him for the preparation of a report requiring his signature. This contention was flatly contradicted by prosecution's rebuttal evidence. The court was fully entitled to reject accused's story as unworthy of belief and to accept the prosecution's rebuttal testimony (MCM, 1928, par. 124; CM 128252, Heppberger), and in view of the flimsy and improbable character of accused's testimony as a whole

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NAVY DEPARTMENT

the Board of Review is of the opinion that the court was amply justified in doing so. The record of trial sustains the finding of guilty.

The offense of gambling with enlisted men alleged in the Specification of the Additional Charge was established by the uncontradicted testimony of accused's battery commander and the three enlisted men who participated in the game. Such conduct on the part of an officer tends to destroy the respect of enlisted men for him, to weaken authority and to impair the integrity of required relationships; it is consequently prejudicial to good order and military discipline and violative of Article of War 96 (CM 248934, Murray, 31 B.R. 389; CM 252710, Bates, 34 B.R. 147). The offense in the instant case was aggravated by the fact that all of the enlisted men in question were members of accused's battery.

8. The records of the War Department show that accused is 22½ years of age and married. He graduated from Gulf Coast Military Academy in 1940, and was a student at Louisiana State University from 11 September 1940 until 4 March 1944, when, as a member of the ROTC, he was called to active service in the Army. He was commissioned a second lieutenant, Field Artillery, Army of the United States, upon graduation from the Field Artillery Officer Candidate School, Fort Sill, Oklahoma, on 12 August 1944.

The Staff Judge Advocate's Review, attached to the record of trial, contains the following statement with respect to prior punishment given this officer:

> "The Commanding Officer of the 783d Armored Field Artillery Battalion had occasion to punish the accused under the 104th Article of War on 27 April 1945 for failing to post range guards at the appointed time, on or about 13 April 1945."

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

Thomas N. Tolly, Judge Advocate.

William H. Bamberger, Judge Advocate.

Robert E. Trevethan, Judge Advocate.

05736

SPJGH-CM 283457 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 Nicholas B. Stallworth (O-556555), Field Artillery.

2. Upon trial by general court-martial this officer was found guilty of absence without leave for one day, in violation of Article of War 61 (Specification of Charge I); guilty of wrongfully taking and using a Government vehicle, in violation of Article of War 96; and guilty of gambling with enlisted men of his organization, 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 about 3 p.m. on Saturday afternoon, 26 May 1945, accused absented himself without leave from his organization, while on bivouac near Camp Hood, Texas, and did not return until the evening of the following day, Sunday 27 May. During that interval he made a pleasure trip to a point more than 100 miles distant from his camp in a Government jeep, having no authority from anyone to make such use of the vehicle. The jeep was driven on this trip, pursuant to direction of the accused, by an enlisted man, who likewise had no authority to be absent from camp. The jeep was driven a total of approximately 400 miles while in such unauthorized use and possession of the accused and the enlisted man. On the evening of 10 June 1945 accused was observed to be participating in a 10 cent-limit poker game with three enlisted men of his battery, in the battery area, at Camp Bowie, Texas. While the sentence is, in my opinion, entirely legal, it is my belief that, in view of accused's youth, his short term of commissioned service, the nature of the offenses of which he has been convicted and the absence of any record of a prior conviction, it is too severe. I recommend, therefore, that the sentence be confirmed but commuted to a reprimand and forfeiture of pay of $50 per month for a period of six months.

4. The Staff Judge Advocate's Review, attached to the record of trial, contains the following statement respecting prior punishment given this officer:

> "The Commanding Officer of the 783d Armored Field Artillery Battalion had occasion to punish the accused under the 104th Article of War on 27 April 1945, for failing to post range guards at the appointed time, on or about 13 April 1945."

5. Inclosed is a form of action designed to carry the above recommendation into effect should such recommendation 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 commuted to reprimand and forfeitures. GCMO 427, 28 Aug 1945.)

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

SPJGK - CM 283459

28 JUL 1945

UNITED STATES	)	I TROOP CARRIER COMMAND
v.	)	Trial by G.C.M., convened at Bergstrom Field, Austin, Texas, 26 and 27 June 1945. Dismissal and confinement for one (1) year.
First Lieutenant MAURICE G. REID (O-578971), Air Corps.	)	

OPINION of the BOARD OF REVIEW
LYON, LUCKIE, MOYSE and SYKES, 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 arraigned and tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant Maurice G. Reid, Air Corps, Inactive, and on and before 18 March 1945 being First Lieutenant Maurice G. Reid, Air Corps, Squadron A, 807th Army Air Forces Base Unit, did, at Austin, Texas, on or about 3 February 1945, feloniously embezzle by fraudulently converting to his own use and benefit two cases of Old Gold cigarettes of the value of about $183.60 and two cases of Philip Morris cigarettes of the value of about $183.60, the property of the Non-Commissioned Officers' Club, Bergstrom Field, Austin, Texas, entrusted to him by virtue of his office, he, the said First Lieutenant Maurice G. Reid, being at that time the counselor of the Non-Commissioned Officers' Club.

He pleaded not guilty to and was found guilty of the Charge and of the Specification, except the words "two cases of Old Gold Cigarettes of the value of about $183.60 and two cases of Philip Morris cigarettes of the value of about $183.60," substituting therefor the words "four cases of assorted cigarettes of the value of about $367.20," of the excepted words, not guilty, of the substituted words, guilty. There was no evidence of previous convictions. He was sentenced to be dismissed the service, and to be confined at hard labor for two years. The reviewing authority approved the sentence but reduced the period of confinement to one year and forwarded the record of trial for action under Article of War 48.

3. The record of trial reveals that accused was commissioned as an officer in the Army of the United States on 16 April 1943 and was relieved from active duty on 25 April 1945. The alleged offense was committed on or about 3 February 1945. The charges were dated and sworn to on 23 May 1945; referred to an investigating officer that date, and the investigating officer made his report on 5 June 1945. The charges were referred for trial on 12 June 1945, and the trial was held on 26 June 1945. The accused, apparently, voluntarily submitted himself to the jurisdiction of the military authorities and was not placed in confinement or other restraint.

4. The only question which we deem it necessary to discuss is whether the relief of accused from active duty prior to the time the charges were preferred deprived the court of jurisdiction under the particular specification. The fact that accused did not object to the jurisdiction is immaterial. Jurisdiction cannot be given by consent of the parties if it did not otherwise exist. By virtue of the last sentence of Article of War 94, a court-martial retains jurisdiction, in some instances, even though the accused officer has been relieved from active duty. The sentence reads:

> "And if any officer, being guilty, while in the military service of the United States, of embezzlement of ration savings, post exchange, company, or other like funds, or of embezzlement of money or other property intrusted to his charge by an enlisted man or men, receives his discharge, or is dismissed, or is dropped from the rolls, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so discharged, dismissed, or dropped from the rolls."

It is to be noted that the sentence refers to embezzlement in two categories: (1) of funds from ration savings, post exchange, company, or other like funds; OR (2) property or money intrusted to his charge by an enlisted man or men. The question is whether the offense alleged against the accused falls within the above provisions of Article of War 94, thereby subjecting accused to the continuing jurisdiction of a court-martial.

5. In the instant case accused is charged with the embezzlement of property of a noncommissioned officer's club. No money or funds are involved. Property being mentioned only in the second part of the above sentence, it becomes necessary to determine whether the cigarettes were property of an enlisted man or men intrusted to the charge of accused. Army Regulations provide for the establishment of a noncommissioned officers' club, and further provide for the regulation of its funds and property. Paragraph 4c, AR 210-50, states that the fund of a noncommissioned officers' club is a "nonappropriated fund". Paragraph 5i states, "Cash, securities, or other property of a nonappropriated fund will at no time be distributed to individuals" (underscoring supplied). The same regulation, paragraph 12, provides that deposits or contributions may be made to a noncommissioned

officers' club, and sub-paragraph a(2) states,

> "* * * deposits and contributions are accepted with the express condition that no person making a deposit or contribution will thereby acquire or own any funds or property of the club or association or possess any enforceable right or interest therein."

By paragraph 5b it is provided that "non appropriated funds are - (1) primarily for the welfare and recreation of the military personnel currently stationed at a War Department installation, and (2) secondarily for the welfare and benefit of the entire army." Therefore it is quite obvious that the property described in the specification and alleged to have been embezzled was not the property of an "enlisted man or men" within the provision of Article of War 94.

6. Jurisdiction of military courts is special and limited and cannot be implied as in cases before general courts of law and equity (8 Op. Atty. Gen. 328), therefore, the statutory extension of jurisdiction must be strictly construed. It is the opinion of the Board of Review that the present case does not come within the provisions of Article of War 94 in that accused is not charged with the embezzlement of funds from ration savings, post exchange, company, or other like funds, nor is he charged with embezzlement of money or property intrusted to his charge by an enlisted man or men.

7. In view of the foregoing, we consider it unnecessary to discuss the several other questions presented by the record of trial, such as whether the variance between the allegation and findings is fatal; or whether the property was obtained through fraud and trickery so as to make the offense larceny rather than embezzlement.

8. For the reasons stated, the Board of Review is of the opinion the court had no jurisdiction of the accused and that the record of trial is, therefore, legally insufficient to support the findings of guilty and the sentence.

Henry E. Zom, Judge Advocate

Charles G. Luckie, Judge Advocate

(On Leave), Judge Advocate

Wesley A. Sykes, Judge Advocate

SPJGK - CM 283459 1st Ind

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

TO: Commanding General, Headquarters I Troop Carrier Command, Stout Field, Indianapolis, Indiana

1. In the case of First Lieutenant Maurice G. Reid (O-578971), Air Corps, I concur in the foregoing opinion of the Board of Review holding that the court had no jurisdiction of the accused and that the record of trial is, therefore, legally insufficient to support the findings of guilty and the sentence, and for the reasons stated I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (MCM, 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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

(CM 283459).

Myron C. Cramer

1 Incl
Record of trial

MYRON C. CRAMER
Major General
The Judge Advocate General

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

SPJGN-CM 283545

UNITED STATES	FIELD ARTILLERY REPLACEMENT TRAINING CENTER
v.	Trial by G.C.M., convened at Fort Sill, Oklahoma, 13 July 1945. Dishonorable discharge and confinement for one (1) year. Federal Reformatory, El Reno, Oklahoma.
Private JOHN W. PUCKETT (38731443), Battery B, 26th Battalion, Field Artillery Training Regiment.	

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

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

2. The evidence supports the findings of guilty and the sentence except for the designated place of confinement, the legality of which presents the only question requiring discussion.

Article of War 42 provides that no person under the sentence of a court-martial shall be confined in a penitentiary unless the period of confinement adjudged by "* * * such court-martial is more than one year * * *". Since the period of confinement imposed in the present case was one year only, and since confinement in a reformatory is permitted only in cases in which confinement in a penitentiary is permitted (CM 222140, Teal, 8 BR 267), the designation of a reformatory as the place of confinement was not authorized.

3. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty and 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 at a place other than a penitentiary, Federal reformatory or correctional institution.

Abner E. Lipscomb, Judge Advocate.

Robert J. O'Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 283545 1st Ind
Hq ASF, JAGO, Washington 25, D.C.
TO: Commanding General, Field Artillery Replacement Training Center, Fort Sill, Oklahoma.

1. In the case of Private John W. Puckett (38731443), Battery B, 26th Battalion, Field Artillery Training Regiment, 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 sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year in a place other than a penitentiary, Federal reformatory or correctional institution, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution you will have authority to order the execution of the sentence.

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

(CM 283545).

Myron C. Cramer

1 Incl
Record of trial

MYRON C. CRAMER
Major General
The Judge Advocate General

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

SPJGN-CM 283637

UNITED STATES	)	FIRST AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Westover Field, Massachusetts, 7 July 1945. Dismissal and total forfeitures.
	)	
Second Lieutenant RAYMOND J. AKSCIN (O-836545), 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 Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Raymond J. Akscin, E Squadron, 112th Army Air Force Base Unit, (CCTS-H), did, on or about 8 April 1945, wilfully and wrongfully fly a government owned B-24 type airplane, #42-51003, over the city of Charlotte, North Carolina, at an altitude of less than one thousand feet, in violation of paragraph 16a, Army Air Force Regulation 60-16, dated 6 March 1944.

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

3. The evidence for the prosecution shows that, at approximately 1600 o'clock on the afternoon of 8 April 1945, a B-24 airplane was observed "making turns" over the thickly populated northeast section of

Charlotte, North Carolina, at an altitude of from fifty to two hundred feet above the ground. After hovering over the district for about fifteen minutes, the ship proceeded in a northeasterly direction for a distance of five or six miles beyond the city to the Plaza Airport, descended "in a very shallow gliding dive" to a height of between fifty to seventy-five feet, pulled up in a steep turn to the right, and departed. The "buzz" number painted on the left side of the nose was "003" (R. 8-9, 13-14, 16, 19; Pros. Ex. 1).

That day a formation of six B-24's was scheduled to fly from Chatham Field, Georgia, to Knoxville, Tennessee. One of the planes was to be piloted by the accused. On its nose there appeared the last three digits of its serial number, which was 1003. Two other planes in the flight were respectively numbered 0983 and 0984. Their logs record that between approximately 1526 and 1554 they flew successively over Spartanburg, South Carolina, and Hickory and Wilkesboro, North Carolina (R. 19-20; Pros. Exs. 2-10).

4. After being fully apprized of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. Six of the members of his crew also appeared for the defense and unanimously failed to recall participating in a flight on 8 April 1945 or flying over a thickly populated area at an altitude of one thousand feet at any time (R. 21, 23-24, 26, 28-29, 38-39; Def. Exs. A, B). Flight Officer Russell W. Kistler, the co-pilot, stated, however, that he was from Charlotte, North Carolina, and that he lived in the northeast "portion" (R. 38-39). Although Second Lieutenant Ward M. Webb, the navigator, was able to identify a log in his handwriting for 8 April 1945 indicating that plane 1003 had taken off at 1405 that afternoon in formation with planes "983" and "984", the course entered by him in that instrument under the heading "Position" was completely at variance with that recorded in the two logs introduced into evidence by the prosecution. Instead of a flight northward over Spartanburg, Hickory, and Wilkesboro, several successive sweeps over the triangle formed by Chatham Field, Georgia, Savannah, Georgia, and Parris Island, South Carolina, were shown for the hours between 1415 and 1830. Under "Remarks" there was set forth the apparently incongruous entry "Left Formation 1715" (R. 29, 31; Def. Ex. C). According to Lieutenant Webb, it was unnecessary to record a departure from one formation and joinder with another, but most of the time it was his practice to note the change (R. 33-34).

The seventh and last witness for the defense, other than the accused, was Captain Louis H. Joram, the Base Statistical Officer at Westover Field, Massachusetts. He had examined his records and had discovered "seven cases of duplication in serial numbers of the last three digits". He had no personal knowledge concerning the numbering of aircraft at Chatham Field (R. 41-43).

Unlike the members of his crew, the accused remembered flying in a B-24 on 8 April 1945. The event was firmly fixed in his mind be-

cause the termination of the flight was the only occasion in which he had ever "shot two landings" (R. 44, 48). Although he was scheduled to participate with planes 983 and 984 in a mission to Knoxville, Tennessee, and although he took off when they did, he soon separated from them because their "leader didn't come up". After circling over the field traveling from one formation to another, the accused finally joined three strange ships in flying the triangle formed by Chatham Field, Savannah, and Parris Island (R. 49-50, 52-54, 56-58). At no time did he ever leave the local flying area. Occasionally the co-pilot was at controls (R. 47-48). After some three hours the accused broke away from the formation to which he had attached himself and devoted the succeeding hour or hour and a half to instrument practice (R. 55-56). Although he had talked to the pilots of the other planes in the formation, he did not remember their names (R. 59).

5. The Specification of the Charge alleges that the accused "did on or about 8 April 1945, wilfully and wrongfully fly a government owned B-24 type airplane, * * * over the city of Charlotte, North Carolina, at an altitude of less than one thousand feet, in violation of paragraph 16a, Army Air Force Regulation 60-16, dated 6 March 1944". This offense was laid under Article of War 96.

The findings of guilty are predicated upon three evidentiary items, two elicited by the prosecution and the third by the defense. They are:

> 1. That on the afternoon of 8 April 1945 the accused was scheduled to participate, as the pilot of a B-24 airplane, in a flight, which at 1545 o'clock passed within forty miles of Charlotte, North Carolina (R. 31; Pros. Exs. 7, 9).
>
> 2. That at 1600 o'clock a B-24 airplane bearing the same "buzz" number as his ship flew over the northeast district of that city and over the nearby Plaza Airport at altitudes ranging from fifty to two hundred feet above the ground.
>
> 3. That the home of his co-pilot, Flight Officer Russell W. Kistler, was located in the northeast section of the city.

In direct contradiction of the circumstantial case thus established the defense has introduced evidence placing the accused at the time of the alleged offense with another formation several hundred miles away. To cast doubt upon the value of the most important element of the prosecution's proof the defense has shown that at Westover Field, Massachusetts, where the trial was held, duplications of "buzz" numbers were common.

When, as here, the prosecution relies upon circumstantial evidence which is in direct conflict with personal, eye-witness testimony offered by the defense, every stone in the circumstantial edifice should be strong and without substantial flaw. In other words, the "evidence must be such as to exclude any fair and rational hypothesis save that of guilt". Dig. Op. JAG, 1912-1940, sec. 395 (9). The record before the board does not meet this test. Obviously the main pillar of the prosecution's case is the testimony concerning the "buzz" number of the B-24 observed over Charlotte. If this one item is removed, the whole structure is weakened. While extremely convincing when first presented by the prosecution, the evidence relating to the "buzz" number was deprived of its initial persuasiveness by the defense testimony relating to the existence of several duplications at Westover Field. Although proof of a condition at that base was not ipso facto proof of the same condition at other installations, it may logically be inferred that what was true of one might reasonably also be true of the others. Under the circumstances, after the defense had shown the duplications at Westover Field, the prosecution was under a burden to establish that similar duplications were improbable in the area in which the alleged low flying was reported. In other words, the defense raised a reasonable doubt, which the prosecution was obliged to meet, allay, and overcome. This burden the prosecution failed to assume.

Standing by itself, this omission might not be fatal, but, when considered in the light of all of the evidence for the defense, it completely undermines the prosecution's case. The testimony of the defense witnesses, viewed as a whole, was credible and consistent. Flight Officer Kistler was positive that he had never flown on any mission over Charlotte, North Carolina; the accused was equally certain that on the day in question he had never been outside the triangle comprised of Chatham Field, Savannah, and Parris Island; and the log prepared by Second Lieutenant Webb, the navigator, substantiated the accused's account in every material detail. None of this evidence was impeached or even controverted. Although not necessarily true, its presence in the record, coupled with the weakening of the prosecution's circumstantial case, creates a substantial reasonable doubt which renders the record legally insufficient to sustain the conviction.

6. The accused, who is single and about 28 years of age, attended high school for two years. From 1933 to 1943 he was employed as a farmer in Southhold, Long Island, New York. He entered the Army as a private on 9 December 1942 and served in an enlisted capacity until commissioned as a second lieutenant on 4 August 1944. He has been on active duty as an officer since this last date.

7. For the reasons stated above the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Abner E. Lifsconb, Judge Advocate.

Robert J. Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 283637 1st Ind 9 AUG [illegible]
Hq ASF, JAGO, Washington 25, D. C.
TO: Commanding General, First Air Force, Mitchel Field, New York.

1. In the case of Second Lieutenant Raymond J. Akscin (0-836545), Air Corps, I concur in the foregoing opinion of the Board of Review, holding the record of trial legally insufficient to support the findings of guilty and the sentence, and for the reasons stated therein I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (MCM, 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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

(CM 283637).

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 25, D. C.

SPJGH-CM 283682

27 AUG 1945

UNITED STATES v. Corporal THURMAN E. LAWS (34259181), Squadron L, 3018th Army Air Forces Base Unit, Kingman Army Air Field, Kingman, Arizona.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Kingman Army Air Field, Kingman, Arizona, 28 June 1945. To be shot to death with musketry.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Thurman E. Laws, Squadron L, 3018th Army Air Forces Base Unit, Kingman Army Air Field, Kingman, Arizona, did, at Kingman, Arizona, on or about 23 June 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Lila O. Laws and Waldemar A. Vernet, human beings, by stabbing them with a knife.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of any previous conviction was introduced. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence but recommended that the sentence be commuted to life imprisonment and forwarded the record of trial for action under Article of War 48.

3. On the early afternoon of 23 June 1945, Technical Sergeant Waldemar A. Vernet and Private Alvin A. Bridges visited the town of Kingman, Arizona. While drinking in a bar, Vernet espied Lila Laws, the wife of accused, as she was passing by. At Vernet's suggestion she joined the two men and during the next hour or two the three of

them consumed several drinks (R. 6, 7, 13, 14). Thereafter they moved to another drinking establishment known as the Tavern Bar, arriving there about 3 p.m. While at that bar it was decided that all three would drive to Boulder City to spend the evening and about 5 or 5:30 p.m. Vernet left the group to obtain Lila's automobile which was apparently parked in another section of the town. Between 5:30 and 6:30 p.m., while Vernet was absent, accused entered the Tavern Bar, was introduced to Bridges and turning to his wife who by then was intoxicated he asked her to go home with him but she refused to do so. Her refusal angered accused and as he continued to urge her to leave, Bridges stepped to the bartender and asked him to tell Vernet to remain outside when he returned because Lila's husband had put in appearance (R. 8, 9, 14, 15, 19, 20, 22, 23). Vernet returned about a half hour after accused had joined his wife and, addressing accused, said: "How are you, Corporal? Are you talking to me tonight?" Lila continued to drink and refused to leave with her husband despite his continued urging. Shortly after 6:30 p.m. accused angrily arose, poured a drink on the floor and departed alone for his home (R. 9, 14, 20). Sometime shortly before accused arrived at the bar or soon after he left, Lila and Vernet were observed seated in a booth kissing each other (R. 53).

Around 9:30 p.m., Lila who by then was quite drunk seated herself at the bar beside another soldier, Private First Class Carl R. Arnold, and commenced conversing with him. Soon they moved to the patio of the bar where Lila continued drinking. Vernet joined them and when informed by Lila that she had lost her automobile keys he commenced looking about the patio for them. Accused, who had returned and was watching the group from outside the patio, finally entered, approached his wife and again urged her to leave with him but she refused to do so until she finished her drink. Accused thereupon walked from the patio (R. 10, 11, 26-29, 35-37, 40, 41). Thereafter Arnold, Vernet and Lila went outside the patio and searched for the car keys in the parking area. Vernet and Lila were next observed standing in a close embrace near a parked automobile. Vernet's hands were on Lila's buttocks and she had her arms around his neck (R. 29, 43, 54, 55, 68). About 15 minutes later, accused was seen walking past the bar toward the area where Vernet and Lila had been standing. He returned alone but soon made a second trip and returned that time conducting Lila by the hand as he urged her to accompany him home. She pulled herself from accused's grasp, walked to the ladies' room, returned and then stood near the corner of the building with accused where they engaged angrily in conversation. In the meantime, Vernet and Arnold were searching for the automobile keys in the parking area close by. It was now about a half or three quarters of an hour since Vernet and Lila had been observed embracing each other in the parking area. (R. 44, 50, 51, 55-57, 60, 66, 68-70).

Within a short period of time accused was seen to approach Vernet as he searched about the parking area and he struck him in the back, As Vernet staggered and blood flowed from his back, accused was

observed standing a few feet away with a knife in his hand. Promptly thereafter Arnold raced for the patio pursued by accused who stopped abruptly as he espied his wife standing near the patio. Accused then struck at Lila, she reeled into a wire fence, sagged over it and accused took flight from the parking area, leaping the fence. Rescuers ran to Lila and found blood flowing from her side and arm. Vernet was lying in a pool of blood near a parked automobile not far away (R. 11, 12, 30-33, 44-48, 50, 51, 60-66).

Doctor Robert A. Price attended Mrs. Laws on the night of 23 June and early morning of 24 June 1945. He found her suffering from knife wounds inflicted about 10 p.m., 23 June 1945. She expired at 12:25 a.m., 24 June 1945 "from shock caused by hemmorage (sic) from her left lung and left intercostal vessels, caused by knife wounds" (R. 71; Pros, Ex. 2). Vernet died on 23 June 1945 and an autopsy performed at 12:45 a.m. the next morning revealed that he expired as a result of a "massive internal hemorrhage following a pulmonary stab wound at level of 3rd thoracic vertebrae 1½ inch lateral to right side of spine, penetrating superior portion of lower lobe of right lung and piercing inferior branch of right pulmonary artery" (R. 71, 72; Pros, Ex. 3).

A lengthy statement signed and sworn to by accused on 24 June 1945 was admitted without objection after it had been established to have been voluntarily made following full warning of accused as to his rights. In its important aspects the statement is as follows (R. 72-75; Pros. Ex. 6). Accused came to the town of Kingman about 5:45 p.m., 23 June 1945, on his way home from Kingman Army Air Field. He stopped at the Rail Cafe where his wife worked but found she had not put in appearance. This bothered accused inasmuch as he had informed his wife the previous evening that he objected to her conduct with Vernet. He waited awhile at the Rail Cafe and then commenced a search of the taverns of the town finally finding his wife about 7 p.m. in the Tavern Bar occupying a booth with Vernet and Bridges. Accused was seized with anger when he observed Vernet seated close to his wife. Joining the group he asked his wife to accompany him home while he bathed and changed his clothing. She procrastinated, wishing to have another drink first. Later, after telling accused she intended to go dancing that evening with him or "somebody", she sent him to the Rail Cafe to inform the proprietor that she was ill and would not be at work that evening. When he returned he repeatedly urged his wife to go home with him and each time she requested another drink before so doing. After several rounds of drinks had been obtained for her and she still procrastinated, accused tossed her last drink on the floor and set out for home alone.

Sometime around 9 p.m. accused left his home taking with him a Bowie knife because as he stated "I figured I might need it if the soldiers tried to frame up on me and not let me take her home." He found his wife seated in the patio of the Tavern Bar with a strange soldier

and soon they were joined by Vernet. After she stated that she had lost the automobile keys, all three men commenced looking for them about the patio and the bar. Finally, as accused walked from the bar to the patio, he saw his wife and Vernet standing in the areaway outside the patio. His wife's arms were about Vernet's waist and Vernet's arms were around her shoulders. As they looked "adoringly into each other's eyes" and Vernet started to say "Well, Honey ---," accused "lost all sense of reason," jerked his Bowie knife from the scabbard and lunged at Vernet. From then on he had no idea where his blows fell. The next thing he remembered was running down an alley in the rear of the Tavern Bar. He tossed his knife away and it landed on the roof of a garage. Eventually he gravitated to the Mohave County Hospital, saw nurses and doctors working inside, figured that they were concerned with either his wife or Vernet and entered the hospital. After identifying himself he beseeched the doctor to save his wife's life and then, at the suggestion of a nurse, went to a Western Union office to notify her parents. While there military police entered the office and accused surrendered to them.

The military police found a knife on the roof of the garage where accused said he had thrown his and when it was shown to him accused admitted it was the knife he had used (R. 75; Pros. Ex. 4).

4. After having been informed of his rights, accused elected to give sworn testimony in his own defense and testified as follows. Before entering the Army he had lived in North Carolina. He left school after completing the seventh grade and thereafter farmed with his father and worked for a textile mill and for Tennessee Valley Authority. He was 22 years old when he entered the Army in which he has served 38 months. He met Lila in September 1943 and married her in December 1943. They attended church and accused much in love with his wife gave her his pay check each month and did all he could to make her happy (R. 79-82).

About a week and a half before the fatal day accused observed his wife and Vernet conversing in the Rail Cafe where she was employed. Later he saw them seated together in a booth and his suspicions were aroused. On 22 June 1943 he again saw them together, protested to his wife and was told that if he didn't like what was going on to stay away from the Rail Cafe. Accused was bothered about his wife's association with Vernet and on 23 June 1945, when he did not find her working, he went searching for her (R. 89-95).

Accused then told of finding his wife intoxicated in the Tavern Bar seated in a booth close to Vernet and of his repeated requests that she accompany him home and of her repeated excuses that she wished either to finish a drink or have one more. She told accused that she was going to Boulder City with Vernet and Bridges for the evening and requested accused to inform the proprietor of the Rail Cafe that she would not be at work. When he returned from that mission she still refused to leave the Tavern Bar. Accused then emptied her drink on the floor and left for home alone to bathe and dress. Accused was mad and upset

because of his wife's behavior (R. 82-84, 97-108).

When he left his home to return to the Tavern Bar he took the Bowie knife from his kitchen shelf and placed it in his pocket. He had bought the knife in Tia Juana, Mexico, at his wife's suggestion and it had been used in their kitchen for cutting bread and meats. He took the knife with him in case Vernet and the other soldier sought to prevent him from taking his wife home (R. 84, 87, 89, 111, 112). After returning to the Tavern Bar accused joined in the search for the automobile keys and during it he observed his wife and Vernet embracing each other, he with his arms about her neck and she with hers about his hips. As they gazed at each other, accused heard Vernet say "Well, honey ——." Accused unsheathed the knife but had no recollection of what happened from then until he leaped the fence. Observing the bloody knife in his hands, he flung it away and soon thereafter appeared at the hospital (R. 84, 85, 114, 116, 117). While he was at the Western Union office notifying his wife's folks, he was taken into custody by military police (R. 86, 87).

It was stipulated that the keys to Mrs. Laws' automobile were found in the waistband of Vernet's trousers; that in Vernet's billfold was discovered a piece of paper bearing the name Lila Laws; and that in Mrs. Laws' purse was found an envelope bearing Vernet's name and military address (R. 126-128; Def. Exs. B, C).

On 24 June 1945, accused was taken to the mortuary where he tearfully kissed and embraced his wife's lifeless body, and professed his undying love for her (R. 124, 125).

5. Murder is the unlawful killing of a human being with malice aforethought. Malice aforethought does not necessarily connote hatred or personal ill will. Its existence is established by proof either of an actual intent to take life or of intent to inflict grievous bodily harm upon any person or knowledge that the act which causes death will probably cause grievous bodily harm (MCM, 1928, Par. 148a, CM 281750, Rubit). The evidence conclusively establishes that accused assaulted both his wife and Vernet with a knife and that both expired as a result of the wounds they received. From these facts the court was entitled to conclude that accused intended to inflict grievous bodily harm upon each of them which in turn established the requisite malice aforethought unless the killings were committed in the heat of sudden passion caused by adequate provocation.

It is apparent that when the assaults occurred, accused was laboring under a severe emotional disturbance induced by his wife's loose conduct with Vernet. When a killing is committed in the heat of sudden passion caused by provocation, the homicide is manslaughter (MCM, 1928, Par. 149a,). The provocation must be such, however, as the law deems adequate to excite uncontrolled passion in the mind of a reasonable man. The law has recognized that the sight by a husband of

an act of adultery committed by his wife is adequate provocation (MCM, 1928, par. 149a; Wharton's Criminal Law, 12th ed., Vol. I, sec. 426). However, even accepting as true accused's testimony that immediately before the killings he saw his wife and Vernet embracing each other their conduct was not so extreme that the sight of it by accused constituted adequate provocation as a matter of law.

Not only must adequate provocation have existed, but furthermore it must have excited an uncontrollable passion within accused and the killing must have occurred while he was in the throes of that passion if the offenses are to be reduced to manslaughter. Where sufficient cooling time elapses between the provocation and the killing the offense is murder even if the passion persists (MCM, 1928, par. 149a). The prosecution's evidence here shows that the killing occurred more than 15 minutes after Vernet and Mrs. Laws had embraced and immediately after accused had engaged in angry conversation with his wife. For over three hours before the killings took place accused had known and witnessed familiarity between his wife and Vernet. Angered by it he had proceeded home where he procured a Bowie knife with which he returned to the tavern. From all these facts the court was amply warranted in concluding that, even had the embraces constituted adequate provocation, nevertheless the killings did not occur while accused was in the throes of an uncontrollable passion produced by the sight of the embrace. Rather they resulted from a mind so angered by events occurring over a period of hours that it willingly conceived the intent to kill. Although Mrs. Laws' conduct may well constitute an extenuating circumstance to be considered in determining the appropriate penalty, nevertheless it is insufficient as a matter of law to reduce accused's offense from murder to manslaughter. In our opinion the record of trial is legally sufficient to support the court's findings of guilty.

The two offenses charged, i.e., the murder of Vernet and the murder of Mrs. Laws, are set forth in the same Specification. Inasmuch as they are separate offenses they should have been alleged in separate Specifications (MCM, 1928, par. 29b). However, this defect in form is not fatal since the essential elements of each offense were alleged, the accused was not misled or deceived by the misjoinder nor were any of his substantial rights materially affected thereby (CM 247496, Egalnick, 30 B.R. 361).

6. Accused is 25 years of age. He entered military service on 10 April 1942.

7. Attention has been given to the following communications received in The Office of The Judge Advocate General and forwarded herewith, viz: letter from accused dated July 5, 1945; letter from accused's sister, Mrs. Luther Beauton, dated July 3, 1945; letters from C. C. Buchanan, Esq., civilian counsel for accused, dated July 14, 1945 and July 23, 1945; letter from the Honorable R. Gregg Cherry, Governor of North Carolina; and letter from Mr. Josephus Daniels, dated July 20, 1945. On 9 August 1945, Mr. C. C. Buchanan, civilian counsel for accused, was accorded a full hearing before the Board of Review. He submitted to

the Board for its consideration many communications too numerous to itemize here but all of which are forwarded herewith.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of a violation of Article of War 92.

Thomas N. Jaffy, Judge Advocate

William H. Lamberl, Judge Advocate

Robert E. Trevethan, Judge Advocate

(124) SPJGH-CM 283682 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 Corporal Thurman E. Laws (34259181), Squadron L, 3018th Army Air Forces Base Unit, Kingman Army Air Field, Kingman, Arizona.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The murders of Sergeant Waldemar Vernet and accused's wife, Lila Laws, were committed by accused while he labored under the stress of extreme anger produced by his knowledge and actual observance of an amorous familiarity existing between, and openly flaunted before him by, the two deceased. Accused's prior civil and military records are unblemished. In his action the reviewing authority recommended that the sentence be commuted to life imprisonment. Because of the extenuating circumstances, I concur with the recommendation of the reviewing authority and I recommend that the sentence be confirmed but that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for life, and that the sentence as thus commuted be carried into execution. I further recommend that the United States Penitentiary, Leavenworth, Kansas, be designated as the place of confinement.

3. Consideration has been given to the following communications received by my office and transmitted herewith, viz: Letter from accused dated 5 July 1945; letter from accused's sister, Mrs. Luther Beauton, dated 3 July 1945; letters from C. C. Buchanan, Esq., civilian counsel for accused, dated 14 and 23 July 1945; letter from the Honorable R. Gregg Cherry, Governor of North Carolina; and letter from Mr. Josephus Daniels, dated 20 July 1945. There are also transmitted herewith numerous communications from private individuals and State and Federal officials urging clemency for accused, these communications having been submitted by counsel for accused at a hearing held before the Board of Review on 9 August 1945.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Ltrs from accused and approx 45 private individuals and State and Federal officers
3. Dft ltr for sig S/W
4. Form of action

8

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life. GCMO 468 , 29 Oct 1945).

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

SPJGN-CM 283726

UNITED STATES	)	ARMY AIR FORCES PERSONNEL DISTRIBUTION COMMAND
v.	)	Trial by G.C.M., convened at Miami Beach, Florida, 20 and 21 June 1945. Dismissal, total forfeitures and confinement for two (2) years.
Second Lieutenant JESSE K. BOWLES (0-685292), 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 2nd Lieutenant Jesse K. Bowles, Air Corps, Squadron H, 1020th Army Air Forces Base Unit (Redistribution Station No. 2), did, at Miami Beach, Florida, on or about 23 December 1944, with intent to defraud, wrongfully and unlawfully make and utter to Robert C. Martin, doing business as Martin's Drug Store, a certain check, in words and figures as follows, to wit:

Dec 23 1944 No.

National Bank of Fort Sam Houston
San Antonio, Texas

Pay to the order of Martin's Drugs $25.00

Twenty-Five and - - - - - - - - no/100 Dollars

and by means thereof, did fraudulently obtain from Robert C. Martin, doing business as Martin's Drug Store, $25.00, he the said 2nd Lieutenant Kesse K. Bowles 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.

Specifications 2 to 5, inclusive, are identical with Specification 1 except as to dates and amounts as follows:

Specification	Date	Amount
Specification 2	29 December 1944	$20.00
Specification 3	30 December 1944	$25.00
Specification 4	30 December 1944	$25.00
Specification 5	2 January 1945	$35.00

Specifications 6 to 15, inclusive, are identical with Specification 1 except that each check was drawn on the First National Bank of St. Petersburg, Florida, and made and uttered to Ben Gaines. As to dates and amounts they were as follows:

Specification	Date	Amount
Specification 6	12 February 1945	$30.00
Specification 7	12 February 1945	$25.00
Specification 8	13 February 1945	$30.00
Specification 9	14 February 1945	$30.00
Specification 10	14 February 1945	$35.00
Specification 11	15 February 1945	$30.00
Specification 12	19 February 1945	$35.00
Specification 13	19 February 1945	$35.00
Specification 14	20 February 1945	$40.00
Specification 15	21 February 1945	$50.00

The accused pleaded not guilty to, and was found guilty of, the Charge and its Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for two years. The reviewing authority approved only so much of the findings of guilty of Specifications "6, 7, 8, 9, 10, and 11 as finds the accused guilty, excepting the words 'with intent to defraud' and 'fraudulently', wherever they appear"; approved the sentence; and forwarded the record of trial for action under Article of War 48.

3. The defense, at the inception of the trial, raised the question of the accused's mental accountability at the time of the alleged offenses and presented Major Marshall deG Ruffin, Medical Corps, a psychiatrist at the Army Air Forces Regional and Convalescent Hospital, Coral Gables, Florida, as a witness (R. 14, 15). He testified that the accused was a patient at the Army Air Forces Regional and Convalescent Hospital from 6 February 1945 to 17 April 1945 and during that period was daily under the observation of the witness and his associates. This period of study and observation led the witness to a finding that a psychopathic behavior pattern was "inherent" in the accused, "if not outwardly, certainly inwardly", since his childhood and that this condition "blossomed * * * to full flood" under the stimulus of overseas experience. As a result of this experience he had developed several anxiety symptoms which, while characterized by tension and restlessness, were "moderate" and "mild" and no more severe than those exhibited by many other returnees (R. 18). His condition was further distinguished, however, by the negotiation of a series of worthless checks and, since he had never before revealed such "anti-social" and "amoral" behavior, the witness and his associates "were at a loss to completely explain the case". They concluded that the accused "had both a constitutional psychopathic state and anxiety reaction" (R. 17). The fact that the accused was "push[ed] * * * into a type of behavior that repeats itself" could be explained by the fact that he was emotionally unstable, that "he lacks something, we don't know what, that makes a person a normal well adjusted individual", and that he had an inherently weak character that was unusually susceptible to the strains and stresses of overseas service. He was thus easily swayed in the direction of abnormal behavior (R. 17, 23).

Major Ruffin expressed the opinion that the accused could distinguish right from wrong (R. 16). When asked whether the accused was so far free from mental defect, disease, or derangement as to be able to adhere to the right, the witness, after stating that this was a "difficult question to answer", replied in the negative (R. 17, 18, 27). He explained that the accused has an "illness, just as any criminal has" (R. 23) and went on to say:

> "I feel that he had a defect and he could not help himself from behaving the way he did. I feel this fellow is sick. I think he will behave in this way for a long time to come. I think he has been this way all his life, and he has blossomed out in the Army due to combat experience. I think he is sick. He is sick as hell, just as I think Al Capone is sick as hell" (R. 27).

The witness testified, however, that in his opinion the accused was "in a legal sense" responsible for his acts (R. 25).

Prior to his discharge from the hospital the accused appeared before a Disposition Board whose members concluded that the accused's

anxiety had "quieted down" and accordingly recommended his return to general duty and his administrative separation from the service pursuant to Army Regulations 605-230 (R. 22, 24). Major Ruffin explained that this type of recommendation was routine in psychopathic cases because the malady was not considered a "disease" by Army authorities and a person so afflicted did not "rate" an honorable medical discharge (R. 23, 24).

The defense, in presenting the testimony of Major Ruffin, attempted to raise a reasonable doubt as to the mental responsibility of the accused for the alleged offenses. This position was taken in reliance on the following language from the Manual for Courts-Martial (par. 78):

> "Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused cannot legally be convicted of that offense. A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right".

No effort was made to establish that the accused was insane, in the sense that he was demented, or had lost contact with reality, or was afflicted with an obsessive-compulsive neurosis or a psychosis. He was intelligent, had full possession of his faculties, and, according to Major Ruffin's unqualified assertion, was able to distinguish right from wrong. It is clear that Major Ruffin found it difficult, and even objectionable, to describe the accused's psychiatric disorder in terms of an ability to adhere to the right. A careful analysis of his testimony, however, with its constant emphasis on the repetitive character of the behavior and the refusal to learn from experience, warrants the conclusion that the accused acted with an unwise disregard for consequences, but does not establish that he was deprived of his volition. He doubtless suffered from anxiety, with its consequent tension and restlessness, and the resulting nervous condition may well have clouded his judgment and caused him to act indiscreetly without proper concern for what would follow. The testimony of Major Ruffin does not go further. Certainly it does not establish the existence of an impulse so strong and irresistible that the accused was powerless to control his conduct.

The members of the hospital Disposition Board considered that the accused, because of his misconduct, "did not deserve an honorable medical discharge". Major Ruffin expressly acknowledged his conviction that the accused was responsible for his acts and could be "legally punished". The evidence, while revealing the presence of a psychiatric disorder, failed to cast any reasonable or substantial doubt on the mental responsibility of the accused for his alleged offenses. The court properly denied the motion by the defense and proceeded with the trial.

4. The evidence for the prosecution shows that, from 23 December 1944 to 2 January 1945, inclusive, the accused executed and cashed at "Martin's Drugs", Miami Beach, Florida, five checks, three for $25.00, one for $20.00, and one for $35.00. When the checks were negotiated and again when they were subsequently presented for payment on 8 January and 11 January 1945, the accused's account in the National Bank of Fort Sam Houston, the drawee bank, did not exceed $13.15. All five were dishonored (R. 30-33; Pros. Exs. 1-5, 16, 18).

The following month the accused executed and cashed at the Pago Pago Room, Miami Beach, Florida, ten checks, which, as to date and amount, were as follows:

Date	Amount
12 February 1945	$30.00
12 February 1945	25.00
13 February 1945	30.00
14 February 1945	30.00
14 February 1945	35.00
15 February 1945	30.00
19 February 1945	35.00
19 February 1945	35.00
20 February 1945	40.00
21 February 1945	50.00

(R. 38-42; Pros. Exs. 6-15).

All were written on the First National Bank of St. Petersburg, Florida, with whom the accused had opened an account on 26 January 1945. Two deposits, each in the amount of $150.00, were credited to him, one on 26 January 1945 and the other on 8 February 1945. The account showed a balance of $220.00 on 12 and 13 February, $190.00 on 14 February 1945, $170.00 on 15 February 1945, and $90.00 from 16 February to 18 February 1945. The balance thereafter never exceeded $15.00 (Pros. Ex. 17). The checks were presented to the drawee bank during the period of 19 February to 28 February 1945, and all were dishonored (R. 39; Pros. Ex. 19).

The accused acknowledged to the investigating officer that he made and negotiated the fifteen checks described above (R. 46). Restitution has not been made (R. 32, 41).

5. Captain Frank A. Knox, a witness for the defense, who was custodian of officers' records, testified that the accused had authorized a monthly allotment of $150.00 to the National Bank of Fort Sam Houston. The allotment was outstanding during November and December, 1944, but, on 4 January 1945, it was discontinued at the instance of the accused, effective as of 31 December 1944. The witness explained that the normal result of this action would be the receipt by the bank of the final payment between 1 and 10 January 1945. If the accused had previously cancelled the allotment, Captain Knox, according to the usual practice,

would have been advised of that fact by the Office of Dependency Benefits. No such notice had been received (R. 56-59).

The accused, after his rights relative to testifying or remaining silent had been explained, elected to remain silent (R. 59).

6. Each of the fifteen Specifications of the Charge alleges that the accused did, at Miami Beach, Florida, "with intent to defraud, wrongfully and unlawfully make and utter * * * a certain check * * * and by means thereof, did fraudulently obtain" its face value in cash, "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 check. The instruments described in the first five Specifications, aggregating $130.00, were allegedly written on the National Bank of Fort Sam Houston, San Antonio, Texas, during the period of 23 December 1944 to 2 January 1945, inclusive. The latter ten Specifications set out checks, totalling $340.00, allegedly drawn on the First National Bank of St. Petersburg, Florida, from 12 February 1945 to 21 February 1945, inclusive. These offenses are set forth as violations of Article of War 96.

The checks described in Specifications 1, 2, 3, 4, and 5 were negotiated by the accused at a time when his account in the drawee bank never exceeded $13.15 and were dishonored upon presentment because of insufficient funds. The defense did not undertake to controvert these facts but took the position that the accused, by virtue of a monthly allotment to the drawee bank, had made arrangements for adequate credits. In support of this contention, Captain Knox, custodian of officers' records, attested the existence of the allotment and explained that, since action to effect its termination was not taken until 4 January 1945, the drawee bank, in the normal course of events, would be expected to receive the allotment payment between the first and tenth day of January, 1945. Captain Knox conceded the possibility of prior action by accused to cancel the allotment but pointed out that, in such event, the Office of Dependency Benefits, according to usual practice, would have advised that discontinuance had previously been effectuated. No such intelligence had been received.

The effect of this evidence is to cast reasonable doubt on the existence of the alleged culpable intent and knowledge. Obviously the allotment payment representing a deduction from the accused's earnings for the month of December, 1944, was never entered as a credit to his account. The record is silent as to the reason. It may be, as suggested in the course of the cross-examination of Captain Knox, that the accused had theretofore at another station taken action to terminate the allotment or that his total allotments exceeded his earnings, thereby necessitating the stoppage of the item in question. As against these mere assumptions that the alloted money never reached the bank because of action or fault of the accused, the record contains persuasive evidence to the contrary. The request which he filed on 4 January 1945

was apparently his initial effort to cancel the allotment, for it is hardly probable that he would duplicate action taken at another station. Significant, too, is the fact that the usual notice of prior termination had not been received by the personnel officer. Since the allotment payment exceeded the amount of the checks in question and apparently would have provided ample funds for their redemption, and since the record suggests that the accused was justified in expecting the funds to reach the drawee bank, the evidence fails to establish beyond a reasonable doubt the existence of the alleged fraudulent intent and guilty knowledge. He should not, moreover, under the circumstances described be charged with notice of the actual depleted state of his account so as to support a finding of guilty of a lesser included offense. The findings of guilty of Specifications 1, 2, 3, 4, and 5 should, therefore, be disapproved.

Because the checks set out in Specifications 6, 7, 8, 9, 10, and 11 were drawn at a time when a sufficiency of funds existed for their payment the reviewing authority, upon the recommendation of the Staff Judge Advocate, excepted the words "with intent to defraud" and "fraudulently". Since the finding of fraud was necessarily based on the allegation of blameworthy knowledge and purpose and since the reviewing authority apparently found neither element, it appears that the words on which the alleged fraud was bottomed, to-wit, "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 check", should also be excepted from the findings of guilty. The accused apparently had sole control of the account, however, and should be charged with the responsibility for its depleted state. His failure to provide funds adequate for the payment of the checks upon presentment, while lacking the elements of fraud and deceit, was wrongful and manifestly of a nature to bring discredit and disrepute to the military service, in violation of Article of War 96. The evidence is sufficient to support so much of the findings of guilty of each of Specifications 6, 7, 8, 9, 10, and 11 as involves a finding that the accused, at the time and place alleged, wrongfully failed to maintain sufficient funds in the drawee bank to pay the alleged checks. See 32 BR 255, CM 249993, Yates.

The evidence shows that the checks referred to in the remaining Specifications were made and passed by the accused at a time when his account in the First National Bank of St. Petersburg had been reduced to $15.00 or less. From the wholly inadequate state of the account, both when the checks were made and when subsequently presented to the drawee bank, from the patently irresponsible and careless manner in which the accused managed his financial affairs, and from his continued failure to redeem the checks, the wrongful and fraudulent character of his conduct becomes apparent. The findings of guilty of Specifications 12, 13, 14, and 15 are sustained by the evidence.

Consideration has been given to the fact that the investigating officer, in spite of the accused's professed reluctance to make a statement, obtained admissions as to the execution and uttering of the checks.

This persistence in procuring information, in the face of an expressed desire to remain silent, was unwarranted and revealed a lack of appreciation on the part of the investigating officer of the accused's rights, but the error did not spell substantial prejudice in view of the compelling and convincing evidence indicating guilt, exclusive of the admissions.

7. The accused is about 27 years of age. After completing high school, he attended Asbury College for three years. He served as a pilot with the Royal Canadian Air Force from May, 1941, to August, 1942, taking part in patrol missions from Trinidad, British West Indies, over a period of several months. After entering the United States Army, in September, 1942, as an aviation cadet, he was commissioned a second lieutenant on 26 June 1943. While overseas from December, 1943, to August, 1944, he was awarded the Air Medal, with Oak Leaf Cluster, and the Distinguished Flying Cross, with Oak Leaf Cluster, for meritorious and extraordinary achievement in operational flights over the hills and mountains of Burma and in landing troops and supplies behind enemy lines.

8. The court was legally constituted. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Specifications 1, 2, 3, 4, and 5; is legally sufficient to support only so much of the findings of guilty of Specifications 6, 7, 8, 9, 10, and 11 as involves a finding that the accused, at the time of making and uttering the checks therein described, wrongfully failed to maintain sufficient funds in the alleged drawee bank to pay the checks upon presentment; and is 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. Lifecomb, Judge Advocate.

Robert J. Ullmer, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 283726 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 for the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Jesse K. Bowles (0-685292), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of fraudulently making and uttering fifteen worthless checks, aggregating $470, 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 two years. The reviewing authority approved only so much of the findings of guilty of Specifications "6, 7, 8, 9, 10, and 11 as finds the accused guilty, excepting the words 'with intent to defraud' and 'fraudulently', wherever they appear", 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 findings of guilty of Specifications 1, 2, 3, 4, and 5; legally sufficient to support only so much of the findings of guilty of Specifications 6, 7, 8, 9, 10, and 11, as involves a finding that the accused, at the time of making and uttering the checks therein described, wrongfully failed to maintain sufficient funds in the alleged drawee bank to pay the checks upon presentment; and is legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof.

The accused, from 12 February 1945 to 21 February 1945, inclusive, made and cashed at the Pago Pago Room, operated by Ben Gaines, in Miami Beach, Florida, 10 checks aggregating $340, all drawn on the First National Bank of St. Petersburg, Florida (Specs. 6 through 15). The first 6 of these checks were executed at a time when the accused's account in the drawee bank was adequate for their payment and the latter 4 when the account was inadequate. When the ten checks were presented for payment, the account was depleted and all were dishonored because of insufficient funds. At the time of the trial the dishonored checks had not been redeemed by the accused.

The record reveals a protracted practice by the accused of passing worthless checks. He apparently has no appreciation of the

meaning of financial integrity or the important part it must play in the life of an officer. Since he lacks this essential quality, I feel that he is not qualified to hold a commission. He has a long and creditable record of service, however, and while overseas was awarded the Air Medal with Oak Leaf Cluster and the Distinguished Flying Cross with Oak Leaf Cluster. In view of these achievements, I am of the opinion that clemency is warranted. I recommend, therefore, that the sentence be confirmed but that the forfeitures and confinement 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.

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures and confinement remitted. GCMO 440, 21 Sept. 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGH - CM 283727

3 DEC 1945

UNITED STATES v. Major ROBERT A. FARRIS (O-472880), Ordnance Department.	)	NINTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Presidio of San Francisco, California, 14, 15, 16 June 1945. Dismissal, total forfeitures and confinement for ten (10) years.

OPINION of the BOARD OF REVIEW
TAPPY, BECK, STERN 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 1: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 15 February 1945 feloniously take, steal and carry away three (3) Cylinder Hydraulic Hoists of the value of about one thousand and fifty ($1,050.00) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 2: (Finding of not guilty).

Specification 3: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 1 October 1944 feloniously take, steal and carry away one (1) Complete Metalizing Set (Metalizing Engr Co - Serial No. 3458) of the value of about Four hundred fifty ($450.00) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 4: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 15 February 1945 feloniously take, steal and carry away one (1) Winch with Cable of the value of about Three hundred thirty-five ($335.00) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 5: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 23 December 1944 feloniously take, steal and carry away three (3) Porto Power Push Pull Jacks of the value of about One hundred forty ($140.00) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 6: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 1 February 1945 feloniously take, steal and carry away two (2) Hoists 1½ Ton Gear 8' Lift of the value of about Two hundred forty ($240.00) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 7: (Finding of not guilty).

Specification 8: (Finding of not guilty).

Specification 9: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 1 April 1944 feloniously take, steal and carry away one (1) Thompson Calibre .45 Sub-Machine Gun, Serial No. 182425, of the value of about Eighty ($80.00) Dollars and one (1) Thompson Sub-Machine Gun Cleaning Rod of the value of about 25/100 ($.25) and 1,800 Rounds Calibre .45 Ammunition of the value of about Eighty-four and 50/100 ($84.50) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 10: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 1 April 1944, feloniously take, steal and carry away one (1) Calibre .30 Carbine, Serial No. 12190385, with sling, of the value of about Fifty ($50.00) Dollars, one (1) Calibre .30 Carbine, Serial No. 1680566, of the value of about Fifty ($50.00) Dollars, one (1) Clip for Carbine Rifle M-1 of the value of 25/100 ($.25) Dollars, one (1) Rifle Case Carbine of the value of about one and 25/100 ($1.25) Dollars and 3,000 Rounds of Calibre .30 Ammunition Carbine of the value of about One Hundred eleven ($111.00) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 11: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 15 April 1944 feloniously take, steal and carry away one (1) Calibre .30 Rifle Model 1903, Serial No. 794636 of the value of about Twenty-seven and 50/100 ($27.50) Dollars, one (1) Calibre .30 Rifle

M-1, Serial No. 4162244, of the value of about Ninety-five ($95.00) Dollars, one (1) Calibre .30 Rifle M-1, Serial No. 1081326, of the value of about Ninety-five ($95.00) Dollars, four (4) Cartridge Clips of the value of about One ($1.00) Dollar and One thousand five hundred (1,500) Rounds Calibre .30 Ball Ammunition of the value of about Forty-five ($45.00) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 12: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 1 April 1944 feloniously take, steal and carry away one (1) Calibre .22 Target Rifle of the value of about Thirty-eight and 50/100 ($38.50) Dollars and two (2) Rifle Magazines Calibre .22 of the value of about 50/100 ($.50) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 13: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 1 August 1944 feloniously take, steal and carry away one (1) Calibre .30 Carbine M-1 Serial No. 984411 of the value of about Fifty ($50.00) Dollars, and one (1) Calibre .30 Carbine M-1 Serial No. 2114777 of the value of about Fifty ($50.00) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 14: (Finding of not guilty).

Specification 15: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 1 March 1945 feloniously take, steal and carry away eight (8) Clutch Pressure Plate Assemblies of the value of about Two Hundred eighty ($280.00) Dollars, one (1) Heavy Truck Pressure Plate of the value of about Fifty and 20/100 ($50.20) Dollars, two (2) Truck-type Clutch Plate Assemblies of the value of about Sixty-four and 50/100 ($64. 50) Dollars, two (2) White half-track Clutch Pressure Plate Assemblies of the value of about Eighty-one and 50/100 ($81.50) Dollars, one (1) Pressure Plate Assembly of the value of about Twenty-three ($23.00) Dollars, one (1) Clutch Pressure Plate Assembly of the value of about Thirty-seven and 40/100 ($37.50) Dollars, seven (7) Clutch discs at the value of about One hundred fifty-four and 80/100 ($154.80) Dollars, three (3) White half-track Clutch discs of the value of about Forty-nine and 50/100 ($49.50) Dollars and one (1) Heavy Type Clutch Plate Assembly of the value of about Thirty-five and 25/100 ($35.25) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 16: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 14 March 1945 feloniously take, steal and carry away one (1) 12-Volt Storage Battery of the value of about Sixty-five ($65.00) Dollars and one (1) 6-Volt Storage Battery of the value of about Twelve and 50/100 ($12.50) Dollars, property of the United States, furnished and intended for the military service thereof.

Specifications 17 to 20 Incl: (Findings of not guilty).

Specification 21: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 1 December 1944 feloniously take, steal and carry away one (1) Lot of tools of the value of about Five hundred seventy-eight and 58/100 ($578.58) Dollars, one (1) Pipe Wrench (Chain type) of the value of about Eighty ($80.00) Dollars, one (1) Hinged Handle Socket Wrench of the value of about Four ($4.00) Dollars, one (1) Box of various mechanics tools of the value of Two hundred twenty-five ($225.00) Dollars, one (1) Reamer Expansion Set of the value of about Thirty-two and 50/100 ($32.50) Dollars, one (1) Wrench Set 3/4" Drive of the value of about Forty-eight and 54/100 ($48.54) Dollars, one (1) Bar Socket Wrench 1" Extension of the value of Three and 50/100 ($3.50) Dollars, one (1) Wrench Set with Ratchet 3/4" drive of the value of Forty-eight and 54/100 ($48.54) Dollars, one (1) Wrench Double End 15/8" x 1½" of the value of Fourteen ($14.00) Dollars, one (1) Socket Wrench set with case of the value of about Sixteen ($16.00) Dollars, one (1) Kit Mechanics Tools of the value of Eighty-five ($85.00) Dollars, four (4) Motorcycle Chain Tools of the value of about Six ($6.00) Dollars, one (1) Box Socket Wrenches of the value of one ($1.00) Dollar, one (1) Ratchet Handle ½" Drive of the value of Four ($4.00) Dollars and one (1) Wrench Socket Gear head 1" of the value of Ten ($10.00) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 22: (Finding of not guilty).

Specification 23: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 15 October 1944 feloniously take, steal and carry away four (4) 6 x 16 Automobile Tires - Pennsylvania Serial Nos. 1L10402, 1V 74973, 1L11028, RV 67344, of the value of about Seventy-two ($72.00) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 24: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 1 April 1945, feloniously take, steal and carry away one (1) Royal Portable Typewriter of the value of about Fifty ($50.00) Dollars,

property of the United States, furnished and intended for the military service thereof.

Specification 25: (Finding of not guilty).

Specification 26: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 16 March 1945 knowingly and willfully apply to his own use and benefit 62 gallons of gasoline of the value of about Twelve ($12.00) Dollars, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Robert A. Farris, Major, Ordnance, did, at Camp Cooke, California, on or about 13 April 1945 willfully and knowingly attempt to commit suicide by cutting his throat with a razor blade.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 2, 7, 8, 14, 17, 18, 19, 20, 22 and 25 of Charge I; guilty of Specifications 3 and 23; guilty by exceptions and substitutions of all other Specifications of Charge I and guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The accused was charged in Specifications 1 to 25, both inclusive, with the larceny of various items of Government property of a total value of $7,513.66, and in Specification 26 with misappropriation of Government gasoline of the value of $12, all in violation of Article of War 94, and charged with attempted suicide in the Specification of Charge II in violation of Article of War 95.

The accused was on duty at Camp Cooke, California, between February 1943 and April 1945, first as post Ordnance officer and later as Deputy Director of Supply for Maintenance in charge of the combined maintenance shops at that station. During his tour of duty at Camp Cooke, several armored units, antiaircraft units, engineer units and tank destroyer units were successively housedand trained there. Upon departure of these organizations for overseas duty and because of the frequent requirement that they carry with them only the bare essentials, they discarded and left behind huge quantities of material and equipment, both organizational and vehicular used during their training, as well as surplus supplies which they had on hand for the maintenance of that equipment. Due to the haste with which these organizations departed and the lack of personnel it was not possible to identify, classify and inventory this material and equipment either as to quantity or nomenclature. All of it was merely left in

Camp Cooke warehouses or in the open, some of it covered with tarpaulins and some of it left exposed to the elements lacking sufficient warehouse capacity. In any event it passed to accused's station without accountability. In the course of accused's performance of duty he had access to this property and some of it actually passed into his custody. The accused's access or custody of the property did not operate as authority for him to remove it from the camp, or otherwise dispose of it.

Accused's wife resides in San Francisco, California, and prior to accused's entrance into the military service she and accused owned and operated the Automotive Shock Absorber Company located at 1650 Pacific Avenue in the same city. They also owned a fishing lodge known as "The Ark" in Greenbrae, California. The Automotive Shock Absorber Company is now and has, since accused entered the military service in May 1942, been operated by accused's wife. Among other things, the company is engaged in rebuilding shock absorbers for the U.S. Government.

The record of trial demonstrates that the case was poorly tried. The evidence, much of which was hearsay and irrelevant, was presented in a most unorderly fashion. It is difficult to summarize the evidence of the prosecution and defense in the customary manner. In order to summarize the pertinent evidence in a clear and understandable manner the evidence for the prosecution and defense with respect to each Specification will be summarized in the same paragraph, and no mention will be made of the evidence relating to those Specifications of which accused was acquitted (Specs. 2, 7, 8, 14, 17, 18, 19, 20, 22, 25, Ch. I), except in so far as it may pertain to those of which he was convicted (Specs. 1, 3, 4, 5, 6, 9, 10, 11, 12, 13, 15, 16, 21, 23, 24, 26, Ch. I and Spec., Ch. II).

Specification 1, Charge I:

By exceptions and substitutions as to both quantity and value made in the court's findings, accused was found guilty under this Specification of the larceny of two (2) cylinder hydraulic hoists of a total value of about $100, property of the United States furnished and intended for the military service (R. 238). Mr. Roy E. Phillips, Automotive Foreman at the combined maintenance shops, Camp Cooke, California, testified for the prosecution that about February 1945 he loaded two (2) old cylinder hydraulic hoists, removed from disassembled Government trucks, into accused's private automobile at Camp Cooke, California (R. 37, 38, 58). Three (3) cylinder hydraulic hoists were recovered in April of 1945 by agents of the Federal Bureau of Investigation at accused's place of business, the Automotive Shock Absorber Company, 1650 Pacific Avenue, San Francisco, California, and later transferred to Fort Winfield Scott (R. 68-72). Just prior to accused's trial, Mr. Phillips saw some cylinder hydraulic hoists at Fort Winfield Scott, which he identified as similar to those he had previously loaded into accused's private automobile at Camp Cooke (R. 38). Following a full explanation of his rights as a witness, accused elected to testify in his own behalf, and on cross-examination with respect to

this Specification he admitted that he had removed two (2) cylinder hydraulic hoists belonging to the Government to his place of business in San Francisco, California, for use in connection with a machine he was constructing to assist in the repair of automotive clutches for the Government (R. 164, 165). The cylinder hydraulic hoists had a value of $50 each (R. 78).

Specification 3, Charge I:

It was stipulated that if Loren E. Anderson, accused's shop foreman, were present in court and sworn as a witness, he would testify that he saw accused bring a metalizing set into the main shop at Camp Cooke, California, and place it near the steam and wash rack, stating that he (accused) intended to set it up near the wash rack for use in the maintenance shop. He saw this metalizing set in the maintenance shop at Camp Cooke, California, as late as September 1944, at the time he left the camp, but did not know if accused thereafter removed the set from the shop. This metalizing set was among the property recovered by agents of the Federal Bureau of Investigation from the custody of accused (R. 69, 74; Pros. Ex. 3). On cross-examination accused admitted that the metalizing set had been shipped from Camp Cooke, California, along with other articles, by Government conveyance to the Colyear Motor Sales Company, in San Francisco, California, and later transferred to accused's place of business at 1650 Pacific Avenue, in the same city (R. 196). The metalizing set was new and had a value of $450 (R. 80).

Specification 4, Charge I:

The winch and cable described in this Specification were included among the items of property recovered by agents of the Federal Bureau of Investigation from the custody of accused (R. 74). The winch was of a type generally used only on Government vehicles (R. 80). Accused admitted that it was the property of the United States, furnished and intended for the military service (R. 191). The winch and cable had a value as of 15 February 1945 of $75 (R. 80-81).

Specification 5, Charge I:

About December 1944, at the request of accused, Mr. Roy E. Phillips, who was automotive foreman at the combined maintenance shops, Camp Cooke, California, loaded a Porto Power push type jack into the private automobile of accused. This jack had previously been used at Camp Cooke, and was leaking oil and was in need of repairs (R. 39-40). Three Porto Power Push Pull Jacks were included among the items of property recovered by agents of the Federal Bureau of Investigation from the custody of accused (R. 74). Accused admitted that, insofar as he knew these jacks so recovered were Government property furnished and intended for the military service (R. 191). They had a value as of 23 December 1944 of $8 to $10 each (R. 81).

Specification 6, Charge I:

About March 1944, at the direction of accused, Mr. Roy E. Phillips loaded three used hoists, 1½ ton gear 8' lift, which he believed to be Government property, into the personal automobile of accused at Camp Cooke, California (R. 40-41). Two hoists of the same description were included among the items of property recovered by agents of the Federal Bureau of Investigation from the custody of accused (R. 74). These two hoists had a combined value of $100 (R. 81-82).

Specifications 9 to 13, both inclusive, Charge I:

The items of property described in these five Specifications were among the property recovered by agents of the Federal Bureau of Investigation from the custody of accused (R. 74). All the rifles except the 22 caliber rifle bore the identifying words "U.S. Government Property," and no arms of this type have been sold to civilians since 1940 (R. 72). On cross-examination accused admitted that each and all items described in these Specifications were Government property and had been brought by him from Camp Cooke, California, to San Francisco, California (R. 192). About three months before the Federal Bureau of Investigation agents recovered this property, accused loaned and personally delivered two .30 caliber carbines to Mr. Charles Morosin, who was going on a hunting trip, and told Morosin to keep them as long as he desired. Mr. Morosin was co-owner of a building where at one time accused had some of this property stored (R. 73; Pros. Ex. 1). Accused confessed specifically to taking four rifles, including a carbine, a .22 caliber rifle, a case of .30 caliber ammuntion, and a case of .22 caliber ammunition, all of which had been in his custody at Camp Cooke, California, without accountability (Pros. Ex. 5). The value of all items was established by reference to Government price lists, of which the court took judicial notice (R. 75-76).

Specification 15, Charge I:

In the early part of 1945, Mr. Roy E. Phillips, at the direction of accused, loaded 25 or 30 used or rebuilt half-track clutch discs and clutch plate assemblies into the personal automobile of the accused at Camp Cooke, California. These items of property had been removed from Government vehicles at Camp Cooke and were taken, as accused said, as replacements for similar articles personally owned, which he had previously brought from his place of business in San Francisco for installation in Government vehicles at Camp Cooke (R. 42, 43, 192). Clutch discs and clutch assemblies of the type described in this Specification were among the items of property recovered by agents of the Federal Bureau of Investigation from the custody of accused (R. 74, 82-83). Accused admitted that the clutch parts were Government property intended for the military service and that he transported them from Camp Cooke to San Francisco (R. 192). As of 1 March 1945, the two clutch pressure assemblies had a combined value of $81.50, and the three clutch discs had a combined value of $43.50 (R.83).

Specification 16, Charge I:

About February or March 1945, Mr. Roy E. Phillips, at the request of accused, loaded a 12-volt storage battery into a truck destined to proceed from Camp Cooke to San Francisco (R. 43-44). The battery was taken from either the battery storage room or from the maintenance shop at Camp Cooke and looked to be new (R. 44). This battery was among the other items of property recovered by agents of the Federal Bureau of Investigation from the custody of accused (R. 74). It was Government property intended for use in a tank and had the words "U.S. Government" and "ARMY" written on it and moulded into the case. Also the battery terminal was stamped with Ordnance green (R. 84, 175). This battery had a value of $50 (R. 84).

Specification 21, Charge I:

In either February or March 1945 Mr. Roy E. Phillips, at accused's direction, loaded a set of heavy duty socket wrenches obtained from the tool crib at Camp Cooke, which he (Phillips) believed to be Government property, into the private automobile of accused (R. 46-47). A box containing various mechanic's tools bearing the label "POS,", meaning "Post Ordnance Shop," was among the items of property recovered by agents of the Federal Bureau of Investigation from the custody of accused (R. 74, 86). Accused confessed to removing two kits of mechanic's tools from Camp Cooke, (Pros. Exs. 5, 6) and on cross-examination at the trial admitted that the tools and fittings in the kits recovered by the Federal Bureau of Investigation were Government property furnished and intended for the military service (R. 193). These tools had a value of $175 (R. 87).

Specification 23; Charge I:

On two different occasions during the fall of 1944, Mr. Roy E. Phillips, at the direction of accused, installed two passenger automobile tires on accused's private automobile. These tires were obtained from a storeroom over the combined maintenance shops at Camp Cooke (R. 47, 64). Four passenger automobile tires were among the items of property recovered by agents of the Federal Bureau of Investigation from the custody of accused (R. 74). Accused confessed that these four tires were Government property and that he had transported them in his personal automobile from Camp Cooke to his place of business in San Francisco (Pros. Ex. 6). These tires had a market value on 15 October 1944 of $18 each (R. 89).

Specification 24, Charge I:

Accused confessed that the typewriter described in this Specification was obtained from salvage and repaired at the combined maintenance shops at Camp Cooke. When accused departed Camp Cooke in March of 1945 to attend a school at Fort Winfield Scott, he took this typewriter with him, in his

personal automobile, and it was later recovered from his room at the Hotel Richelieu, in San Francisco, California (R. 182; Pros. Ex. 6). The typewriter had a market value on 1 April 1945 of $30 (R. 74).

Specification 26, Charge I:

On or about 15 March 1945, Mr. Roy E. Phillips checked a Government truck out of the motor pool at Camp Cooke, for the purpose of transporting some of accused's personal belongings from Camp Cooke to San Francisco. Staff Sergeant Charles J. Lazar, a machinist in the maintenance shop, was directed to drive and pursuant to such order did drive the truck into accused's garage on Pacific Avenue in San Francisco, and left it until Monday morning - 19 March. When Sergeant Lazar returned for the truck Monday morning it had been unloaded, and he thereupon drove it back to Camp Cooke (R. 66). Sergeant Lazar used about 50 gallons of gasoline for the round trip. The day Sergeant Lazar left Camp Cooke for San Francisco, Mr. Phillips pumped about 50 or 60 gallons of gasoline from Government gasoline tanks at the motor pool, Camp Cooke, California, and placed it in the back of the truck for use on this trip. Accused admitted that from time to time as he made week-end trips to San Francisco, he or Mr. Phillips at his direction would place gasoline belonging to the Government in his personally owned automobile. Also that he used gasoline from cans of gasoline around the maintenance shop, but denied knowing where Mr. Phillips obtained the gasoline he put in his (accused's) car (Pros. Ex. 5). It was stipulated that the gasoline had a value of 9½ cents per gallon (R. 75).

Specification of Charge II:

On 13 April 1945, while a patient at the station hospital, Camp Cooke, California, accused was discovered to be suffering from a lacerated neck wound, which had completely severed the external jugular vein. He was taken immediately to the surgery ward where the hemorrhage was controlled and the wound repaired by a medical officer. The wound was of a character which could have been self-inflicted by the use of a razor. Accused admitted to the medical officer attending him that he had nicked himself while shaving and had decided to "finish the job." The wound was approximately three or four inches long, parallel to his collar bone on the right side of his neck, and except for prompt action on the part of the medical attendants the wound would have proven fatal within a few minutes (R. 107-109). At the trial accused testified that on 13 April 1945 he left his room in the hospital and proceeded to the bathroom to clean up. On his way toward the bathroom he passed a room occupied by some officers' wives and one of them remarked, "Well, we [you] might as well pace up and down like convicts." He began to shave and nicked himself, and said "Oh hell, what's the use. They say I am a convict - so I took out the blade and that is what I did" (R. 156).

4. Several witnesses testified that accused had a good reputation in and around San Francisco for truthfulness, honesty and integrity, and a letter to the same effect addressed to defense counsel by Colonel

Harold J. Conway, Director of Supply, Ninth Service Command, Fort Douglas, Utah (R. 112-114, 117, 122, 125, 126, 131; Def. Ex. A). Defense presented evidence demonstrating that accused had been recommended for the Legion of Merit, and twice recommended for promotion to the grade of lieutenant colonel (R. 119, 120, 135, 136; Def. Exs. B, C, D, E). The accused denied any intent to steal the Government property and offered numerous explanations of both the taking and possession thereof (R. 162-201). In further denial of his intent to steal, accused testified that he was a man of means, the owner of a substantial and successful automotive repair business, from the profits of which he had paid for the preceding year, an income tax of beseven and eight thousand dollars (R. 162).

As Deputy Director of Supply for Maintenance at Camp Cooke, accused testified that he was responsible for the repair of large quantities of Army equipment and felt this responsibility very keenly. He was imbued with a desire to contribute his utmost to the war effort by repairing equipment under his supervision as rapidly as possible and to attain this objective he was not averse to cutting corners and dispersing with red tape. To justify his attitude in this regard, he referred to an order promulgated by the Chief of Ordnance (no date shown) addressed to all Ordnance officers, reading: "Whenever a member of the Ordnance Department, regardless of rank, encounters red tape in conducting our business throw the red tape to hell out the window. If an abundance of paper work is involved in a matter of supply or maintenance, deliver first and fill out the forms when there's time. Accept that, please, as a definite general order" (R. 174; Def. Ex. G).

Accused testified further that when faced with inadequate supplies to meet a deadline he had often taken necessary parts from his private business in San Francisco and used them in the repair of Government vehicles, expecting to obtain like Government supplies to reimburse himself when they later became available (R. 133, 148, 166, 167). He had from time to time assisted officers at other installations in the Pacific coast, occupying positions comparable to his own, by furnishing them with supplies and equipment from Camp Cooke of the type and character described in the Specifications of Charge I (R. 160). With respect to the many items of Government property which were removed from Camp Cooke to the Colyear Motor Sales Company in San Francisco, and later removed by accused to his own place of business in the same city, accused contended in his testimony that these supplies were intended for a Major Goodwin, Ordnance Officer, at Fort Winfield Scott, at whose station the supplies were badly needed, and who had agreed to pick them up at Colyear Motor Sales Company (R. 160, 161, 184, 188, 194; Pros. Exs. 5, 6). With respect to the various items of arms and ammunition, accused testified that he had been approached by Ordnance officers at other installations along the Pacific coast, who stated that they had not been given an opportunity to fire such weapons during their Army careers, and inquired if accused could obtain such weapons for their use. Accused contended that he had arranged for the transfer of these items to his place of business in San Francisco, in order to accommodate these officers, but that following such transfer the officers in question

had failed to call for the equipment, and that he had forgotten about it (R. 184-186). With respect to the tires (Spec. 23), accused contended that he had purchased them on the black market for $75 from a junior officer formerly stationed at Camp Cooke, but could not recall his name. In support of this contention accused's counsel undertook to introduce in evidence a check drawn to cash for $75 and cashed at Camp Cooke Post Exchange. With respect to the battery (Spec. 16), accused testified that it had been placed in his private automobile by mistake on an occasion when he had directed Mr. Phillips to load a used car battery belonging to him into his vehicle, and that he had no use for it in his place of business in San Francisco (R. 175). He explained the presence of a typewriter in his hotel room in San Francisco as one he had taken from Camp Cooke when he went to Fort Winfield Scott to attend a school and had left it behind with his personal belongings when he made a hasty return to Camp Cooke (R. 181-182). In explanation of secreting certain of the property at his fishing lodge (The Ark) and in the homes of his friends, accused stated that when he learned the Federal Bureau of Investigation was probing his transactions, he became frightened and panicky and undertook to conceal the property to avoid unfavorable consequences (R. 161, 162, 189, 200, 201).

5. Following accused's arraignment and before pleading to the general issue, special counsel for accused informed the court that he doubted that accused possessed the mental capacity to cooperate in his defense. In support of this statement, he cited the inability of accused to recall the name (not specified) of an important defense witness until the day preceding the trial. Acting upon defense counsel's statement, the court directed an inquiry into the sanity of accused. Medical officers, specializing in psychiatry, who had previously observed and examined accused, testified for the prosecution that in their opinion accused was sane, able to distinguish right from wrong, and able to adhere to the right (R. 16, 18, 20, 24, 26, 28). They described accused as possessing an emotional instability, characterized by a reactive depression secondary to the very embarrassing and serious situation confronting him, and stated that this condition was considered not abnormal for a person faced with an uncertain future such as accused's (R. 26). While the condition of depression had lowered his judgment to a moderate degree and placed him in a position of mild disadvantage, they considered him able to understand the nature of the court proceedings and likewise able to cooperate in his defense (R.27,29).

Defense counsel freely admitted that accused was sane (R. 31) and that he understood the proceedings, but doubted his ability to cooperate with counsel in his defense because of his psychoneurotic condition. The defense presented no evidence of accused's insanity and the law member of the court properly directed that the trial proceed on the merits (R. 32).

At the conclusion of its case, the defense called a civilian psychiatrist, who had previously examined accused. He testified that accused was sane, knew the difference between right and wrong, and diagnosed him as a

psychopath subject to an instability in mental make up, which caused him to act impulsively without first considering the consequences of his acts. It was his further opinion that accused's emotional instability, aggravated by overwork, had moderately impaired his judgment (R. 216-219).

Such evidence established beyond a reasonable doubt that accused was legally sane both at the time the offenses were committed and at the time of his trial. His psychopathic condition, manifested by emotional instability and warped judgment, constitutes no defense to the crimes charged.

6. It is clear from the evidence of the prosecution that accused had personally taken possession of all of the items of Government property embraced in the court's findings of guilty, some of which were still in his actual or constructive possession and other of which had been delivered by accused to third persons when recovered by Government agents. His explanations for his possession of this property were variously (a) that he took certain property as an exchange for similar property owned by him which he had previously delivered to the Army shop at his installation; (b) that certain property had been taken to his wife's business establishment for use in constructing machinery to make repairs upon other Government property; (c) that other property had been delivered by him to a private automotive concern where it was to be picked up by an Ordnance officer at another Army installation for use there; (d) that the rifles had also been intended for other Ordnance officers to be used temporarily by them but they also had failed to call for them; and (e) certain property had come into his possession through mistake. Accused offered no independent evidence to support these various explanations. He did not call as witnesses any of the Army officers for whom he claimed certain of the property was intended nor any witness from the automotive business establishment to confirm his statement that the property was delivered to it temporarily pending its transfer to another military installation. The property accused claimed was intended for use by other Army officers remained in his possession or in that of third persons a most unreasonable length of time without delivery thereof ever being made to the other officers. Finally, when accused learned that his possession of Government property was being investigated by the Federal Bureau of Investigation, he made frantic efforts to remove and conceal it. Considering all of this evidence we cannot say that it was insufficient to warrant the court's findings of guilty. The intent with which accused took all of this various property was a matter of fact to be determined by the court. Its conclusion that he took it without authority and with intent to convert it to his own use is sustained by the evidence.

The evidence clearly establishes that accused attempted to commit suicide as alleged in the Specification of Charge II. It is well established that such conduct constitutes an offense in violation of Article of War 95 (CM 252628, Earle, 34 BR 111; Dig. Op. JAG 1912-40, sec. 453 (4)).

7. Accused is 47 years of age and is married. War Department records reveal that for the nine years preceding his entry into military service

in 1942 he owned and operated the Automotive Shock Absorber Service, San Francisco, California, a concern engaged in rebuilding automobile component parts. He had prior military service from 8 December 1917 to 29 January 1919 as a sergeant in the Army Air Corps. On 18 May 1942 he was commissioned direct from civilian life as a Captain, Army of the United States, and assigned to duty in the Ordnance Department as Ordnance Officer at Camp Cooke, California, where he was in charge of all Ordnance procurement and maintenance. On 22 February 1943 he was promoted to the grade of major. On 4 April 1944 his commanding officer recommended that he be awarded the Legion of Merit for outstanding services performed by him as Director of Combined Maintenance Shops and Post Ordnance Officer at Camp Cooke. He was the recipient of especial commendations from the Commanding Generals of the Fifth and Sixth Armored Divisions for services performed for those divisions while stationed at Camp Cooke.

8. Careful consideration has been given to the communications, briefs and pleas for clemency filed by civilian and military defense counsel, and to the letters from accused's wife, Senator Sheridan Downey, Congressman Franck R. Havenner and Mr. Ira Partin, all urging that clemency be accorded accused.

9. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings 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 a conviction of a violation of Article of War 95.

Thomas H. Coffey, Judge Advocate.

W. T. Beck Jr, Judge Advocate.

Joseph C. Stern, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

SPJGH-CM 283727 1st Ind DEC 14 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 Major Robert A. Farris (O-472880), Ordnance Department.

2. Upon trial by general court-martial this officer was found guilty, under 15 Specifications of Charge I of the theft of various Government property of a total value of $1515.45, and of misappropriating Government gasoline of a value of $4.75, in violation of Article of War 94, and guilty under Charge II of attempted suicide, in violation of Article of War 95. He was sentenced to dismissal, total forfeitures and confinement at hard labor for 10 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 accompaning 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. Accused was Post Ordnance Officer and later Deputy Director of Supply for Maintenance, Camp Cooke, California, to April 1945. Over the period from April 1944 to April 1945 accused stole various items of tools, machinery and equipment and also certain rifles and ammunition, owned by the Government and located at Camp Cooke, totaling $1515.45 in value, and misappropriated Government gasoline of the value of $4.75. After accused's thefts had been discovered and he had been taken into custody, he attempted to commit suicide by severing his jugular vein.

The record of trial and War Department records reveal that accused is 47 years of age and married. He is a vereran of World War I. Prior to accused's entry into the military service in the grade of captain in May 1942, he owned and successfully operated a small concern engaged in rebuilding automobile component parts. It also appears that, except for the instant derelictions, he discharged his duties at Camp Cooke in an eminently satisfactory manner. As a result thereof he was recommended for the Legion of Merit and also received especial commendation from the Commanding Generals of two armored divisions which were processed at his post.

In view of the foregoing, I recommend that the sentence be confirmed, but that the period of confinement be reduced to three years, that the sentence as thus modified be carried into execution and that a United States penitentiary be designated as the place of confinement.

4. Consideration has been given to the communications, briefs and pleas for clemency filed by civilian and military defense counsel, and to letters from the accused's wife and Mr. Ira Partin. Consideration has also been given to letters, urging clemency on behalf of accused, addressed to the Secretary of War from Honorable Sheridan Downey, United States Senate, and Honorable Frank R. Havenner, House of Representatives, which were transmitted to this office for preparation of replies. These letters, with drafts of replies, were returned to the office of the Secretary of War.

5. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

5 Incls
1 Record of trial
2 Form of action
3 Briefs and pleas for clemency
4 Ltr fr Mrs R A Farris
5 Ltr fr Ira Partin

(Sentence confirmed but period of confinement reduced to three years. GCMO 16, 25 Jan 1946).

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

SPJGQ - CM 283737

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G. C. M., convened at
	)	Drew Field, Tampa, Florida, 5
Colonel GEORGE H. MACINTYRE	)	and 6 July 1945. Dismissal.
(0-20016), Air Corps.	)	

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 95th Article of War.

Specification 1: In that Colonel George H. Macintyre, 301st AAF Base Unit, Drew Field, Tampa, Florida, did, at Richmond, Virginia, from on or about 18 November 1944 to on or about 24 November 1944, wrongfully occupy a room at 3806 Chamberlayne Avenue, jointly with Dorothy Masten Macintyre and Nell Welborn Macintyre, neither of said women being then his wife, such being conduct unbecoming an officer and a gentleman.

Specification 2: (Withdrawn)

Specification 3: In that Colonel George H. Macintyre, 301st AAF Base Unit, Drew Field, Tampa, Florida, did, at DeRidder Army Air Field, DeRidder, Louisiana, about December 1943, and January 1944, while Commanding Officer of DeRidder Army Air Field, have improper relations with Nell Olise Welborn, a civilian employee of the War Department under his supervision, such being conduct unbecoming an officer and a gentleman.

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

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

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

Specification 1: (Finding of not guilty)

Specification 2: In that Colonel George H. Macintyre ***, for the purpose of obtaining the payment of a claim against the United States by presenting to First Lieutenant D. Y. Proctor, Jr., Agent Finance Officer at DeRidder Army Air Field, DeRidder, Louisiana, an officer of the United States duly authorized to approve, pay and allow such claim, did, at DeRidder Army Air Field, DeRidder, Louisiana, on or about 31 July 1944, procure the making of and use Pay and Allowance Account WD Form No. 336a, which, as he, the said Colonel George H. Macintyre then knew, contained a statement that he had, as a dependent, a lawful wife, Dorothy Masten Macintyre, which statement was false, in that the said Colonel George H. Macintyre was then unmarried, and which statement was then known by the said Colonel George H. Macintyre to be false.

Specification 3: Identical with Specification 2 except that offense was committed at same place on or about 31 August 1944.

Specification 4: Identical with Specification 2 except that offense was committed at Fort Leavenworth, Kansas, on or about 30 September 1944.

Specification 5: Identical with Specification 2 except that offense was committed at Tampa, Florida, on or about 30 November 1944.

Specification 6: Identical with Specification 2 except that offense was committed at Tampa, Florida, on or about 31 December 1944.

ADDITIONAL CHARGE I: Violation of the 94th Article of War.

Specification: In that Colonel George H. Macintyre ***, did, at Fort Leavenworth, Kansas, on or about 31 August 1944, present for payment a claim against the United States by presenting to the Finance Officer at Fort Leavenworth, Kansas, an officer of the United States, duly authorized to pay such claims, in the amount of $724.00, for pay and allowances from 1 August 1944 to 31 August 1944, which claim was false and fraudulent in that the said Colonel George H. Macintyre, previously had presented a claim for pay and allowances in the same amount and for the same period to the Finance Officer at Barksdale Field, Louisiana, through the Agent Finance Officer, DeRidder Army Air Base, DeRidder, Louisiana, and such claim was then known by the said Colonel George H. Macintyre to be false and fraudulent.

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

Specification: In that Colonel George H. Macintyre ***, with intent to defraud the United States, did, at Fort Leavenworth, Kansas, on or about 31 August 1944 unlawfully pretend to the Finance Officer at Fort Leavenworth, Kansas, an officer of the United States, duly authorized to approve and pay claims, that he, the said Colonel George H. Macintyre, was entitled to receive pay and allowances for the period from 1 August 1944 to 31 August 1944, in the amount of $724.00, and by means thereof did fraudulently obtain from the said Finance Officer at Fort Leavenworth, Kansas, the sum of $724.00, when, in fact, he, the said Colonel George H. Macintyre, was being paid pay and allowances in the same amount and for the same period by the Finance Officer at Barksdale Field, Louisiana, on a voucher presented by the said Colonel George H. Macintyre at DeRidder Army Air Base, DeRidder, Louisiana.

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

Specification: In that Colonel George H. Macintyre ***, did, at Fort Leavenworth, Kansas, on or about

> 23 August 1944, with intent to deceive the Finance Officer at Fort Leavenworth, Kansas, officially state in writing to the said Finance Officer that he, the said Colonel George H. Macintyre, had not previously signed a pay voucher covering the period stated in this voucher or any portion thereof, namely from 1 August 1944 to 31 August 1944, which statement was known by the said Colonel George H. Macintyre to be untrue, in that he, the said Colonel George H. Macintyre, had previously signed a pay voucher for the period from 1 August 1944 to 31 August 1944 at DeRidder Army Air Base, DeRidder, Louisiana.

He pleaded not guilty to all the Specifications and Charges and was found not guilty of the Specifications of Charge II and Charge II and of Specification 1 of Charge III; guilty of all other Specifications and Charges. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record under the provisions of Article of War 48.

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

The accused and Dorothy Masten Macintyre were married on 2 July 1933 and divorced by final decree dated 23 June 1944 in an action instituted by Dorothy Masten Macintyre. The accused and Nell Welborn Macintyre were married on 14 July 1944 at Little River, Arkansas, and divorced by decree of the Chancery Court of Pulaski County, Arkansas, dated 27 July 1944, in an action instituted by Nell (Welborn) Macintyre. The accused and Dorothy Masten Macintyre were remarried on 4 January 1945 in Los Angeles, California (Stipulation, R. 7: Decree, R. 7; Pros. Ex. 4).

Specification 3, Charge I.

The accused assumed command of DeRidder Army Air Base, DeRidder, Louisiana, in October 1943 (R. 18, 20). He was married to Dorothy Masten Macintyre, by whom he had four children, the last of whom was born about Christmas of 1943 (R. 20). Nell Welborn (later Macintyre) was a civilian employee on the post, secretary to the accused's predecessor in command, and she continued as secretary to the accused until the end of March 1944. Her desk was in his office. No other desks were there except his own (R. 18, 19, 24). In December of 1943 and January of 1944, the accused and Miss Welborn were seen together socially at the

Officers' Club on a few occasions, but in the company of the accused's wife (R. 19) and sometimes other couples (R. 21), never alone (R. 22). At the end of March 1944, Miss Welborn went on a three-months leave of absence (R. 19), without pay, and left her employment (R. 23, 24). As above noted, the accused was divorced 23 June 1944, married Nell Welborn (Macintyre) 14 July 1944, and was divorced by her 27 July 1944 (R. 7; Pros. Ex. 4). His first wife, Dorothy Masten (Macintyre), testified as Nell Welborn Macintyre's corroborating witness in the latter's divorce hearing (Pros. Ex. 4) and remarried the accused on 4 January 1945 (R. 7).

Photostatic copy of a Standard Certificate of Live Birth as recorded by the State Board of Health of Missouri, certified by the State Registrar of Vital Statistics, under the seal of the State of Missouri, was admitted in evidence (R. 31; Pros. Ex. 14), upon waiver of objections as to authentication (R. 25) but over strenuous objection as to its competency (R. 25-31). It certified the normal birth at St. Mary's Hospital, Kansas City, Jackson County, Missouri, on 15 September 1944, of Christine Lynell Macintyre, female, to Mrs. G. Macintyre, whose maiden name was Nell Olise Welborn, married (with the word "divorced" written but canceled). The birth was stated to have followed nine months pregnancy. The usual place of residence and mailing address of the mother was stated as 575 Buena Vista Avenue, San Francisco, California, her age 25 years, her birthplace DeRidder, Louisiana, usual occupation entertainer, then unemployed. The father was stated to be G. Henry Macintyre, 32 years old, born at Weehawken, New Jersey, occupation banker, business address 6385 Hollywood Boulevard, Los Angeles, California. Certification of the factual entries recorded was by Marie Esmond, M.D.O., attending physician, upon information furnished by the mother. Receipt was certified by the registrar.

In processing for classification records on 21 December 1944, Form 66-2, the accused stated to the Classification Assignment Officer of the Third Air Force Personnel Depot, in response to a question, that he, the accused, had five children at that time. He also named as another dependent, his ex-wife, Mrs. Dorothy Masten Macintyre, whose address he gave as 527 Buena Vista, San Francisco, California. Entry accordingly was made on the form, which the accused signed in the presence of the processing officer (R. 32-33). The accused also stated at that interview, in connection with his education, that he had had a year's course at the American Institute of Banking, for which he received a certificate in 1932 (R. 36). The form 66-2 was not offered in evidence, but was used to refresh the memory of the witness (R. 35). Cross-examination indicated that there were some erasures upon it, not

initialed (R. 34-35). "There were no corrections at the time of the signature" (R. 34). The purpose of the interview was to process the accused for overseas shipment contemplated at that time and to "re-accomplish qualifications" (R. 34).

Pertinent provisions of the Statutes of Missouri, concerning registration and certification of births, were introduced in evidence (R. 36; Ex. 25).

Evidence introduced primarily in support of Specification 1 of Charge II, whereof the accused was acquitted, showed that in the course of an altercation between the accused and Nell Welborn Macintyre at Richmond, Virginia, on the night of 24 November 1944, the accused sought to persuade her to leave a short order restaurant and return to her room to take care of "her baby" or "the baby", referring to her as his wife (R. 14; Pros. Ex. 7, pp. 2, 3: R. 14; Pros. Ex. 9, p. 2). Further, the presence of the baby and the other circumstances shown on the occasion with which the evidence in support of Specification 1 of Charge I is concerned may be considered here.

Specification 1, Charge I.

On 18 November 1944, at Richmond, Virginia, Dorothy Masten Macintyre, appearing as "Mrs. Masten", and Nell Welborn Macintyre, as "Mrs. Macintyre", with a small baby, rented a large single room with two double beds and a private bath from one Mrs. Gilkeson. "Mrs. Masten" rented and paid for the room for the party, registered as "Col & Mrs. G. H. Macintyre, Mrs. Dorothy Masten" (R. 8; Pros. Ex. 5: R. 8; Pros. Ex. 3). They had the accused's luggage with them and he joined them that evening. The party, consisting of the accused, the two women and the baby, occupied the room for one week, during which time the accused and both women stayed in the room every night. Lodging accommodations in Richmond were crowded and the ladies were unable to obtain other accommodations. Mrs. Gilkeson, lacking suitable accommodations for them, furnished a folding screen for the room, which remained there through the week (R. 8; Pros. Ex. 5). However, Bachelor Officers Quarters were available at Richmond Army Air Base, and records thereof showed no occupancy by the accused (R. 17; Pros. Ex. 13).

On the night of 24 November 1944, a disturbance occurred in a White Tower restaurant in Richmond, when the accused attempted to get Nell Welborn Macintyre to go home and take care of the baby,

as a result of which Richmond Police officers went to the room occupied by the accused and his party. A police officer stated to the accused that he was informed that the accused was occupying the room with his purported wife, a former wife and a child. The accused made no answer, but Mrs. Gilkeson, the landlady, said in his presence that the party had registered as man and wife, child and nurse. The accused made no denial. Nell Welborn Macintyre stated in the presence of the accused that she wanted to take her baby back to Louisiana but that the accused would not let her do so. The police officer observed that there was then no screen between the two beds in the room (R. 16; Pros. Ex. 11, Deposition). At the request of the police, the accused went to the Richmond police station to take Nell Welborn Macintyre off the hands of the police. At first she refused to go with him, saying that she was afraid he might kill her, but finally she went with him peaceably. She said that the accused had her baby. A military police officer asked the accused where the baby was. The accused replied that the baby was in good hands and that he had taken the baby because Mrs. Macintyre had neglected the baby. The accused said that he had felt sorry for his second wife and had given her a job taking care of the baby, and that he was occupying the same apartment with the two women, but that they were not sleeping in the same bed, or words to that effect (R. 17; Pros. Ex. 12, Deposition).

The accused was acquitted of disorderly conduct in connection with the affair at the restaurant (Specification 1, Charge II).

Specifications 2, 3, 4, 5, 6; Charge III.

The accused submitted to the Finance Officer, as specified, and received payment accordingly in each instance, pay and allowance vouchers for the months of July, August, September, November and December, 1944, reciting as his dependent: "Lawful wife, Mrs. Dorothy M. Macintyre", with her address variously stated as DeRidder, Louisiana, San Francisco, California, and 575 Buena Vista, San Francisco, California. All payments were directed to be placed to the accused's credit at Hollywood and Cahuenga Branch, Security First National Bank of Los Angeles, 6385 Hollywood Boulevard, Los Angeles, California. Each voucher was certified by signature of the accused as a true and correct statement and account (R. 28; Pros. Ex. 16: R. 29; Pros. Ex. 17; R. 29; Pros. Ex. 18: R. 29; Pros. Ex. 19: R. 29; Pros. Ex. 20).

The accused was divorced from Mrs. Dorothy M. Macintyre from 23 June 1944 until their remarriage 4 January 1945 (R. 7).

Findings of not guilty were entered as to Specification 1, Charge III, concerning a like voucher for June, 1944 (R. 28; Pros. Ex. 15).

The accused's account in the depository bank from 23 June 1944 to 4 January 1945 was in the name of G. H. and Dorothy M. Macintyre and was used by Dorothy Masten Macintyre (R. 30).

Additional Charges I, II, III and Specifications.

The accused received his pay and allowances for August, 1944, in the sum of $724, upon his voucher dated August 31, 1944, presented to and paid by the Finance Officer at Barksdale Field, Louisiana (R. 29; Pros. Ex. 17). Reporting for duty at Fort Leavenworth, Kansas, 19 August 1944, he received a duplication of his pay and allowances for August, 1944, in the same amount, upon his voucher also dated August 31, 1944, presented to and paid by the Finance Officer at Fort Leavenworth, Kansas (R. 29; Pros. Ex. 21), supported by his certificate in writing, over his signature, that he had not previously signed a pay voucher covering "the period stated on this voucher or any portion thereof." The certificate was on mimeographed form, undated, and contained no statement of the period referred to, except by that reference to the voucher (R. 29; Pros. Ex. 22). Both payments were credited, on successive days, 5 and 6 September 1944, to the joint account of the accused and Dorothy Masten Macintyre at the depository bank specified by the accused, and statements of the account were mailed to the accused's home address (R. 30).

4. For the defense, no witnesses were called and the accused, fully advised of his rights, elected to remain silent (R. 42). By stipulations and exhibits certain circumstances were shown. The accused's presence at Richmond, Virginia, in November, 1944, was on temporary assignment prior to overseas movement (R. 37; Def. Exs. 1, 2). Dorothy Masten Macintyre's divorce decree, dated 23 June 1944, awarded alimony to her to the extent of 75% of the accused's pay and income. Such alimony, from 23 June 1944 until 4 January 1945, was paid for and devoted to the maintenance, support and education of Dorothy Masten Macintyre and their minor children, who were in her custody (R. 37, 38). Judicial notice was invoked of

Army Regulations 35-4220 and change thereto, to show that the accused was entitled to receive pay and allowances (for dependents) (R. 38). No treasury check was received or credited to accused's bank account during the month of November, 1944 (R. 38; Def. Ex. 3), and Finance records show no payment to him for the month of October, 1944 (R. 39; Def. Exs. 5, 6). His bank account was a joint account with Dorothy Masten Macintyre and was used by her throughout the period while the two were divorced (R. 39; Def. Ex. 3). This account showed substantial credit balances at all times, generally near or above $1000 to 6 September 1944 and generally near or above $2000 thereafter. No single withdrawal larger than $100 is shown during 1944 except $150 on 30 October 1944, $300 on 21 November 1944, $200 on 14 December 1944 and $150 on 27 December 1944 (Def. Ex. 3).

The accused consistently received superior efficiency ratings from April 1943 to August 1944, as Base Executive Officer at Page Field, Florida, to June 1943 and at Greenville Army Air Base, Greenville, South Carolina, to October 1943, and as Base Commander at DeRidder Army Air Base, DeRidder, Louisiana, to August 1944. He received a scholastic rating of excellent at Command and General Staff School, Fort Leavenworth, Kansas, in October 1944. Thereafter he was on temporary duty as a replacement, in preparation and special training. In 1940 he was commended officially for efficiency in handling aircraft operations in Panama Mobile Force Maneuvers (R. 39; Def. Ex. 7). In January 1944 he was commended officially for the fine example set by him and the personnel of DeRidder Army Air Base under his command (R. 39; Def. Ex. 8).

5. The accused officer, a thirty-nine-year-old Colonel, Air Corps, with thirteen years military experience, three in the Reserve and ten in the Regular Army, eleven years married to his first wife, with four children by her, was convicted of two offenses involving misconduct and culpable indiscretion in his female associations (Specifications 3 and 1, Charge I), in violation of the 95th Article of War, and nine offenses involving false statements in connection with pay and allowance claims, whereof six consisted in his certifying his first wife, whom he later remarried, as his lawful wife during the interim of six months and eleven days while they were divorced, in violation of the 94th Article of War (Specifications 2 through 6, Charge III), and three consisted in his presentation of a duplicate pay and allowance claim for the month of August 1944, obtaining payment thereunder, and making a false official statement in connection therewith, that he had not presented a previous claim for the same period, in violation, respectively, of the 94th, 96th and 95th Articles of War (Additional Charges I, II and III and the Specifications).

The derelictions of the accused all had their origin in his association with one Nell Welborn, later (briefly) Macintyre, and in his family troubles which ensued. Nell Welborn was a personable young woman some fifteen years his junior, who, as a civilian Government employee, was his secretary at DeRidder Field, Louisiana, from October 1943, when he became Base Commander there, until March 1944, when she departed on extended leave from which she did not return to the Base, but did return to the accused and his affairs, abundantly, with a baby, putatively his child, born 15 September 1944. In the interim, much is shrouded in darkness, but the wife of the accused, Dorothy Masten Macintyre, divorced him on 23 June 1944. He married Nell Welborn on 14 July 1944. She divorced him on 27 July 1944, thirteen days later, with Dorothy Masten Macintyre as her corroborating witness in obtaining the divorce decree. This marriage and the two divorces took place in Arkansas communities sufficiently accessible from DeRidder Field, Louisiana, to be useful for the purpose, but sufficiently remote to avoid undesirable notoriety. These events all took place patently, if not admittedly, with the full concurrence and collusion of both wives, by arrangement between the parties concerned. The accused and Dorothy Masten Macintyre were remarried 4 January 1945. In the interim, the entire pay and allowances of the accused went into a joint account in his depository bank in Los Angeles, California, held by him and Dorothy Masten Macintyre, which she used freely for her support and that of their four children, in her custody.

The first offense of which the accused was convicted was having improper relations with Nell Welborn about December 1943 and January 1944, at DeRidder Army Air Base, while he was commanding officer of that base and she was a civilian employee under his supervision. The evidence in support thereof is indirect, but sufficient. There was no testimony that anybody observed any improper conduct at the time. Nell Welborn's desk was in the accused's private office with his own and no others. She was seen a few times in the company of the accused and his wife at the Officers' Club. However, later events reflect back upon what must have occurred during the period specified. The collusive divorces and the brief marriage of the accused with Nell Welborn, in July 1944, the birth of her child 15 September 1944, her presence with the baby in company with the accused under the remarkable circumstances at Richmond in November 1944, involving an implied representation that the baby there with him and his "wife" was his child, the accused's solicitude there for the baby, and his statement to the Classification Assignment

Officer in December 1944 that he had five children, one more than the four children of himself and Dorothy Masten Macintyre, unexplained except by the inferences drawn from common human experience and observation of human affairs under such circumstances, all fit together to form a solid basis for the conclusion that improper relations occurred between the accused and Nell Welborn at about the time specified. This conclusion is fortified by the birth certificate, reciting that "G. Henry Macintyre" was the father of the child born to the divorced mother, the surname "Macintyre" being given to the child. That information was based, of course, entirely upon the recital of the mother as transmitted to the registrar by the attending physician at the birth, but given under the solemnity of such a statement made for permanent public record to establish the place in society of the newborn child. The legal questions concerning the admissibility in evidence of the birth certificate will be discussed hereinafter.

The second offense of intersexual character was the joint occupancy by the accused with his two ex-wives, neither being his wife at that time, of a lodging-house room at Richmond, Virginia, for a week in November 1944. The facts concerning this affair were clearly proven and undisputed, except for some question as to a screen being furnished to separate the two double beds in the room, which was not performing that function when the police observed the situation. The accused lived from 18 November to 24 November in a single room with the two women and the baby, representing that Nell Welborn Macintyre was then his wife and "Dorothy Masten" their nursemaid. However inconveniently crowded the transient housing situation in the vicinity may have been, and however tolerant the feminine personnel concerned under the highly unusual circumstances of this case, that cohabitation was conduct ill suited to an officer, especially one of the accused's rank and position, and, passing the bounds of unconventionality or mere indiscretion, was clearly unbecoming. This office has held that open unlawful cohabitation by an officer with a woman not his wife in such manner that the discovery thereof would bring discredit upon the military service is a violation of the 96th Article of War, of which offense sexual intercourse is not an essential element (CM 254722, Grimstad, 35 BR 341, 354; 3 Bull. JAG 345). Such offense also may be charged appropriately under the 95th Article of War, as it is in this case.

The six offenses specified under Charge III were the successive monthly making and use of pay and allowance vouchers for the

purpose of obtaining payment of his claims against the United States, which vouchers each contained the statement, known by the accused to be false, that Dorothy M. Macintyre was then his lawful wife. She was not, as these vouchers were made and used during the period when she was divorced from him, as he well knew, although he was supporting her and their children and probably then planned to remarry her, as thereafter he did. The undisputed evidence amply supports the findings of guilty. His purpose, inferentially, was to avoid publicizing the facts of his divorces and remarriages, leaving the illusion among those who knew him at home that he had never been divorced, and perhaps to simplify his claims and avoid the extra detail of claiming his allowances for dependents by reason of his children instead of his "wife". It is incredible that he forgot that he was divorced from Dorothy Masten Macintyre.

The gist of these offenses is not that the claims were false, but that the statements so specified were false and that the vouchers containing them were made and used for the purpose of obtaining the payment of the claims. This is the offense specifically condemned by the fourth separate clause of Article of War 94 - the third alternative clause following the primary clause. The claims themselves were neither false nor fraudulent, since the accused was entitled to the pay which he claimed and was entitled on other grounds of dependency to the allowances which he claimed and received. The objectionable statements in the vouchers were not fraudulent, for the same reason, but they were false. They were clearly material to the claims. The misconduct condemned by that particular provision of Article of War 94 is the use of any "false or fraudulent statements" in any writing or paper made or used to obtain the allowance, approval or payment of any claim against the United States. False or fraudulent claims are penalized by other provisions of the article. Pecuniary detriment to the United States is not a necessary element of the offense, nor is payment or even actual presentation of the claim, though these facts, if present, would necessarily affect the gravity of the offense and the quantum of guilt involved. (See par. 150a, 150d, M.C.M., 1928: Winthrop, Military Law and Precedents, Second Edition, 1920 Reprint, pp. 698-699. So held under analogous Federal statute, Sec. 35, U.S.Criminal Code, Title 18, U.S.C., Sec. 80: U.S. v. Gilliland, 312 U.S. 86, 85 L. Ed. 598, wherein Mr. Chief Justice Hughes, for the court, said in the opinion,

"the statute was made to embrace false and fraudulent statements or representations where these were knowingly and wilfully used in documents or affidavits 'in any matter within the jurisdiction of any department or agency of the United States.' In this, there was no restriction to causes involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practises described.")

The remaining offenses, under the Additional Charges, are concerned with the drawing by the accused of double pay and allowances for August 1944. His presentation of a second claim for $724 pay and allowances for that month at Fort Leavenworth, Kansas, after he had previously presented a claim for the same items at Barksdale Field, Louisiana, was false and fraudulent, in violation of the second clause of Article of War 94 (par. 150b, M.C.M., 1928). His obtaining that amount, by representation to the Finance Officer at Fort Leavenworth that he was entitled to receive payment of such claim, was another offense, which involves a violation of Article of War 96, as charged. His signed statement in writing that he had not previously signed a pay voucher for the period constituted a false official statement, in violation of the 95th Article of War. Why the accused, apparently not in financial distress, claimed and received this duplicate payment for the month of August 1944 remains wholly unexplained in the record. Conceivably, a careless-minded or inexperienced officer might sign a pay voucher, prepared for him by others, covering a particular month, on the mistaken assumption that it covered the next following month, but scarcely for the second following month, under the ordinary practices of the Military Establishment familiar to this accused. If two vouchers were presented to him on arriving at a new station, the ordinary assumption would be that one was for the next month to come and the other for the current month in case he had omitted, in changing stations, to file one for that month. In any event, neither that explanation nor any other was offered in evidence at the trial and the court was not required to invent one. The accused made restitution by the indirect means of not filing a claim for October 1944, and apparently regards that omission as fully exonerating him in the matter. On the assumption that he will never claim his pay and allowances for the later month, or that if claimed it will not be paid, he has received from the

Government above that to which he was entitled, in effect, only a two-months loan of $724 without interest, but in doing so he has falsely claimed and received double pay for the month and made the false official statement as specified and charged.

6. The case presents a strenuously contested question of law on the admissibility in evidence of the birth certificate, admitted by the court "for what it was worth" over the vigorous objection of the defense. Clearly it was relevant and material; so much so that unless it was competent, its admission must be held to be reversible error, as it could not do otherwise than damage seriously the case of the accused. In our opinion it was competent and properly received in evidence.

The question arises upon the competency of the original record, not the authentication of the copy, as proper authentication was stipulated and that objection expressly waived.

Although there is a very considerable accumulation of legal lore on the evidentiary competency of birth certificates, the only military case found (CM 208296, Huskea, 9 BR 1) is of little persuasive value as a precedent because there was no objection made, the defense accepting the birth certificate as "only prima facie evidence". The Board of Review said in its opinion (page 3) that the certificate was "properly received as prima facie evidence of the facts therein recorded", citing paragraph 117a, M.C.M., 1928, and held it sufficient corroboration of the accused's confession to sustain his conviction for adultery in violation of the 95th Article of War.

The direct provisions of the Manual for Courts-Martial do not quite cover the case. While the character of a document as an official report will not in itself qualify its hearsay contents as evidence,

> "An official statement in writing (whether in a regular series of records, or a report, or a certificate) is admissible when the officer or other person making it had the duty to know the matter so stated and to record it; * * *." (Par. 117a, M.C.M., 1928, p. 121)

The requirement of a "duty to know" first appears in the 1928 Manual, the duty to record being sufficient under paragraph 238a, M.C.M., 1921 and paragraph 239, M.C.M., 1917. The context and the examples given

in the current Manual clearly indicate that, while the language does not limit the application of these provisions to military as distinguished from civil records, or the basis of the duty to record to military duty, the authors primarily had in mind military records based on a military duty, and the expression of the principle involved is less inclusive than the subject warrants where civil records are concerned. There is no civil equivalent of the military "duty to know" that lends credence by military usage and sanction to purely military reports not self-condemning by disclosure on their faces that the reporting authority did not know. The Manual does provide, however, that

> "So far as not otherwise prescribed in this manual or by act of Congress, the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States will be applied by courts-martial." (Par. 111, M.C.M., 1928, p. 109)

This provision embodies in military law the Federal law of evidence, as the rule where the Manual and pertinent acts of Congress do not cover the case and certainly as a proper guide in questions of doubtful interpretation.

The prevailing law on the evidentiary competency of birth certificates in the civil courts can best be understood in the light of its development. The recording of vital statistics by state authority is itself a relatively modern institution, and the law on the subject has naturally grown with it. Thus the earlier cases frequently refused to accept birth certificates as public records, or limited the purposes for which they were accepted, because they were <u>not</u> public records or were not required by law to be kept as such, as well as for other reasons peculiar to the particular cases. This situation, no doubt, is reflected in the text statement, 32 C.J.S. 496:

> "Under the general rules discussed * * *, a birth certificate or record may be admissible, as competent evidence of the facts recited therein, and an official birth certificate is ordinarily competent on the issue of the fact of birth.

> On the other hand, birth certificates or records have been held inadmissible. They are inadmissible where there exists no express judicial or statutory authority for making them, and they are incompetent to establish parentage, or to show matters as to which no satisfactory inquiry was made prior to the making of the certificate or record."

That this statement as to evidence of parentage does not accurately reflect existing law appears by reference to other authorities. Abbott's Trial Evidence (4th Ed.), 184, states:

> "A registry, whether of birth, marriage, death or burial, kept pursuant to law (statutory or unwritten), is competent evidence of the main fact and its date, and of any other fact which the law or statute directed the officer to ascertain and record; and it is not incompetent because the statute does not expressly declare it to be evidence."

Wharton's Criminal Evidence (11th Ed.), 1367, states:

> "An official registry, it has been shown, is admissible, when kept in conformity with law and when duly authenticated, to prove such facts as the law requires to be registered."

In 5 Wigmore on Evidence (3d Ed.), paragraph 1643, the author discusses various theories upon which registers of vital statistics have been accepted in evidence as an exception to the hearsay rule. These include the "orthodox" theory of entries made by officers in keeping required records in the performance of the duties of their offices, as in the case of clergymen or priests, as ecclesiastical officers; recording in church registers the ceremonies of baptism, marriage and burial performed by them, the statutory duty theory, where the duty to record the event was imposed by statute upon persons in office, the theory of entries in regular course of business, as historically established and later expanded, and, finally, express statutes adopted in many jurisdictions declaring such registers admissible - usually state or municipal registers, but sometimes also church registers of every sort - thus obviating the necessity for

judicial construction of the principles involved in order to sustain their admissibility. The author concludes (5 Wigmore on Evidence, 3d Ed., par. 1646 at page 591):

> "On the whole, then, it is sound policy to receive all such registers as evidence (a) first, of the facts required by law to be recorded, and (b) next, if no law specifically provides for the contents of the register in question, of the fundamental facts customarily entered in such registers directly on the faith of other persons having personal knowledge, - namely, in birth or baptismal registers, of name, sex, parentage and date of birth; in marriage registers, of name, age, residence, and date of ceremony; and in death of (sic) burial registers, of name, sex, age, residence, date of death, and cause of death. Under the modern Vital Statistics Acts, numerous varieties of facts are required to be reported and entered. It is sensible to admit all such entries for what they may be worth; in the occasional controverted cases, other evidence is usually available. A main purpose of the system would be defeated if the records were not liberally available in litigation."

Rule 516 of the Model Code of Evidence of the American Law Institute provides:

> "Subject to Rule 519", (not pertinent here) "evidence of a writing made as a record, report or memorandum of facts and conclusions concerning an act, event or condition, unless specifically privileged from disclosure by a statute requiring it to be made, is admissible as tending to prove the truth of each matter stated therein in compliance with statutory requirements if the judge finds that
>
> (a) the maker of the writing was duly authorized pursuant to statute to perform designated functions performance of which

> by persons not so authorized was forbidden by statute, and was required by statute to file a written report in a designated place or office setting forth specified matters relating to the performance of those functions and the persons or things connected therewith, and
>
> (b) the writing was made and filed by him as a report so required by the statute."

The "Comment" on the foregoing Rule 516 makes clear its application to birth registers:

> "This Rule deals with records made by persons who are sometimes said to be ad hoc public officials, such as physicians, undertakers and ministers of the gospel, but it is not confined to them. It is applied to those whose business or profession requires action in matters usually made the subject of vital statistics and health regulations, and who are under a duty to make and file reports of specified acts, events or conditions."

In the foreword to the American Law Institute's Code, the Reporter, Professor Edmund H. Morgan of Harvard, states in his discussion of hearsay (page 50):

> "5. Written statements by public officials and entries in public records by ad hoc officials are made generally admissible in the manner now commonly provided for by statute in records of vital statistics."

It is clear that the trend supported by modern authority is to admit, with or without statutes now generally in effect expressly making them admissible, entries in vital statistics records kept in accordance either with official or quasi-official duty imposed by law or with established custom, though the knowledge of the reporter and of the entrant may or must have been based upon hearsay from the original informant, and to admit these entries for all purposes and as to all statements therein made in accordance with the requirements governing the making of the particular record. Where the record is made as required by statute, that doctrine is fully supported by the decided cases on birth certificates, though offered to show collateral facts recited therein, other

than the primary facts of the birth of the child at the time and place stated.

Thus, in Hellman v. Karp (Conn.), 105 A. 678, a birth certificate was held admissible in a bastardy proceeding, to prove parentage, the certificate having been made under authority of law and the recitals therein having been required to be stated by the attending physician and made upon the best information he could obtain.

In Gett v. Isaacson (Conn.), 120 A. 156, upon an issue of paternity, it was held error to restrict the admission to "the limited purpose of tending to prove the date of birth, identity of the mother, color and sex of the child."

In Vanderbilt v. Mitchell (N.J.), 57 A. 97, a bill in equity was allowed to cancel a birth certificate fraudulently declaring the complainant to be the father, upon the ground that the statements therein recorded would be admissible in evidence against him "in all matters where the question of the paternity of the child is involved."

In George v. Galani, 219 N.Y.S. 24, the court held: "The birth certificate (if duly authenticated) was competent evidence of the facts therein stated." Accord: In re Bartowicz Estate, 3 N.Y.S. 2d. 764. A statement in In re Strong's Estate, 6 N.Y.S. 2d. 300, 306, that such certificate is not admissible to establish paternity, though it may establish the fact of birth, is not persuasive, since it was made obiter dictum in a referee's report where there was no birth certificate in the case, the statement surviving merely in the approval of the referee's report by the Surrogate and the Court (This case is the sole authority cited in Corpus Juris Secundum (excerpt supra) for its categorical statement that birth certificates are incompetent to establish parentage. 32 C.J.S. 496, note 65.) Earlier New York cases excluding or limiting admissibility are explainable upon the ground of the lack of state authority under a comprehensive statute in that state for the registration of vital statistics prior to 1913, records of births and deaths being kept by the City Board of Health. Statute (see 44 McKinney's Consolidated Laws of N.Y., Public Health, Sec. 391) then provided for state registration and limited extract certification for prima facie evidentiary use, later expanded in line with the general trend.

Birth certificates made according to statute were held admissible to show the age of the parents in Aitken v. John Hancock

Mutual Life Insurance Co., 124 N.J.L. 58, 10 A. 2d. 745; Katz v. New York Life Insurance Co., (N.J.) 15 A. 2d. 898, affirmed 19 A. 2d. 830; Metropolitan Life Insurance Co. v. Levy (N. J.), 30 A. 2d. 571. The latter decision expressly overruled Kiely v. McMurray (N.J.), 139 A. 343, formerly a leading case denying admissibility of a birth certificate to show the age of the father, with the comment that the birth involved in the Kiely case occurred in 1892, before there was statutory authority for stating the age of the parents in the birth record of the child. (The Kiely case is the only authority cited in the discussion of the subject in Corpus Juris Secundum (excerpt supra) for the inadmissibility of birth certificates to establish the age of the parent, or where they are based upon "no satisfactory inquiry". 32 C.J.S. 496, note 66.)

In Oklahoma, Indian enrollment records in the nature of birth registers are held admissible in evidence to show paternity (Yekcha v. Texas Co., 275 P. 312), marriage of parents (Warren v. Canard, 120 P. 599), or their nonmarriage (Johnson v. Perry, 153 P. 289.)

As the criterion is the law of evidence recognized in the federal courts, state court precedents are persuasive only to show the state of the general law on the subject, in explanation and amplification of federal decisional doctrine. There is direct federal authority.

In Hilliard v. United States, 121 F. 2d. 992, on appeal in a criminal prosecution for violation of the White Slave Act, 18 U.S.C. 400, the United States Circuit Court of Appeals for the Fourth Circuit held admissible to show the age of the prosecutrix a certificate of her birth from the vital statistics registry kept in accordance with Virginia statute which provided for such record and certificate and made duly certified copies thereof admissible in evidence in the courts of the state. Over objection that the state statute had no application to a criminal trial in a federal court, the court expressed itself (opinion, p. 996) as satisfied that the copy was admissible in evidence as the copy of a public record, duly certified. The question was on the competency of the record to prove the fact recorded, not on the authentication of the copy of the certificate.

In New York Life Insurance Co. v. Aronson, 38 F. Supp. 687, the United States District Court for the Western District of Pennsylvania held admissible a duly authenticated certificate of a registry of the insured's birth in Poland, to show the age of the insured in a suit to reform certain annuity policies to reflect his correct age.

In Pollack v. Metropolitan Life Insurance Co., 138 F. 2d. 123, the United States Circuit Court of Appeals for the Third Circuit held the exclusion of a birth certificate offered to show the age of a parent to have been reversible error, where the record certified was made in accordance with a state statute (New Jersey) providing for the registry of such information in connection with the registry of birth. In the opinion (page 128) the court said: "Certainly it cannot be said that the only entry admissible under the statute is the notation that a child was born", and further, after discussion conceding that more difficult questions would be presented if such birth register should call for unusual and irrelevant information, "It is sufficient to say here that the record of the parent's age is close enough to be included. This record should have been received for what probative effect on this point the jury saw fit to give it." The court based its opinion on the proposition that such records kept by the New Jersey Bureau of Vital Statistics were entries in the regular course of business within the broad scope of the federal statute embodying that evidentiary doctrine, 28 U.S.C. 695, liberally construed in accordance with its purpose as admonished by the United States Supreme Court in Palmer v. Hoffman, 318 U.S. 109, 115; 63 S. Ct. 477, 481, 144 A.L.R. 719, citing Wigmore (supra), as well as entries in a registry required by statute.

Certainly, showing the age of the parent includes showing the identity of the parent.

On the same general principles, death certificates, made according to the same modern statutory systems of recording vital statistics, generally have been held admissible as prima facie evidence of the facts therein recited (Troutman v. Mutual Life Insurance Co., 125 F. 2d. 769 (Ky.); Lydon v. Boston Elevated Railway (Mass.), 34 N.E. 2d. 642; Milwaukee Electric Railway and Light Co. v. Giardina (Wis.), 267 N.W. 62), including prima facie evidence of the cause of death (Kirsch v. Federal Life Insurance Co. (Kans.), 87 P. 2d. 591; Porter v. Metropolitan Life Insurance Co. (Kans.), 127 P. 2d. 444; Bennett v. Brady (Cal.), 61 P. 2d. 530; American National Insurance Co. v. Valencia (Tex.), 91 S.W. 832; same v. Hernandez (Tex.), 104 S.W. 525; Metropolitan Casualty Insurance Co. v. Reese (Ga.), 21 S.E. 2d. 455; Woodruff v. American Mutual Liability Insurance Co. (Ga.), 21 S.E. 298; VanBodegan v. Standard Coated Products Co. (N.J.), 14 A. 2d. 760; State v. Pabst (Wis.), 121 N.W. 351). Colorado has

held admissible death certificates stating, as required by particular statute, the "probable" cause of death (Occidental Life Insurance Co. v. United States National Bank of Denver, 53 P. 2d. 1180), though Pennsylvania has refused to accept such opinion of probability as statement of fact (Heffron v. Prudential Insurance Co., 8 A. 2d. 491; Johnson v. Valvoline Oil Co., 200 A. 224), and some other cases have drawn distinctions between statements of fact and statements of opinion in the "cause of death" cases (Rees v. Insurance Co., N.C., 5 S.E. 2d. 154, 156; Insurance Co. v. Brockman, Va., 3 S.E. 2d. 480; Welz v. Accident Assn., 40 N.Y.S. 2d. 128; Insurance Co. v. Watts, Ky., 183 S.W. 2d. 499). A few courts have required that the entry in "cause of death" cases be based upon some testimonial knowledge (Stough v. Industrial Comm., Ohio, 52 N.E. 2d. 992, 999; In re Schultz' Estate, Ill., 45 N.E. 2d. 577). Thus the federal courts for the District of Columbia have accepted such certificate from the attending physician (Labofish v. Berman, 55 F. 2d. 1022) but refused it from the coroner (Insurance Co. v. Miller, 81 F. 2d. 263; Levy v. Vaughan, 42 App. D.C. 146). Massachusetts, however, has held the exclusion of a statement of cause of death in a death certificate on the ground that there were no eyewitnesses to be reversible error (Walcott v. Sumner, 32 N.E. 2d. 685).

In "cause of death" cases in the federal courts, a death certificate was held admissible as a public record provided for by the law of Kansas, although the certifying physician's own testimony would have been excluded upon a claim of privilege (Krug v. Mutual Benefit Health Assn., 120 F. 2d.296.

In Hunter v. Derby Foods, 110 F. 2d. 970, on appeal in a death action tried in a federal district court in New York, the Second Circuit Court of Appeals, Judge Robert P. Patterson writing, held admissible under 28 U.S.C. 695, a death certificate made in Ohio, where the death occurred, by a coroner in the course of his duty under Ohio law, saying (opinion, p. 973):

> "Congress provided that a record made in regular course of business should be admissible in evidence, 'business' including profession, occupation and calling of every kind. Manifestly, a death certificate made by a coroner in the course of his official duty under the laws of Ohio already referred to is a record made in regular course of business within the meaning of the Act. A

> further basis of admissibility was that the coroner's certificate, as a certificate required to be made and filed by a public officer touching an act done by him in course of official duty, would be proper evidence in the New York courts. *** The evidence tending to impeach the coroner's certificate, and there was plenty of such evidence, went to the weight to be given to the certificate, not to its admissibility."

There are other cases, involving the evidentiary admissibility of birth or death certificates, which have had our consideration but which we will not particularize here, as they are regarded as clearly distinguishable or too remote in relevancy to justify further extension of this discussion.

The birth certificate in the instant case was made under the law of the State of Missouri, where the birth occurred. Such certificate, or registry, is a public record by that law. The Revised Statutes of Missouri, 1939, provide that all births shall be registered with the State Registrar of Vital Statistics (Sec. 9771). The duty of filing the certificate, "properly and completely filled out, giving all the particulars required by this article", is placed primarily upon the attending physician or midwife, secondarily upon the parents of the child (Sec. 9772). Section 9773 requires that such certificates shall show, among other items, "(5) Whether legitimate or illegitimate", and, if legitimate, then:

> (6) Full name of father.
> (7) Residence of father.
> (8) Color or race of father.
> (9) Birthplace of father.
> (10) Age of father.
> (11) Occupation of father.

Section 9781 provides for the certification of copies of such certificates by the Registrar, "and any such copy of the record of a birth or death, when properly certified by the State Registrar to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts stated."

In the courts of Missouri, such certificates are fully admissible, not only to show the age of the child (Hente v. Michie, Mo.,

151 S.W. 2d. 107), even as prosecutrix in a rape case (State v. Spinks, Mo. 125 S.W. 60), but as prima facie evidence of all its contents (Guardian Life Insurance Co. of America v. Kissner, 111 F. 2d. 532, 534, a death case, holding that the Missouri death certificate therefore constituted prima facie evidence of all its recitals in a federal court in Missouri.)

That provision of the Missouri statute which expressly qualifies its certificates of vital statistics as evidence can, of course, have no extra-territorial effect by its own force. The law of the forum determines the admissibility of particular evidence (Par. 597, American Law Institute Restatement, Conflict of Laws). But a part of the law of evidence in all American state jurisdictions and in the federal courts is that the public records of any state, duly authenticated, are competent as evidence in the forum if they are competent in the state of their origin. Article IV, Section 1, of the Constitution of the United States provides that:

> "Full faith and credit shall be given in each State to the public acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." (Emphasis ours.)

Implementing that provision, Congress has so prescribed. Chapter 17 of Title 28, U.S.C., sets forth the statutory law of evidence in the courts of the United States. Contained therein are the Sections prescribing the methods and effect of proof of the acts and judicial proceedings (Title 28, U.S.C., Sec. 687; R.S. 905) and of the records in state offices not pertaining to courts (Title 28, U.S.C., Sec. 688; R.S. 906) of any state. Section 688, here pertinent, after prescribing the acceptable manner of authentication of state records, provides:

> "And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory, or country, as aforesaid, from which they are taken."

The constitutional provision is a requirement upon the states, plus an authorization to Congress to prescribe the extra-territorial acceptance of state acts, records and proceedings. The statute exercises

both the jurisdiction which the constitutional provision gives to Congress over the states and the jurisdiction which Congress has as the federal legislative branch over federal affairs within its province. The statute, a part of the code of evidence enacted for federal courts, applies expressly to "every court and office within the United States." Clearly that includes the federal courts. It would be fatuous to suppose that Congress is imposing upon state courts, under a special power, evidence which would be rejected in the federal courts. Thus, by the force of the statute, 28 U.S.C. 688, the birth certificate, as a duly authenticated exemplification of a public record of the State of Missouri competent as evidence in that state by its law, is competent evidence in any court within the United States. So held: Hardy v. State Mutual Benefit Society (Pa), 170 A. 704; Milwaukee Gold Extraction Co. v. Gordon (Mont.), 95 P. 995, 999. The same result, admissibility of official vital statistics records as public records of the state of origin, was reached without reference to the statute in federal court cases hereinbefore noted: Hilliard v. United States, 121 F. 2d. 992; Pollack v. Metropolitan Life Insurance Co., 138 F. 2d. 123; New York Life Insurance Co. v. Aronson, 38 F. Supp. 687; Troutman v. Mutual Life Insurance Co., 125 F. 2d. 769; Krug v. Mutual Benefit Health Assn., 120 F. 2d. 296, and Hunter v. Derby Foods, 110 F. 2d. 970, as well as in state cases too numerous for further discussion.

We cannot believe or hold that the military law of evidence, especially in matters of nonmilitary character such as form the subject matter of civil and criminal jurisprudence generally, is so far a thing apart from all other functionings of the judicial process that evidence commonly or universally acceptable before other tribunals is excluded from the consideration of courts-martial.

In our opinion, the birth certificate was properly received in evidence for such probative weight as the court saw fit to give it in connection with the circumstances otherwise in evidence in the case.

7. Every case of violation of the 95th or 96th Articles of War involves, fundamentally, a consideration of the culpability of the conduct in question according to its military significance under the circumstances of the case. Neither the code of honor of an officer and a gentleman nor the standards of military discipline and propriety are oblivious to the facts of human frailty. A saintly life wholly free from sin and moral error may be most admirable as a matter of

philosophical precept, but it is not required by military law. Neither must the stern gaze of Military Justice penetrate the last secret recesses of one's personal affairs, decently cloaked in privacy and held within the bounds of the family and the home. Offenses against the family, when forgiven and condoned by the family concerned, may well be left alone by the Military Establishment. It is the common lot of Man to yield to temptation and fall into error. Many good and worthy men have imperiled the fruits of years of service and rectitude by some unworthy indiscretion. Many have been redeemed and rescued at the brink of the precipice by the kind and loving forgiveness of a wise and worthy wife. If, then, but only if, such a man has the qualities of basic worth and character to realize his fault, correct the error of his way and seek to make honorable amends, he may go on to other years of valuable service and accomplishment. If not, his value is largely destroyed.

The appraisal of the measure of guilt and the application of enlightened justice in the case are beyond the scope of this opinion, and the keys thereto lie outside the record of trial. In so far as the conduct in question has escaped the bounds of private affairs and has been such as to reflect discredit upon the Military Establishment or besmirch the honorable estate of its officers, the guilt of the accused is established by this record. It has done both, and thus the clandestine entanglements of this officer have lost their purely domestic character and become the proper concern of the military authority which trained him for and placed him in positions of responsibility and command.

8. A brief filed by individual defense counsel, attached to the record of trial, has received full consideration.

9. The accused officer is 39 years of age, born 24 October 1905, a native of New Jersey, resident of California. He is married, twice divorced and remarried, at present to his original wife, with four children by her. His personal War Department record does not disclose whether or not he acknowledges a putative fifth child by his second wife. After graduation from high school at Hollywood, California, he attended the University of California at Los Angeles for 3½ years, withdrawing in the school year 1930-31, and had a one-year course at the American Institute of Banking. He had two years high school and 3½ years college military training in the Reserve Officers Training Corps. Apparently while receiving his education, he held employment from 1926 to 1929 as a bookkeeper at Hollywood

and Cahuenga Branch, Security-First National Bank, Los Angeles, and in 1931 was a laborer for the Pacific Gas and Electric Company and a Christmas-tree sales manager. He enlisted as a Flying Cadet 24 February 1932 and received training at Randolph and Kelly Fields, Texas, qualifying as an airplane pilot and observer. He was commissioned a second lieutenant, Air Corps Reserve, 29 June 1933, and served on extended active duty in successive tours to 18 February 1935. He then enlisted in the 91st Observation Squadron to qualify for commission in the Regular Army, and was commissioned a second lieutenant, Air Corps, 30 June 1935. He served on foreign duty in the Panama Canal Department from September 1939 to September 1941. He was promoted to the permanent grade of first lieutenant, Air Corps, Regular Army, 30 June 1938. He was appointed temporary captain, Army of the United States, Air Corps, 1 October 1940; temporary major, Air Corps, 5 December 1941; temporary lieutenant colonel, Army of the United States, Air Corps, from 1 March 1942; promoted to temporary major, Army of the United States, 29 January 1944 and promoted to temporary colonel, Army of the United States, Air Corps, 14 March 1944. He served in the European Theater of Operations apparently from about January 1945 to April 1945. Other information concerning his service appears in the digest of the evidence in an earlier section of this opinion.

10. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of violation of Articles of War 94 and 96.

_____, Judge Advocate.

_____, Judge Advocate.

Donald A. Hickman, Judge Advocate.

SPJGQ - CM 283737 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 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 Colonel George H. Macintyre (0-20016), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of ten offenses; two offenses against morals, and eight misrepresentations in connection with his pay and allowance claims. In the first category he stands convicted of wrongfully occupying a room jointly with two certain women, neither of whom was then his wife, at Richmond, Virginia, during the period from 18 November 1944 to 24 November 1944 (Specification 1, Charge I), and also of having improper relations with a certain female civilian employee of the War Department under his supervision, on or about December 1943 and January 1944, while he was Commanding Officer of De Ridder Army Air Base, Louisiana, (Specification 3, Charge I), both in violation of the 95th Article of War (Charge I). The remaining offenses are of a military nature and consist of procuring the making of, and using, for the purpose of obtaining payment of claims against the United States, pay and allowance vouchers for July, August, September, November and December, 1944, each voucher containing the known false statement that Mrs. Dorothy M. Macintyre was then his lawful wife (Specifications 2 through 6, Charge III), in violation of the 94th Article of War (Charge III); and further, the presentation of a claim for, (Specification, Additional Charge I) and fraudulent obtaining of payment of (Specification, Additional Charge II) duplicated pay and allowances for August, 1944, and making the false official statement in writing that he had not previously signed a pay voucher for that period (Specification, Additional Charge III), in violation, respectively, of the 94th, 96th and 95th Articles of War (Additional Charges I, II, and III). He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. I concur in that opinion.

The accused officer is a Colonel, Air Corps, 39 years old, with over 13 years professional military experience, 3 on active duty in the Reserve and 10 in the Regular Army. He had been 11 years married to his first wife, Dorothy Masten Macintyre and has had four

children by her. He became Base Commander of De Ridder Army Air Base, Louisiana, in October, 1943. As such, his secretary was one Nell Olise Welborn, a War Department employee and an attractive young woman some 15 years the junior of the accused. Her desk was in his private office, with no other except his own. Through the ensuing months, Nell Welborn was sometimes seen in the company of the accused in public, but always in the presence also of his wife, and no misconduct was observed, so far as the evidence shows. However, in March, 1944, Nell Welborn left the base on extended leave and did not return to her employment. On 23 June 1944, Dorothy Masten Macintyre divorced the accused by decree of court in Arkansas. On 14 July 1944 the accused married Nell Welborn, in Arkansas. On 27 July 1944, 13 days later, she divorced him by decree of an Arkansas court. Partly from the record of trial and partly from information properly embodied in the accompanying papers, it appears clearly that these divorces and the brief intervening marriage of the accused to Nell Welborn were thoroughly collusive, agreed to and facilitated by the accused's wife, Dorothy Masten Macintyre, who procured the marriage license for the accused and Nell Welborn, and appeared as the corroborating witness at the latter's divorce hearing. Moreover, Nell Welborn was the corroborating witness at Dorothy Masten Macintyre's divorce hearing. The marriage to Nell Welborn was effectuated under her written agreement, as appears in the papers accompanying the record of trial, with the understanding that if Dorothy Masten Macintyre would divorce the accused so that he could marry Nell Welborn to protect the child Nell Welborn was then carrying, whether or not the child was that of the accused, then Nell Welborn would, immediately upon receiving the protection of the marriage ceremony, relinquish all her marital rights and institute proceedings for, and obtain in the shortest possible time, her divorce from the accused. The accused attended Command and General Staff School at Fort Leavenworth, Kansas, from 20 August to 26 October, 1944. On 15 September 1944, Nell Welborn Macintyre gave birth to a child at Kansas City, Missouri, which she named Christine Lynell Macintyre, and gave information which resulted in the registry of the birth in official Missouri vital statistics records identifying herself as Mrs. G. Macintyre, divorced, and naming the father of the child as "G. Henry Macintyre", with other data somewhat evasively fitting the accused. Information in the accompanying papers discloses that in October, 1944, Nell Welborn Macintyre, masquerading as "Mrs. Nellie Brown", wife of a soldier overseas, and her baby, were living with Mrs. Dorothy Masten Macintyre at Leavenworth, Kansas, while the accused was at Fort Leavenworth, and that certain stormy embroilments occurred between Nell and the accused. From 18 November 1944 to 24 November 1944, the accused was at Richmond, Virginia, on temporary duty prior to departure overseas. There he lodged in a single large room in a lodging house with Nell Welborn Macintyre, represented to be his wife, her baby, and Dorothy Masten Macintyre, represented to be "Dorothy Masten", their nursemaid. A rowdy scene occurred in a short-order restaurant in Richmond, Virginia, on the night of 24 November 1944, when the accused sought to persuade or compel Nell, whom he referred

to as his wife, to go home and take care of the baby. This disturbance evoked the interference of and certain activities by the civil and military police, which apparently resulted in the termination of the collective domestic establishment at the lodging house. In December, 1944, the accused stated to a Classification Assignment Officer, in giving data for official records, that he was the father of five children. (He had four by Dorothy Masten Macintyre). The accused and Dorothy Masten Macintyre were remarried in Los Angeles, California, (their home), 4 January 1945.

Through the intervening months following the divorce of the accused from Dorothy M. Macintyre, 23 June 1944, and preceding their remarriage 4 January 1945, the accused continued to submit his monthly pay and allowance vouchers showing Dorothy M. Macintyre as his lawful wife, as though no divorce had occurred. These were prepared and presented monthly except that he has presented none for October 1944 and that he presented and received payment of two for August 1944, each for $724, one at Barksdale Field, Louisiana and one at Fort Leavenworthy, Kansas, before and after change of station. In support of the second claim for that month, he signed and filed a required mimeographed form reciting that he had not previously signed a pay voucher for the same period. During all these months, his entire pay and allowances continued to be deposited, at his prior direction, in a joint bank account of himself and Dorothy M. Macintyre, which she drew upon freely for the support of herself and their children.

The derelictions of the accused and his resulting domestic entanglements arose out of his association with Nell Welborn. The principal victim of this disturbance, his wife, Dorothy Masten, has not only condoned these injuries to her conjugal rights but seeks to redeem and sustain the accused in honorable estate, manifesting a remarkable degree of charity and tolerance. However, her forgiveness cannot condone the injury to the Military Establishment involved in such a spectacle of unbridled folly on the part of an experienced officer in responsible command. In the matter of the pay vouchers, the accused has received no more, and the government has parted with no more, than the accused was lawfully entitled to, had he filed his claims on true recitals as to his dependents and for proper months successively. Inferentially, his purpose in continuing his false recital that Dorothy M. Macintyre was his lawful wife was to conceal from public discovery the fact that his married life had ever been interrupted and to conceal entirely the Nell Welborn episode. Except for the duplicated August claim and payment, (nowhere convincingly explained) nothing appears to impeach the financial honesty of the accused, by the light of his own intentions. He was at no time in financial distress or need. He has, however, freely and arrogantly substituted his own self-excusing doctrines of ultimate justification for the rules of law and military propriety in making repeated statements in, and in support of, his claims against the government, that

he knew were false.

Accused has impaired any charitable inferences as to his basic honor and worth which might be drawn from his silence at his trial, his honorably motivated procedure to give his name to the child and his subsequent return to the domestic fold, by asserting, in certain correspondence accompanying the record, that his silence was due to his low appraisal of what he purports to regard as the trivial evidence against him and the additional fact that his remarriage to his first wife was solely for practical advantages in securing the financial welfare of his children before he went overseas. I therefore recommend that the sentence be confirmed and carried into execution.

4. Careful consideration has been given to the items of correspondence and documents, attached to and accompanying the record, submitted by and on behalf of the accused.

5. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.

Myron C. Cramer

3 Incls
1 - Record of trial
2 - Form of action
3 - Correspondence and documents

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed and carried into execution. GCMO 457, 11 Oct 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGK-CM 283836

8 AUG 1945

UNITED STATES v. Lieutenant Colonel JOHN H. VAN CLEVE (O-408114), 4020th Army Air Force Base Unit, Wright Field, Ohio.	FAIRFIELD AIR TECHNICAL SERVICE COMMAND PATTERSON FIELD, OHIO Trial by G.C.M., convened at Wright Field, Dayton, Ohio, 22, 23, June 1945. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, LUCKIE, MOYSE and SYKES, 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 arraigned and tried on the following Charges and Specifications:

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

Specification 1: In that Lieutenant Colonel John H. Van Cleve, Air Corps, 4020th Army Air Forces Base Unit, did, at Wright Field, Dayton, Ohio, on or about 21 February 1945, with intent to defraud the United States, cause to be prepared and presented to Major Doy L. Hancock for official processing and action a Report of Survey on property belonging to the United States, to wit: One (1) Camera, Ground C-3 #41-10487 of the value of about $243.45, one (1) Camera, Aircraft 16 MM 141 B&H #361697 of the value of about $70.00 and one (1) Kit, Navigation Dead Reckoning of the value of about $109.75, property of the United States furnished and intended for the military service thereof, falsely and wrongfully representing and pretending that said property had been lost, damaged or destroyed in the crash of AT-11 Airplane, Serial No. 37207, well knowing that said representations and pretenses were false and that said property had not been lost, damaged or destroyed.

Specification 2: In that Lieutenant Colonel John H. Van Cleve, Air Corps, 4020th Army Air Forces Base Unit, did, at Wright Field, Dayton, Ohio, on or about 22 February 1945, with intent to deceive Major Doy L. Hancock, officially execute and deliver to Major Doy L. Hancock, a statement in writing, addressed to the Supply Officer of the Technical Data Laboratory, Engineering Division, Air Technical Service Command, certifying "that the articles of public property shown in the Report of

Survey of 21 February 1945 in recent crash of AT-11 Airplane No. 42-37207 were lost, damaged, destroyed or worn out in the manner stated while in public service," which statement was known by the said Lieutenant Colonel Van Cleve to be untrue in that the following property listed in the Report of Survey had not been lost, damaged or destroyed: one (1) Camera, Ground C-3 #41-10487, one (1) Camera, Aircraft 16 MM 141 B&H #361697, and one (1) Kit, Navigation Dead Reckoning.

CHARGE II: (Finding of guilty disapproved by reviewing authority).

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

Accused pleaded not guilty to and was found guilty of all Charges and Specifications and was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Charge II and its specification, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The competent evidence in support of the specifications of Charge I may be summarized as follows:

(a) On 24 October 1944 accused was Technical Executive for the Technical Data Laboratory, Engineering Division, Wright Field, and was in charge of the technical and personnel work for the photographic branches of that division. He continued in such capacity until the time of trial (R. 119). On 24 October 1944 an AT-11 airplane, which was assigned to the Technical Data Laboratory, was sent to Langley Field, Virginia, with accused as a passenger, to obtain some photographic equipment. The equipment was loaded on the plane at Langley Field. The plane then left Langley Field and while enroute to Wright Field, the pilot, Lieutenant Summers, became aware that the fuel was low. The pilot searched for a landing spot but failed to find one, thereupon he and the accused bailed out of the plane and the plane crashed near Portsmouth, Ohio, causing the loss of most (if not all) of the photographic equipment (R. 6,7,14). The photographic equipment had been previously taken to Langley Field by a Lieutenant Steinmetz for a photographic mission there, and shortly after the crash the accused asked the civilian in charge of supply for the Photo Engineering Branch to confer with Lieutenant Steinmetz and prepare a list of the items which were lost in the crash. This was done and submitted to accused (R. 16,17). Sometime thereafter, in February 1945, accused directed the preparation of a Report of Survey, purporting to cover the items so lost. Accused gave the purported list of lost items to the civilian stenographer in his office, requesting that she include such items on the Report of Survey (R. 21). He had added to the list the three items alleged in Specification 1, to-wit: One Camera, Ground C-3 #41-10487; One Camera, Aircraft 16 MM 141 B&H #361697; and One Kit, Navigation Dead Reckoning. The three items listed had not been on the plane at the time of the crash and were in the possession of the

accused at the time he directed the making of the Report of Survey. Accused was aware of these facts at the time the Report of Survey was prepared in his office (Pros. Ex. 21).

(b) Major Doy L. Hancock was the responsible property officer for the lost equipment (R. 30), and, when the Report of Survey had been completed it was sent by the accused to Major Hancock (R. 24). While the Major was the responsible officer, it was not possible for him to make a personal investigation on all items of lost property and he consequently required the person submitting reports to execute a certificate which certified that the property listed was "lost in the manner stated while in public service." (R. 30). When the Report of Survey was submitted to Major Hancock it did not contain this certificate, whereupon the Major went to accused and explained the necessity for such document (R. 27, 28). Accused then signed the following certificate: "I do solemnly swear (or affirm), that the articles of public property shown in the Report of Survey of February 1945, in a recent crash of AT-11 airplane, #42-37207 were lost, damaged, destroyed, or worn out in the manner stated while in the public service." (Pros. Ex. 8). Major Hancock then forwarded the Report through channels for final action (R. 29). There were, however, some errors in the Report, some information lacking, so the Report was returned to Major Hancock who informed accused of that fact. Accused then requested the Major to return the Report to him (accused) which was done (R. 24). Accused thereupon prepared a new Report of Survey in which he omitted the items named above and again placed the Report in channels. A Report of Survey, omitting the items above listed, was finally approved.

(c) "Sometime in '42" (R. 40) accused had obtained possession of the Ground Camera, C-3 #41-10487 on proper memorandum receipt (Ex. 12). He had obtained the Kit-Navigation Dead Reckoning on memorandum receipt dated 10 August 1944 (Ex. 9), and had obtained the 16 MM 141 Bell & Howell camera on memorandum receipt dated 9 June 1944 (Ex. 10). The accused, thereafter, kept these items in his office, taking them home occasionally and taking them on various trips which it was necessary for him to make (R. 9, 11, 54, 56, Pros. Ex. 21). In the course of the investigation by the Air Inspector prior to the time charges were preferred, the Inspector asked accused for the three items. The accused then obtained the 16 MM Camera from a room adjacent to his office; the Ground Camera C-3 was obtained from a cabinet in the rear of accused's desk; and the Navigation Kit was found either in the filing cabinet or on a chair in accused's office (R. 45).

(d) Prior to trial the investigating officer, appointed pursuant to A. W. 70, interviewed the accused and fully explained to him his rights under the 24th Article of War. Accused stated that he understood such rights and desired to make a sworn statement (R. 90). In response to questions, accused admitted that he had obtained a list of items which were lost in the crash of the AT-11 plane and that he added to the list the two cameras and the navigation kit. Accused stated he did this

because other items of Government property had been lost or destroyed and no survey made and to "make up for those lost pieces, * I added them to the list." Accused first stated that he thought the 16 MM Camera was actually on the plane, but he subsequently admitted that he had used the camera at Christmas 1944 and therefore knew it was not on the plane. He readily admitted that he knew the Ground Camera C-3 and the Navigation Kit were not on the plane but "my intention at the time was to make up for those losses that we had suffered in this equipment. I specifically had not said anything to anybody about it, but that was my intention." He further stated that, as he was filing a report of Survey, it was his thought to clean up all the small losses that had occurred in his department. Accused knew that the items added to the Report were charged to him on memorandum receipt and also knew that if the Report should be approved the three items would be dropped from the responsible and accountable records. Accused also admitted that Major Hancock had requested him to sign a certificate certifying that all of the items listed on the Report of Survey were lost, destroyed or unserviceable because of the crash of the AT-11 plane and, pursuant to such request, accused executed the certificate and placed it in channels so that it eventually reached Major Hancock. About three days after submitting the first report, Major Hancock requested additional information from accused and, because accused then "realized I had made a mistake and intended to correct it quick," he requested the return of the original Report of Survey which he then corrected by deleting the three improper items. In answer to a question as to what caused him to change his mind, accused replied, "I'd say it was just a decision--that I had made a mistake and I wanted to make this correction." Before making the original report the accused mentioned to an officer in his department that he intended to list the three additional items and the officer told accused "It's up to you, you're doing it." (Pros. Ex. 21).

4. Evidence for the defense was in substance as follows:

(a) Accused, having been previously advised of his rights, elected to remain silent, the defense counsel adding "The statement is in the record" (R. 133). Apparently this referred to the statement taken by the investigating officer and summarized in sub-paragraph (d) above.

(b) Defense then produced several witnesses to testify to the character and efficiency of the accused and to attack the chief prosecution witness. The chief prosecution witness was Captain Harry L. White, the officer to whom accused stated his intention of including the three items in the Report of Survey, and the officer who had reported the matter to the Air Inspector. Witnesses testified that Captain White was inclined to exaggerate (R. 116), and was given to practical joking which lead to serious consequences (R. 83); that he was irritated because accused refused to approve an extended plane trip to California for the Captain (R. 101), and perhaps was upset because he had not been promoted (R. 124). At the time accused denied the request for Captain

White's plane trip to California, the Captain told a civilian employee "I'll get him," meaning accused (R. 99). Later when Captain White was asked to report to the trial judge advocate's office in connection with this trial, White rubbed his hands together and said, in "a rather sneering or leering manner," "Well, here we go," seeming to relish the idea of accused being tried (R. 99, 100). Another witness testified that Captain White was rather happy over the fact charges had been preferred against accused and referred to accused in a cynical fashion as "my friend." (R. 107).

Brigadier General Franklin O. Carroll was called as a witness for the accused and testified that he was Chief of the Engineering Division at Wright Field and had known accused for about four years. That accused had carried out his assignments "exceptionally well" and his character was excellent (R. 131).

Colonel John M. Hayward, Chief of the Technical Data Laboratory, and immediate commander of accused, testified that he had known accused for about four years and that accused had worked under his supervision for about a year and a half. Colonel Hayward testified accused "has been entirely satisfactory in his work and in his decisions. I have never had to reprimand him or countermand any important decisions he has made. I have reposed considerable confidence in his judgment on technical matters, particularly with regard to the photographic end of things." (R. 118, 119). In 1944 Colonel Hayward was absent from Wright Field for about two months and accused, as senior officer, was placed in charge as Acting Chief of the Technical Data Laboratory. Accused performed the duties of Acting Chief so well that, after investigation, Colonel Hayward wrote accused commending him for his attention to duty and capacity for leadership and judgment (R. 120). Colonel Hayward, from the witness stand, expressed his complete confidence in accused (R. 122) and stated that accused was an exceptionally hard worker, working long hours and that accused should have taken some leave for rest and recuperation (R. 123). Colonel Hayward was also acquainted with Captain White and recalled that at various times Captain White had made disparaging remarks about decisions made by accused but that he (Colonel Hayward) had not had occasion to change any important decision of accused (R. 121). Colonel Hayward was of the opinion that Captain White's remarks were made with the view of contributing to the efficiency of the department, but that he was "inclined to be a little too critical of a superior officer." (R. 128). Colonel Hayward also stated that Captain White was concerned about his promotion (R. 124).

5. The evidence offered by the prosecution, including the confession of accused to the investigating officer, shows conclusively that accused caused a Report of Survey to be prepared and presented for processing and approval, which Report falsely and wrongfully represented that three items of property belonging to the United States were destroyed when accused knew that the property was not so destroyed. The mere fact that accused later eliminated the three items from the Report of Survey in no manner expiates his fraudulent act. The evidence is also sufficient

to show that accused officially executed and delivered to proper authority a statement in writing saying that certain property of the United States had been destroyed, which statement was known by accused to be untrue in that the property was not so destroyed but was actually in the possession of accused and being used by him.

6. War Department records reveal that accused will be 45 years of age on 19 February 1946. He is married and has one child, a daughter who is about 15 years of age. Accused was engaged in commercial photography from 1920 until his entry on extended active duty in 1941. He was commissioned a Captain, Specialist, on 21 Mar.1941 and was called to active duty on 24 April 1941. He was promoted to Major, AUS (AC), on 2 July 1942, and to Major, AUS, on 29 September 1943. He was promoted to Lieutenant Colonel, AUS, on 17 November 1944. During his period of extended active duty he has received five efficiency ratings, one of which was "Very Satisfactory," three were "Excellent," and one was "Superior."

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge I and Charge I, and legally sufficient to support the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Percy E. Fox, Judge Advocate.

Charles A. Luckie, Judge Advocate.

(On leave), Judge Advocate.

Charles S. Lyster Judge Advocate.

SPJGK - CM 283836 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 Lieutenant Colonel John H. Van Cleve (O-408114), Air Corps.

2. Upon trial by general court-martial this officer pleaded not guilty to and was found guilty of fraud and misrepresentations in the preparation and presentation of a Report of Survey (Spec. 1, Chg. I); of officially executing and delivering a false certification in reference thereto (Spec. 2, Chg. I), both in violation of Article of War 96, and of knowingly and without proper authority applying to his own use one Astro compass, property of the United States furnished and intended for the military service thereof, in violation of Article of War 94. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of the Specification of Charge II and Charge II, but 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 sufficient to support the findings of guilty as approved by the reviewing authority and the sentence.

On 24 October 1944 an AT-11 airplane in which accused was a passenger and which had been sent from Wright Field, Ohio, to Langley Field, Virginia, to bring back certain photographic equipment, crashed near Portsmouth, Ohio. A list of the items of photographic equipment lost in the crash was prepared at accused's request by the officer who originally flew him from Wright to Langley and submitted to accused. In February 1944 accused prepared a Report of Survey consisting of these items, to which he added two cameras and one navigation dead reckoning kit. None of these articles were on the plane at the time of the crash but were in accused's possession at the time the report was made. Upon his submission of the report to the responsible property officer for the lost equipment it was discovered that the certification that the property was "lost in the manner stated while in public service" had been omitted therefrom, whereupon accused signed a certificate which stated:

"I do solemnly swear (or affirm) that the articles of public property shown in the Report of Survey of February 1945, in a recent crash of AT-11 airplane, #42-37207 were

lost, damaged, destroyed, or worn out in the manner stated while in the public service."

Upon additional administrative errors being found in the report accused requested its return and submitted a new Report of Survey in which he omitted the three items previously listed.

The offenses of which accused has been convicted are of a serious nature. While there is nothing in the record which justifies his misconduct, in view of his early attempt to rectify his wrongful acts, his value to a technical branch of the service, and his four years of excellent service as an officer, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $50 of his pay per month for six months, and that the sentence as thus modified be carried into execution.

4. Consideration has been given to a plea of clemency filed on behalf of accused by his defense counsel and to the letter from Colonel John P. Fraim, Jr., the president of the court which tried accused. The plea and the letter 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 Pres of court, Col John P. Fraim, Jr.

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but commuted to a reprimand and forfeitures. GCMO 430, 28 Aug 1945).

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

SPJGN-CM 283983

UNITED STATES v. Second Lieutenant JOHN F. CAWLEY (O-1330785), Infantry.	INFANTRY ADVANCED REPLACEMENT TRAINING CENTER Trial by G.C.M., convened at Camp Maxey, Texas, 20 July 1945. Dismissal and total forfeitures.

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 69th Article of War.

Specification: In that Second Lieutenant John F. Cawley, Company "D", 83d Infantry Training Battalion, 21st Infantry Advanced Training Regiment, Infantry Advanced Replacement Training Center, Camp Maxey, Texas, having been duly placed in arrest of quarters at Camp Maxey, Texas, on or about 4 June 1945, did, at Camp Maxey, Texas, on or about 2 July 1945 break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Second Lieutenant John F. Cawley, Company "D", 83d Infantry Training Battalion, 21st Infantry Advanced Training Regiment, Infantry Advanced Replacement Training Center, Camp Maxey, Texas, did, at Camp Maxey, Texas, on or about 3 July 1945, with intent to deceive Lieutenant Colonel Allen F. Bacon, officially state to the said Lieutenant Colonel Allen F. Bacon that he was exercising in his BOQ area until

0145, which statement was known by said Second Lieutenant John F. Cawley to be untrue.

The accused pleaded not guilty to, and was found guilty of, both Charges and the Specifications thereunder. After evidence had been introduced of one previous conviction by general court-martial for wrongfully taking and using the sum of forty dollars, without the consent of the owner, 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, pending a previous trial by general court-martial, the accused, on 4 June 1945, was placed in arrest and was specifically instructed that he was limited to his room, the latrine, and the officers' mess adjacent to his "BOQ". In the event that he should desire to exercise, he was to "interview his Battalion Commander, Major [Terance E.] Overgaard, who would detail an officer to accompany him" (R. 7-8).

After the trial had been held, Lieutenant Colonel Allen F. Bacon visited the accused on 21 June 1945 for the avowed purpose of clarifying the terms of the arrest and to allay any possible misunderstanding. The accused was informed that his status had not been changed by the court-martial and that, as before,

> "he was to stay in BOQ building 4-113 and he was free to go into the officers' mess at meal time and at other times he would remain inside the building except when he wanted to exercise. Then he would be furnished an officer from the 83rd Battalion to accompany him during his exercise period. * * * [O]nly the General could affect his arrest" (R. 9-13).

The accused indicated that he understood and that he had no questions (R. 9).

Despite his clear comprehension of the precise delimitations of his arrest, the accused, at about 9:30 p.m. on 2 July 1945, went to Paris, Texas, with First Lieutenant George J. Murray, Jr., and did not return to the BOQ until around 4:00 or 4:30 a.m. the following morning (R. 17-19). His absence from his room was noted at 8:00 p.m. on 2 July 1945 by Major Overgaard, who at first "didn't pay any attention". Upon, however, again finding at 8:40 p.m. that the accused was still away, Major Overgaard "took it upon [him]self to check and re-check" on several occasions between 9:30 and 11:40 p.m. with, of course, no success. After this last search Major Overgaard "went to bed" (R. 13-17). When questioned by Lieutenant Colonel Bacon on 3 July 1945, the accused stated that on the previous night "he had been exercising around the outside of his BOQ building, around 9 o'clock until he went to bed at 1:40" (R. 10-13).

4. After being apprized of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. A general court-martial on 20 June 1945 had sentenced him to forfeit one hundred dollars of his pay and to be restricted for three months to "his place of duty" and on 25 June 1945 had reconvened to define the phrase quoted as meaning "his battalion area" (R. 22; Def. Exs. A, B). Being in doubt as to whether his original arrest had been modified or changed by the action of the court, he had asked Lieutenant Colonel Bacon on 21 June 1945 for an explanation. The reply was that his status remained unchanged, that he was "still in arrest in quarters" on the terms and conditions of which he had been informed on 4 June 1945, and "that this arrest would not be released by anyone except the Commanding General" (R. 21, 23, 27, 32-33; Def. Ex. B).

At 10:00 p.m. on the night of 2 July 1945 the accused had accompanied Lieutenant Murray to Paris, Texas, to visit some "friends" and, after spending a short while with them, had returned in time to be in bed by 1:30 a.m. (R. 31). When interrogated by Lieutenant Colonel Bacon later on 3 July 1945, the accused explained that he was in various rooms of the BOQ, other than his own, until 8:30 p.m. the previous night; that between that time and 9:15 p.m. he took a shower, shaved, dressed, and reentered his own room; and that he then "went to the side porch and sat down waiting for a telephone call, and * * * walked around the BOQ". At no time did the accused state that he had been "exercising around the BOQ until 1:40 or 1:30, or later". Nor was it ever his intention to leave a false impression with Lieutenant Colonel Bacon (R. 26, 29-31). The accused had, however, failed to make any mention of his trip into Paris, Texas (R. 32).

After Lieutenant Colonel Bacon had departed, a copy of a court-martial order dated 30 June 1945 and a letter dated 2 July 1945 were delivered to the accused (R. 22, 24-25; Def. Exs. A, C). The order approved the sentence as modified on 25 June 1945, and the letter specified the limits of the restriction imposed. In this last instrument the accused was instructed that:

> "3a. Your present battalion area is included within Lamar Road, Houston Avenue, Division Road and Seventh Street, Camp Maxey, Texas.
>
> b. You are required to fulfill all regular duties assigned by proper authority and you are granted permission to leave the above area only to fulfill said duties" (R. 24-25; Def. Ex. C).

The purpose for which this document was introduced was to "show that there was no arrest the night of July 2nd" (R. 25).

5. The Specification of Charge I alleges that the accused, "having been duly placed in arrest of quarters at Camp Maxey, Texas, on or about

4 June 1945, did, * * * on or about 2 July 1945 break his said arrest before he was set at liberty by proper authority". This was set forth as a violation of Article of War 69. The Specification of Charge II alleges that the accused did, "on or about 3 July 1945, with intent to deceive" make a false official statement to Lieutenant Colonel Allen F. Bacon. This offense was laid under Article of War 95.

It is not disputed that the accused spent several hours in Paris, Texas, late on the night of 2 July 1945 and early on the morning of 3 July 1945. If he were then in a status of arrest, he was obviously guilty of a contravention of Article of War 69. But the defense has insisted that the reviewing authority's approval on 30 June 1945 of the court-martial sentence adjudged on 20 June 1945 terminated the arrest and superseded it with a restriction to the battalion area. Whether this contention is well-founded depends upon whether the sentence of restriction became valid upon the date of its approval by the reviewing authority or upon the date on which a copy of the general court-martial order approving the sentence was served upon the accused.

An arrest and a sentence of restriction for the same offense cannot be enforced simultaneously. Arrest is a restraint temporarily imposed, pending final disciplinary action by court-martial or under Article of War 104. A sentence of restriction is a final assessment of punishment for the offense charged, and, upon becoming effective, it automatically nullifies, and ends the necessity for, any preliminary form of restraint.

A general court-martial order approving a sentence and directing its execution applies specifically to the accused and is, as to him, a special order. Since, as was recognized in CM 211586, Garber, 10 BR 107, a special order can be binding upon the person affected only if delivered or made known to him, it follows that a general court-martial order is subject to the same limitation. In discussing the action of the reviewing authority in a court-martial case, the Manual for Courts-Martial states:

> "Any action taken may be recalled and modified before it has been published or the party to be affected has been duly notified of the same". (Underscoring supplied). MCM, 1928, par. 87b, p. 78).

If the accused is ordered to be dismissed or discharged from the service, his status as an officer or as a soldier is not changed by the signing of the final action but remains unaffected until the general court-martial order is implemented by further necessary action. For the same reason the status of confinement or arrest imposed upon an accused, prior to a trial by court-martial, does not automatically terminate upon approval of the court-martial sentence. He continues in his pre-trial status until notice of the general court-martial order has been served upon him or

such other procedural step taken as may be necessary to implement and execute the court-martial order. Since the accused was placed in arrest on 4 June 1945, and since he did not receive notice of the general court-martial order until 3 July 1945, he was still in arrest on 2 July 1945. His conduct, therefore, in going to the city of Paris, Texas, on the last date, was a clear contravention of his existing status and a violation of Article of War 69. The Specification of Charge I has been proved beyond a reasonable doubt.

Although the accused has maintained that he did not mean to leave any false impressions with Lieutenant Colonel Bacon on 3 July 1945, the record amply justifies a more sinister interpretation of the facts. In response to Lieutenant Colonel Bacon's interrogatories on that day, the accused gave a detailed account of his activities during the previous night, but at no time did he mention his trip to Paris, Texas. Had the accused sincerely desired to avoid any misrepresentations, he could not possibly have omitted so vital a detail from his account. This concealment of the most important event of the night casts an impenetrable fog of doubt over his protestations of good faith. The Specification of Charge II has also accordingly been sustained beyond a reasonable doubt.

6. The accused, who is married and the father of three children, is about 31 years old. After being graduated from high school, he attended Wharton School of Business and Finance for two years. He was employed from September, 1931, to June, 1933, by the A & P Tea Company as a clerk, from February, 1934, to June, 1941, by the Pennsylvania Liquor Control Board as a senior field accountant, from June, 1941, to August, 1942, by The United States Treasury Department as an internal revenue agent, and from November, 1942, to August, 1943, by the Western Electric Corporation as an assistant store keeper. He had enlisted service from 28 August 1943 to 18 January 1945 when he was commissioned a second lieutenant. On 30 June 1945 he was convicted by general court-martial of wrongfully taking and using the sum of $40.00, without the consent of the owner.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 69.

Abner E. Lipscomb, Judge Advocate.

Robert J. Glenn, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 283983 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 John F. Cawley (O-1330785), Infantry.

2. Upon trial by general court-martial this officer was found guilty of breaking arrest, in violation of Article of War 69; and of making a false official statement, in violation of Article of War 95. After evidence had been introduced of one previous conviction by general court-martial for wrongfully taking and using $40 without the consent of the owner, he was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof.

While in the status of arrest, the accused, at about 9:30 p.m. on the night of 2 July 1945, left the quarters to which he was restricted and went into the nearby town of Paris, Texas. After visiting some friends there for several hours, he returned to his room at about 4:30 a.m. the following morning. When questioned later on 3 July 1945 concerning his activities of the previous night, the accused stated to a superior officer that "he had been exercising around the outside of his BOQ building, around 9 o'clock until he went to bed at 1:40". This conduct, when considered in the light of the accused's previous conviction by general court-martial, plus two punishments under Article of War 104, clearly reveals him to be unworthy of further retention in the service as an officer. 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
Major General
The Judge Advocate General

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

(Sentence confirmed but forfeitures remitted. GCMO 421, 28 Aug 1945).

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

SPJGN-CM 283987

UNITED STATES v. Technician Fifth Grade WILLIE LYLES (35451804), Company C, 33rd Engineer Training Battalion, Army Service Forces Training Center, Fort Leonard Wood, Missouri.	)	SEVENTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Leonard Wood, Missouri, 22 June 1945. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by 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 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 Technician Fifth Grade Willie Lyles, Company C, Thirty-third Engineer Training Battalion, ASFTC, Fort Leonard Wood, Missouri, did, at Fort Leonard Wood, Missouri, on or about 7 June 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fifth Grade Benjamin Manley, 3077th Engineer Dump Truck Company, Fort Leonard Wood, Missouri, a human being by stabbing him in the chest with a knife.

The accused pleaded not guilty to, and was found guilty of, the Charge and the Specification. He was sentenced to be reduced to the grade of private, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor,

at such place as the reviewing authority might direct, for the term of his natural 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. Evidence for the Prosecution: Accused fatally stabbed Technician Fifth Grade Benjamin Manley at Fort Leonard Wood, Missouri, early on the morning of 7 June 1945. Accused's jealousy over a woman, Dorothy Howard, was the motive for the killing. All of the principals in the case are colored (R. 7, 10, 41, 44; Pros. Ex. 3).

Mrs. Howard, a married woman, kept company with the accused for six months prior to the homicide and every night was escorted by him to her home from the post exchange at which she was employed. She had planned to marry him upon obtaining a divorce, but their relationship was anything but tranquil because of his many threats against her life (R. 36, 52-55). His jealous concern over Mrs. Howard was pictured in the testimony of Private James C. White, who asserted that, about 3 or 4 June 1945, he was seated in the post exchange with accused and that Manley was seated nearby with his arms around Mrs. Howard. According to White, accused exclaimed that "if [Manley] did not leave his girl alone he was going to kill him" (R. 31). It was brought out on cross-examination that White had been returned from overseas following his conviction by general court-martial of "beating up a girl" and was in confinement again awaiting trial. His allegations were flatly denied by Mrs. Howard, who stated that she had known Manley for about three weeks, had only talked to him at the service club and the post exchange, and had never been taken to her home by him (R. 37-38, 55).

Manley was in the post exchange until it closed on the night of 6 June 1945. He talked to Mrs. Howard during the evening but made no arrangements with her for any subsequent engagement (R. 38; 56-57). She departed about 10:30 p.m. and was accompanied home by accused. They walked to building No. 290, the dormitory where she resided, and became involved in an argument (R. 38-39). He charged her with "seeing" Manley (R. 61-62). She, in turn, told him that she was afraid of him because of his many threats and that it was best to "separate". He finally agreed "if that's the way it's got to be that's the way it would be" and went away (R. 39, 54). Meanwhile Manley, in a telephone conversation with another girl in the dormitory, had ascertained that Mrs. Howard was at home and, shortly after the accused's departure, had set out to join her there. Manley was accompanied by Private Joe Christburg, who intended to call upon Mrs. Howard's roommate, Evelyn Elkins. Upon arriving at the dormitory Christburg informed Mrs. Howard that Manley was with him (R. 40, 81). She immediately "went out" to Manley and walked down the street with him past buildings numbered 286, 285, 284 and 283, which, in that order, adjoined No. 290 (R. 7-8, 40-41; Pros. Ex. 4). As they approached No. 283, accused came around the corner

of the building and said, "Corporal, I would like to speak to Dot", adding, "My mind told me to come back, I figured this" (R. 41). Accused and Mrs. Howard walked back toward her dormitory and proceeded to engage in a discussion which was initiated by his demand that she explain "why [she] was * * * out with Manley" (R. 66-68). Accused reached in his pocket for his knife, but, when she said she did not think he would harm her and asked for the knife, he handed it to her remarking, "If I wanted to do anything to you I could do it without the knife". She closed the opened blade and returned the knife to him. Before replacing it in his pocket, he again opened the blade which was about four inches long (R. 42, 51).

He called to Manley, who had remained standing down the street, but Manley replied, "No, you don't want to talk to me, you want to talk to her". When accused insisted, Manley came over to him. Accused suggested that Mrs. Howard leave, but, when she started for her dormitory, he suddenly changed his mind and warned her "to stop if [she] didn't want to lay there in [her] tracks" (R. 42, 68-70). Manley placed one foot on the running board of an automobile and stood with his hands, empty, hanging down at his sides. An argument followed and, in Mrs. Howard's words, accused "was in a fighting mood", but Manley, who was a much larger and more strongly built individual, "was talking to him as if he didn't want any trouble" (R. 22, 43-45, 50). Accused reached in his pocket, took out his knife, and held it behind his back (R. 43). Mrs. Howard, who was standing behind him, motioned with her hands to warn Manley of his danger (R. 45). Accused walked around Manley "as if he were trying to circle" him and then suddenly drew back and stabbed Manley in the left side of the chest (R. 44-46). After pulling his knife out, the accused ran a short distance away but suddenly turned and said, "I might as well finish both of you". Mrs. Howard put her arms around Manley and asked if he could run. He replied affirmatively and started down the street while she fled toward No. 283. Although accused commanded her to stop or "I'll kill you too", she did not halt until she entered the building and bolted the door. When she peered out a window, she saw accused wiping the blood off of his knife (R. 46-48). Manley succeeded in reaching the steps of a guest house several hundred feet away but there collapsed (R. 8, 19-20; Pros. Ex. 4).

Military police responded to a call to the guest house about 12:30 a.m., 7 June 1945, and found Manley's body in a pool of blood. Near him was a blood-spattered razor "about half way open" (R. 9, 10-12; Pros. Ex. 5). He was removed to the station hospital where he was pronounced dead. A wound approximately two inches long had been inflicted slightly to the right of the left nipple (R. 14). An autopsy disclosed that death was caused by a "perforating wound of [the] right ventricle of [the] heart", a "left hemothorax" (extravasation of blood into the pleural cavity), and the collapse of the left lung (R. 7; Pros. Ex. 3).

About 12:25 a.m. on 7 June 1945 accused entered the dispensary

in a seeming "state of hysteria" and displayed two small cuts on the palm of his left hand. He said that he had been attacked and cut by another soldier and that he had resisted and cut his assailant. He inquired, "what would they do to a man in the army if he killed another soldier?" He pulled out a knife and requested the attendant to keep it for him but was refused (R. 25-29). In accordance with the attendant's suggestion accused went to the hospital to have some stitches taken in his hand. When questioned by the assistant provost marshal, who was called to investigate the alleged assault, accused stated that he was walking near building No. 284 when a total stranger approached saying, "Boy I'm going to kill you" and attacked him with a knife, cutting his hand. Accused insisted that he was unarmed, did not like knives, and never carried them. Later, when he was taken back to the dispensary for questioning in the presence of the attendant, he admitted that he had a knife (R. 15-17). He asserted that he had thrown the knife away outside the dispensary, but a search of the premises failed to reveal it (R. 18).

4. Evidence for the defense: Private Joe Christburg testified he was with Manley in the post exchange on the night of the killing (R. 136). Manley and Mrs. Howard had previously arranged to walk home together but accused took her home instead (R. 138-139). Christburg and Manley went to their orderly room and, after Manley had received a telephone call, proceeded to Mrs. Howard's dormitory. Christburg called Mrs. Howard's roommate outside and also told Mrs. Howard that Manley was there (R. 139-140). After Mrs. Howard talked to Manley for awhile, he remarked "they was going to get him a room" at the guesthouse and walked away with her (R. 141-143). Christburg returned to his company (R. 147). At the trial he identified the razor found near Manley's body as belonging to Manley and habitually on his person (R. 136, 149-150).

Accused, after explanation of his rights as a witness, elected to testify in his own behalf (R. 82-83). He was 29 years old and had been in the Army approximately three years (R. 83). He had known Mrs. Howard for about nine months, had been "going steady" with her for some time, had given her money, and had planned to marry her. There had never been any trouble between them and he had never made any threats against her (R. 84, 102, 128). He denied any acquaintance with Manley prior to the homicide, denied making any threats against him such as Private White testified to, and asserted that he had met White in the guardhouse after the killing for the first time (R. 85-86).

On the night of 6 June 1945 accused accompanied Mrs. Howard to her dormitory from the post exchange, but she went to her room because she had a stomach ache. There were no differences of any kind between them that evening (R. 87-90). He walked toward the gate, intending to go out, but changed his mind and in proceeding toward his company, passed near the dormitory. He met Mrs. Howard and Manley near building No. 283 and asked to speak to her (R. 90-91). When she walked with accused down

near No. 286, he said to her, "I didn't know you were going to be a girl like that". She accused him of being angry and wanting to hurt her, but he denied it and as proof handed her his knife, which he carried for use in connection with his work as a cook in the kitchen (R. 91-92, 97, 114). It could not be carried open in the pocket because it had a long four inch blade (R. 98). Manley came down the street from where they had left him and walked straight at accused with his hand in his pocket. Being much smaller than Manley, accused became frightened and opened the knife which Mrs. Howard had returned to him. Manley came up close, asking "Are you trying to make this girl do something?" and struck at accused, who threw up his arm and received a stinging blow on the hand. Accused struck back with his knife and inflicted a cut. Manley then fled up a hill with the accused directly behind (R. 83, 91-96, 101, 118).

On cross-examination accused insisted that, although he was engaged to Mrs. Howard for several months, he was not angered at finding her with another man. He had been informed several days before that she was going out with someone else (R. 104-106). There had been no loud talk or quarreling between Mrs. Howard and himself before Manley came at him. Manley approached too quickly to allow accused to avoid him. The reason accused pursued his victim subsequent to the stabbing was simply that he was facing in that direction. The accused's failure to make an immediate and truthful disclosure of the event to the police was due to fear (R. 108, 119-121, 133).

5. Rebuttal evidence for the prosecution: Major Raymond A. Taylor, of the hospital staff, who dressed accused's hand on the morning of 7 June 1945, described the wounds as "rather superficial". They appeared to have been inflicted with a sharp instrument such as a knife or razor (R. 151-153).

Mrs. Howard denied any prearrangements to meet Manley on the night of the killing or that he ever suggested going to the guest house (R. 155, 159). Manley made no effort to defend himself and never raised his hand prior to the stabbing (R. 165). Accused had warned her on several occasions, "Dot, before I see you with anyone else, I'll kill you" (R. 156)

6. The Specification of the Charge alleges that accused "did, at Fort Leonard Wood, Missouri, on or about 7 June 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fifth Grade Benjamin Manley, * * * a human being by stabbing him in the chest with a knife".

Murder is "the unlawful killing of a human being with malice aforethought". By "unlawful" is meant without legal justification or excuse. MCM, 1928, par. 148a. "Malice aforethought" has been defined in the following language:

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

* * *

"* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed: it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought', in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance." Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711.

The words "deliberately" and "with premeditation" have been held to mean "* * * an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act". Wharton's Criminal Law, Vol. I, sec. 420. "Deliberation and premeditation may be instantaneous. Their existence is to be determined from the facts and circumstances in each case". Aldridge v. United States, 60 App. D.C. 45, 47 F. 2d 407, 408. "It is not the lapse of time itself which constitutes deliberation, but the reflection and consideration, which takes place in the mind of the accused, concerning a design or purpose to kill." Bostic v. United States, 94 F. 2d 636, 638, CCA, D.C. 1937.

It is undisputably established that accused, on the early morning of 7 June 1945, stabbed Benjamin Manley with a knife, perforated his lung and heart, and caused his death. The evidence as to the circumstances leading up to the killing must be considered in the light of the quoted legal definitions to determine whether the homicide was murder or self-defense, the respective contentions of the prosecution and the defense.

The prosecution's case is based principally on the testimony of Mrs. Howard, apparently the only eye-witness to the killing other than accused. Her portrayal of him as a highly jealous suitor who on numerous occasions had threatened to take her life if he ever found her with another man is corroborated by the surrounding circumstances. His coming back to her dormitory after she had ostensibly retired for the

night shows his suspicious nature, and his fingering an open knife as he talked to her after finding her with Manley indicates that his homicidal threats were not mere idle bombast. Although he surrendered the knife at her request, he opened the blade again after she had closed and returned it and thus revealed that he contemplated further use of the weapon. He was wholly the aggressor in his subsequent attack upon Manley. After calling him over, accused sought to provoke a quarrel with him but Manley protested his unwillingness to fight. While Manley was talking, accused suddenly plunged the knife into Manley's chest with such force as to penetrate the chest wall and puncture the heart.

Mrs. Howard's testimony is contradicted in most of its essential details by the accused. He denies that he was jealous of Mrs. Howard, that he ever made any threats against her, or that he was angered at finding her with Manley. His version of the killing is that while he was quietly talking with Mrs. Howard, Manley, with his hand in his pocket, came at him in a menacing manner, struck at him with some sharp instrument, and compelled him to use his knife in self-defense. Some equivocal corroboration of accused's story is found in the fact that accused did have two slight cuts on his hand after the killing and that Manley's razor was found near his body.

The court-martial resolved the direct conflict in the testimony against accused. By reason of the superior position which the court-martial enjoyed in judging the credibility of the witnesses its findings, while not conclusive, are entitled to great weight. CM 243466, Calder, 27 BR 365, 3 Bull JAG 231. Aside from the conclusions of the court-martial, the Board of Review believes that the evidence clearly establishes the offense charged. Mrs. Howard's story, except in some minor details, is consistent and reasonable. There is no valid reason apparent why she should have perverted the facts in the case so as to charge the accused unjustly with a capital crime. Accused's self-interest is obvious, and his credibility as a witness is destroyed by the fact that in essential particulars his testimony is wholly improbable and contrary to human experience. His denial that he was jealous of the woman he intended to marry or that he was perturbed over finding her with another man; his explanation that he just happened to walk by her dormitory after he had left her for the night; his testimony that, while he was quietly talking with her, Manley suddenly attacked him without cause; and his statement that he ran after Manley subsequent to the stabbing because he happened to be facing in the same direction; are so implausible as to discredit his entire version of the affair.

The evidence affords ample basis for the finding that the stabbing was done deliberately, with premeditation, and with malice aforethought. The offense of murder is accordingly established beyond any reasonable doubt.

7. The record of trial shows that the accused is about 30 years

of age; that he was inducted at Cincinnati, Ohio, on 14 April 1942 for the duration of the war plus six months; and that he had no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence either of death or of life imprisonment is mandatory upon conviction of murder, in violation of Article of War 92. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 22-2401 of the District of Columbia Code.

Abner E. Libscomb, Judge Advocate.

Robert J. Clamor, Judge Advocate.

Samuel Morgan, Judge Advocate.

WAR DEPARTMENT

IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

Board of Review

CM 283987

UNITED STATES v. Technician Fifth Grade WILLIE LYLES (35451804), Company C, 33rd Engineer Training Battalion, Army Service Forces Training Center, Fort Leonard Wood, Missouri.	SEVENTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Leonard Wood, Missouri, 22 June 1945. Dishonorable discharge and confinement for life. Penitentiary.

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

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

Abner E. Lipscomb, Judge Advocate.

Xavier O'Connor, Judge Advocate.

Samuel L. Morgan, Judge Advocate.

1st Indorsement

War Department, J.A.G.O. To the Commanding General, Seventh Service Command, Army Service Forces, Omaha 2, Nebraska.

1. In the case of Technician Fifth Grade Willie Lyles (35451804), Company C, 33rd Engineer Training Battalion, Army Service Forces Training Center, Fort Leonard Wood, Missouri,

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, you now have authority to order the execution of the sentence.

2. A ~~cablegram~~ teletype is being sent advising you of the foregoing holding and my approval thereof. Please return the said holding and this indorsement and, if you have not already done so, forward therewith five copies of the published order in this case.

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General.

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

SPJGK - CM 284006

8 SEP 1945

UNITED STATES	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	)	Trial by G.C.M., convened at San Bernardino, California, 28 May - 5 June 1945. To be shot to death with musketry.
Corporal CHARLIE L. WELLS (34758701), Squadron F, 3035th Army Air Forces Base Unit.	)	

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

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

2. This case is a companion case to that of Private First Class Raymond W. Klasen (CM 284007) who is charged with the same offenses. Originally the two accused were jointly charged, but, when arraigned, counsel for each accused moved for a severance, which motion was granted.

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Corporal Charlie L. Wells, Squadron F, 3035th Army Air Forces Base Unit, Victorville, California, did, acting in conjunction with Private First Class Raymond W. Klasen, Squadron C 3, 3035th Army Air Forces Base Unit, at San Bernardino, San Bernardino County, California, on or about 6 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Irene C. Clark, a female person.

Specification 2: In that Corporal Charlie L. Wells, Squadron F, 3035th Army Air Forces Base Unit, Victorville, California, did, acting in conjunction with Private First Class Raymond W. Klasen, Squadron C 3, 3035th Army Air Forces Base Unit, at San Bernardino, San Bernardino County, California, on or about 6 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Irene C. Clark, a human being, by shock and excitement incident to

the commission of a felonious act upon the person of said Irene C. Clark, to wit, rape.

He pleaded not guilty to and was found guilty of the Specifications and the Charge. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence but, because the accused Klasen, who was also found guilty, received a sentence of life imprisonment, recommended that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for life. The record was then forwarded for action under Article of War 48.

4. The evidence for the prosecution is substantially as follows:

a. The accused, a colored Corporal, with Corporal Earl W. Gould and Private First Class Klasen, both white, were stationed at Victorville Army Air Field, California, on 6 April 1945. About 0600 hours on that date they left the Air Field in a 2-1/2 ton GMC truck and proceeded on a laundry detail to Camp Haan, California, arriving at Camp Haan at about 0730 hours (R. 95). They had lunch at Camp Haan, but had no food thereafter on this date (R. 149). The three soldiers left Camp Haan about mid-afternoon for the return trip to the Victorville Field and, enroute, stopped at a place known as Adairs (in San Bernardino, California), arriving there about 1530 hours and staying until about 1900 hours (R. 95,96). The accused had one bottle of beer at Adairs and then started drinking whiskey (R. 179). Corporal Gould drank beer at Adairs (R. 152) and purchased a one-fifth bottle of whiskey which he took with him (R. 153) when they left Adairs and went to the Club 888, which is a mile or mile and a half from Adairs. They arrived at Club 888 about 2000 hours and remained there a half or three quarters of an hour (R. 95,96). Each of the three soldiers had a glass of beer at Club 888 (R. 154,181).

b. Clarence and Irene Clark had lived in San Bernardino for several years. They had been married for seven years and had known Corporal Gould for about two years. Gould had visited them often and had frequently spent the night at their home. Mrs. Clark was 52 years of age and suffered from heart trouble, having been confined to her bed for the preceding month, and had spent about a week of that time in the hospital (R. 98,207,209,497). Her physician who had visited her on 6 April 1945 and found no improvement in her condition, advised her to remain quietly in bed (R. 497). Mrs. Clark's condition was such that she was unable to do any housework (R. 209) and her neighbors, Mrs. Ernest R. Kirkbride and "Mrs. Martinell," helped with such housework (R. 210). Mrs. Kirkbride "made" Mrs. Clark's bed that day and there were two sheets on the bed: the bottom sheet was pink and had been on the bed for two or three days; the top sheet was white and had been put on clean the day before (R. 303).

c. Gould knew that Mrs. Clark was ill and he wanted to visit her. On previous occasions Gould had taken soldier friends of his to

visit the Clarks (R. 176,209), so, when leaving Club 888 Gould asked accused and Klasen if they would accompany him to the Clark home to see Mrs. Clark who was sick. They agreed (R. 100,101). Gould drove the truck to the Clark home, arriving there about 2015 or 2030 hours (R. 102,216) and parked in front of the house (R. 156). Mr. and Mrs. Kirkbride, who were at their home which is located 29 feet 6 inches west of the Clark home (R. 90), testified that they heard the truck arrive shortly after 2000 hours (R. 268, 316). Gould went into the Clark house first, taking with him the bottle of whiskey he had previously purchased (R. 158). Accused and Klasen followed Gould into the house. The three soldiers were sober but Gould was "feeling good" (R. 170,222). Mrs. Clark was sitting up in bed in her bedroom which adjoined the living room (R. 103) and had pillows behind her for support (R. 217). Mr. Clark was sitting behind the bedroom door but came into the living room to greet Gould. Gould asked if it would be all right to bring accused and Klasen in and both Clarks consented (R. 104, 219). Gould introduced Mr. Clark to accused and Klasen and then the three soldiers went into the bedroom where Gould introduced the other two to Mrs. Clark. The soldiers then returned to the living room. Klasen sat in a chair near the bedroom door and accused sat in a chair by the radio which was in a corner of the living room opposite the bedroom door (R. 104,220, 225). Gould asked the men if they wanted a drink of whiskey. Clark and, apparently, Klasen, answered affirmatively but accused declined. Gould nevertheless poured drinks for all the men and placed one drink in front of accused (R. 110,111,221). Gould and Clark drank theirs while Klasen sipped his (R. 112). Gould then suggested to Mr. Clark that they (Gould and Clark) go out for a beer and a sandwich. Clark asked Mrs. Clark if it would be all right and she consented. Gould and Clark drove away in the truck and went to Adairs (R. 113,222) which was one or two blocks from the Clark home (R. 115,226). When Gould and Clark left the house, accused was still sitting by the radio and Klasen was sitting by the bedroom door sipping his drink (R. 113). Accused was awake and was listening to a radio program (R. 226).

d. About 15 or 20 minutes after hearing the truck first arrive at the Clark home, the Kirkbrides heard the truck leave and about five minutes thereafter Mrs. Kirkbride saw the lights go out in the Clark house. She commented on such fact to Mr. Kirkbride (R. 269,318). About 20 (R. 272) or 30 (R. 319) minutes later Mrs. Kirkbride saw the lights come on in the Clark house and immediately heard the sound of the truck returning and heard the rear screen door of the Clark house slam (R. 271,298). Mrs. Kirkbride did not hear anyone scream that evening (R. 298), but Mrs. Anna Gaddie who lived in a trailer court (R. 353) located 192 feet from the Clark house (R. 379) heard a woman (R. 355) scream that night sometime between 2030 and 2100 hours (R. 353). Gould and Clark were absent from the house for 20 or 25 minutes having their beer and sandwich, then returned and again parked the truck in front of the house (R. 115-119,226). Gould testified that the lights in the living room were off, but the lights in the bedroom were on when he and Clark returned to

the house (R. 163). Visibility that night was fairly good and "you could see pretty good outside" (R. 198) and could recognize a person about 10 feet away (R. 199). Neither Clark nor Gould saw anyone in front of the house when they returned (R. 119,228). Mr. Clark entered the house first (R. 120,227) and went into the bedroom with Gould following him. When Gould entered the bedroom he saw Mr. Clark on his knees beside the bed (R. 120) moaning and asking for a doctor, and then asking for the police or "the law" (R. 184,185,253). Neither the accused nor Klasen were in the house (R. 144,228), although accused's hat was found in the chair where he had been sitting (R. 382-4).

e. Mrs. Clark was lying diagnoally across the bed, nude, with white foamy "stuff," mixed with what appeared to be blood, coming from her mouth (R. 121). There were bruised spots "around her face" (R. 229), a black mark under her right eye and two scratches on her nose (R. 120). Her feet were 15 or 18 inches apart and the legs were slightly bent at the knees (R. 171). Her hair which had been previously combed (R. 122) was then dishevelled (R. 123). The sheets and blanket had been pushed against the wall (R. 120) and the bottom sheet was torn (R. 279). The bedroom was "all torn up" (R. 227) and an apple which had been on a chest of drawers in the room was on the floor crushed into the rug (R. 275). Mrs. Clark was alive but unconscious, and died about five minutes later (R. 238). Gould put his hand on her breast and then put his ear "down" but could distinguish no heartbeat. (R. 141) Gould then went to the Kirkbrides for help and was followed immediately by Mr. Clark (R. 141,227). The Kirkbrides returned to the Clark house with Clark and Gould, and in so doing hurried past the Kirkbride car which was parked in their driveway (R. 273) and they saw no one by the car (R. 322). Neither Clark nor Gould saw anyone while going to or returning from the Kirkbride house (R. 142,228). When Mrs. Kirkbride entered the Clark bedroom she took one look at Mrs. Clark and then started to a neighbor's house to telephone for a doctor (R. 272, 273). As she left the house and went on the sidewalk she "bumped" into Klasen who was standing there (R. 273). Mrs. Kirkbride went to the Martinell home and Mr. Kirkbride followed her there (R. 323). After the Kirkbrides left, Gould went to the truck intending to go for a doctor but Mr. Clark did not want him to leave and struggled there with Gould to prevent his departure. Mr. Clark then took the keys from the truck and broke some wires from the panelboard of the truck (R. 144,231). In breaking the wires Mr. Clark cut his hand slightly causing it to bleed (R. 400,401). During the scuffle, Gould noticed Klasen standing nearby (R. 145), and asked Klasen what had happened. Klasen replied he did not know and that he had been asleep by the car (apparently meaning the Kirkbride car) (R. 146). Clark and Gould then left Klasen and followed the Kirkbrides to the Martinell home (R. 146).

f. While the Kirkbrides, Gould and Clark were standing in front of the Martinell home, Mr. Kirkbride saw a figure, apparently a man, run from the field across the street from the Clark house and get into the

truck. The motor of the truck started immediately and the truck headed down the street in his direction (R. 328-9). Gould heard the truck door slam and saw the truck start down the street. He yelled for the driver to halt but the truck continued on its way (R. 146). The truck was running without lights (R. 146,274,330) and none of the parties recognized the driver (R. 198,232,330).

After seeing the truck leave, the Kirkbrides, Clark and Gould returned to the Clark home and found Klasen still in front of the house. Clark then took Klasen's left arm and Gould's right arm and all went into the house to await the arrival of the civil authorities (R. 147).

g. About 2230 hours that night the accused was arrested by the Military Police at the main gate of the Victorville Army Air Field (R. 344-5), which is about 40 or 45 miles over mountainous roads from San Bernardino (R. 351, 372). Accused was alone, was not wearing a hat, and was driving the same 2-1/2 ton truck he had been using that day (R. 344-5). He was promptly taken to the station hospital and the medical officer of the day made a blood alcohol test and determined that accused was sober (R. 364,368). From the amount of alcohol found in accused's blood, the medical officer was of the opinion that accused was also sober three hours earlier (R. 369).

h. An autopsy was performed on the body of Mrs. Clark that night, the autopsy being completed at about 0100 hours on 7 April 1945. The cause of her death was diagnosed as "acute congestive failure due to the hypertensive heart disease" (R. 476). The autopsy disclosed small lacerations over both eyelids, which had been recently bleeding. The lacerations were of the type which indicated they had been made by fingernails shortly before her death. There was also a small laceration on the bridge of the nose, which had been recently bleeding. The heart weighed 500 grams. The left ventricle measured 14 m.m. in thickness, and the right 4 m.m. in thickness. Both ventricular cavities were markedly dilated. The right lung weighed 650 grams; the left lung weighed 600 grams. They were markedly rubbery and congested. On section the lungs oozed frothy fluid which was slightly blood tinged. The vagina contained a glary mucoid, grayish white material, smears of which showed spermatozoa present; there being about five c.c.'s of semen in the rear corner of the vagina. The mucosa of the vaginal introitus showed two small lacerations which had oozed blood. These lacerations could have been caused by sexual intercourse if such intercourse was forceful without any preparation and, therefore, without any lubrication. The pathologist who made the autopsy also stated:

> "From my examination of the vagina and its contents, I drew the conclusion that this semen probably had been placed there very shortly before death, probably at the same time that the lacerations were made in the vaginal introitus, and I drew those conclusions because the semen had been placed in the posterior fornix

of the vagina; it was not smeared around; it was not diluted by any other secretion" (R. 477,478,479,484,485,487,494).

Mr. Clark testified that he had not had sexual relations with his wife at any time during the preceding month (R. 208). The aforesaid pathologist expressed the opinion that Mrs. Clark "had been in what is known as congestive failure. In that state any unusual exertion might lead to sudden cardiac failure - heart failure." He further stated that, in his opinion, if Mrs. Clark had been subjected to forcible sexual intercourse "a matter of a few minutes or half hour or so prior to the time she died" death would have been caused by "acute cardiac failure under the situation that she found herself previous to the attack, aggravated by the excitement" (R. 484,485). The physician who had been attending Mrs. Clark testified that, in his opinion, the excitement incident to forcible sexual intercourse would have "contributed" to her death (R. 498). Mrs. Clark's previous physical condition was such that she might die suddenly or might have continued to live for several years (R. 500).

i. Police Patrolman Pyeatt of the San Bernardino police force received a call at 2127 hours to report to the Clark home and he arrived there about three minutes later (R. 381). Shortly after his arrival he noticed that Klasen's field jacket had a spot of blood on the left sleeve, and spots on the left shoulder and the front. There was also a blood speck on the fly of Klasen's trousers (R. 385-6). Subsequent examination failed to reveal any seminal stains on the trousers of Klasen (R. 533-4). Scrapings were taken from Klasen's fingernails (R. 387) and disclosed the presence of blood, sand and dirt (R. 444) but no human tissue was found (R. 454). Pyeatt also noted that there was a particle of white, creamish, solid substance, which looked like apple, on Klasen's shoe just above the sole. The particle was about one-quarter inch in diameter (R. 392).

j. After accused was arrested at the Army Air Field his clothing was taken from him at the guardhouse about 0030 hours 7 April 1945 (R. 415), and accused was subsequently returned to San Bernardino where Patrolman Pyeatt talked with him about 0200 hours (R. 393). Accused's clothing was delivered to Mr. Pyeatt (R. 393) and accused stated that he had put on fresh clothing on the morning of 6 April prior to leaving Victorville for Camp Haan (R. 391,416). Accused also stated that he had not had sexual intercourse within the preceding 24 hours (R. 392), had not masturbated and had no nocturnal emission during that time (R. 421). Accused stated to Mr. Pyeatt that he had met Mr. Clark that evening but denied that he knew Mrs. Clark and denied knowing she was present in the house (R. 393). Accused's clothing was subjected to analysis and his undershorts disclosed urine stains, "semen stains in appreciable amounts, accompanied with spermatozoa." (R. 452). His undershirt had urine stains, semen stains accompanied by spermatozoa and some unidentifiable pink stains (R. 453). Accused's trousers contained evidence of human spermatozoa (R. 527). Testimony also showed that seminal stains will not withstand laundrying (R. 532),

and that prostatic fluid does not contain spermatozoa. Spermatozoa is present only in seminal fluid (R. 528). No semen stains were found on accused's shirt (R. 455) but human blood stains were found on each cuff (R. 427-8). The sheets on Mrs. Clark's bed were examined and the top sheet disclosed blood stains (R. 446) and human spermatozoa (R. 511). The bottom sheet revealed urine stains (R. 457) and human spermatozoa (R. 511).

5. The evidence for the defense is substantially as follows:

a. A physician was summoned to the Clark home shortly after 2130 hours the evening of 6 April (R. 554) and upon arrival found the bedroom in disarray (R. 562). A "gross" examination of Mrs. Clark indicated she died of acute heart failure and pulmonary adenia (R. 555). He observed no evidence of violence or of an attack, but when Gould asked whether she had been attacked the doctor spread Mrs. Clark's legs apart to make an examination. His examination was superficial and he suggested that the coroner have a vaginal examination made. The doctor was there about an hour, during which time there were about fifteen people in and out of the bedroom (R. 561-4-6, 588).

b. Mrs. Elsie Evans, who operates Club 888, testified that she talked with Mr. Clark about three weeks after this incident and she understood Mr. Clark to say that when he returned to his home after being out with Gould he found his wife on the floor (R. 573). She admitted that she was busy while talking with Clark and that the conversation was "in snatches", but she was insistent in stating she understood Clark to say that Mrs. Clark was on the floor (R. 575-6,597). Before testifying she made a written statement after being questioned by the trial judge advocate, in which statement she stated, "It could be possible that I misunderstood him. Mr. Clark may have said pillows were on the floor instead of Mrs. Clark" (R. 583).

c. A sergeant, a corporal, and a private first class who had served with accused from ten to fourteen months testified that accused's reputation for truth, honesty and moral integrity was good, that accused was devoted to his wife and children, and was an "A-1," efficient soldier, and that he was straightforward and always conducted himself in "a nice way" (R. 603,605,617,622,627,630).

d. Accused, having been duly advised of his rights with reference to becoming a witness, elected to testify under oath. He testified that on 6 April 1945 he arose at 0430 hours (R. 714) and, with Corporal Gould and Private First Class Klasen, left Victorville Army Air Field at 0600 (R. 634) to take soiled laundry to Camp Haan. He arrived at Camp Haan about 0930 hours and remained there for the noon meal, leaving shortly thereafter and arriving in San Bernardino about 1515 or 1530 hours (R. 635), stopping at Adairs for beer (R. 636). Accused had two beers and also drank a Coca Cola bottle of whiskey except for a "swallow" taken by Klasen (R. 637). Accused later had three drinks of whiskey from the bottle which Gould purchased (R. 641).

While accused was at Adairs a car in which there were four colored women parked in front of the place and accused went out and talked with them for about thirty minutes (R. 638). The driver of the car was one Daisy Williams who was on the front seat of the car with another woman. While talking to her accused was "feeling" her and placing his hands "all upon her breasts" (R. 656). At that time he wanted to have intercourse but "after she left I forgot all about it" (R. 660). Accused had gonorrhea when he was sixteen years of age (R. 651) and even now there is a discharge from his penis which soils his clothing (R. 636). While playing with Daisy accused had an erection and "that stuff ran out" (R. 639). When Daisy left he went to the latrine and "wet" his trousers while urinating (R. 639).

When the soldiers were ready to leave Adairs the accused was not drunk (R. 658) but Gould said accused was getting "pretty high" and that he, Gould, would drive (R. 642). They then went to Club 888 but the people there were not friendly to accused so he returned to Adairs (R. 663). While at Adairs the first time accused had heard Gould talking with "a lady" about a tire which Gould promised to have fixed (R. 664), so when accused returned to Adairs he asked the waitress if "the lady" had brought the tire back (R. 663). He definitely did not ask for the address of one of the white waitresses (R. 664). Accused then returned to Club 888 where Gould told him of some friends he wanted to visit, but Gould did not say anyone was ill nor did he mention their names (R. 666). The three soldiers then went to the Clark home where accused remembers meeting Mr. Clark but does not remember being introduced to Mrs. Clark and remembers nothing about any woman being present at the house (R. 643,668). Accused sat by the radio in the living room and Mr. Clark turned on the radio and selected a program for accused (R. 643). From Prosecution's Exhibit 3, accused identified the chair in which he was sitting but could not remember the doors leading to the kitchen and the bedroom, which doors were shown by the exhibit (R. 667). Accused does not remember anyone having a drink at the Clarks, of anyone going to the kitchen, or anyone having any conversation with anyone in the bedroom of the house. He does remember that Clark and Gould left the house within one or two minutes after the soldiers first arrived (R. 675). After Gould and Clark left, Klasen also left but returned shortly, and accused then went to sleep (R. 644). He slept until "my water come down on me and like that, you know, very fast, and that is what woke me up." At that time he heard a door slam and saw Clark and Gould going out of the door and Clark said he was going to call "the law" and a doctor (R. 645). Accused became frightened and went to the truck (R. 645) and drove away because he did not want "the law" to come there and find the truck which was not authorized to be there (R. 646). Corporal Gould was in charge of the truck (R. 639), but the trip ticket was made out to accused (R. 714). Accused made no attempt to find either Gould or Klasen before leaving with the truck (R. 713). When first starting the truck accused could not find the light switch and drove about fifty feet before turning on the lights (R. 646,695). Accused's lips had been chapped and while driving in the wind that day they were bleeding, so, when returning to the Air Field that night, accused wiped his lips with his sleeves which accounts for the

blood on his shirt cuffs (R. 711-12). On entering the Army Air Field that night accused was arrested (R. 647). He denies having sexual intercourse with Mrs. Clark and does not know anything about anyone else having such intercourse (R. 650). Accused also states he puts on fresh clothing every morning and sleeps in pajamas at night (R. 654).

e. After his arrest accused was returned to San Bernardino and was questioned there at the police station in the early morning of 7 April 1945. While being questioned a reporter recorded the questions and answers. Accused, on the stand, denied that at such questioning he stated he saw Gould, Clark and other people in the house when he awoke that night (R. 678). He denied he had stated that Klasen was there when he awoke (R. 679,683,684). He likewise denies that he stated he asked Gould what had happened and that Gould replied he did not know but was going to call "the law" (R. 685). He further denies the statement that he left Gould and Clark in the house when he went to the truck and that in going to the truck he saw some people outside (R. 687,688). Accused stated that at the time of the questioning he had been awake since 0430 hours the previous morning and had eaten no food since noon of 6 April (R. 714) and that at the time of the questioning, sometime after 2400 hours, he was "hungry, tired and everything" and was scared. He stated that there were fifteen or twenty men with pistols present at the questioning and one said "he would bust my brains out against the wall," another asked "are we going to kill him," and someone suggested that accused attempt to run so that he could be shot (R. 715,716,720,721).

f. Accused accomplished the second grade of school in Georgia (R. 722) and his service record (Def. Ex. C) shows him to be illiterate. The service record also shows that accused has not been recommended for the good conduct medal.

6. In rebuttal, the prosecution introduced the witnesses hereinafter described who testified substantially as follows:

a. The reporter who recorded and transcribed the questions propounded to and the answers of accused at the San Bernardino police station on 7 April 1945 testified that the questioning lasted only thirty or forty minutes (R. 732) and that during such time accused appeared mentally alert and in full possession of his faculties (R. 733). The witness did not recall anyone making any threatening remarks to the accused (R. 738). At such questioning the accused did make the statements which he denied in paragraph 5e above.

b. The waitress who was on duty at Adairs when accused returned after going to Club 888 testified that accused returned about 1900 or 1930 hours and asked for another waitress, named Ollie West, and when told she was not there accused asked for her address saying he was going to fix a tire for her (R. 754). Another witness who was at a filling station adjacent to Adairs testified that accused asked her where Bonnie Moreno, also a waitress

at Adairs, lived, stating that Bonnie wanted him to fix a tire for her (R. 766). Ollie West testified that she had no tire trouble that day (R. 745) but that her friend Bonnie Moreno did have some trouble but had the tire fixed at the filling station next door to Adairs (R. 748,765). Bonnie Moreno testified that she did not talk to accused about the tire nor did she ask him to come to her house to fix it (R. 766).

c. Eleanor Washington, who was a colored passenger in the car which had stopped in front of Adairs and which Daisy Williams was driving, testified there were only three people in the car and that Daisy was alone in front (R. 777). She further testified they were at Adairs less than ten minutes (R. 779), "no longer than we could get two quarts of oil and the water." While there she gave accused money with which to get them some peanuts and drinks but they did not consume the drinks there and took them in the car, leaving empty bottles in exchange for the full bottles (R. 778). Mrs. Washington did not see accuse fondle Daisy in any way and did not see any lovemaking (R. 779,780). Daisy Williams testified that there were only three women in the car and that they stopped at Adairs about five or ten minutes (R. 784) and that she talked with accused but accused did not put his hands on her breast and that he held her hand "hardly at all." She does not recall accused putting his arms around her (R. 785). Two waitresses at Adairs remember accused going out to the car and also remember that he stayed at the car only three or four minutes (R. 753,766).

d. The scientist who made the examination of accused's clothing was recalled and testified that the seminal stain on accused's trousers was on the outside of his trousers and that no foreign substance was found on accused's trousers. He further testified that, although he was unfamiliar with gleet stains, he found no pus cells on accused's undershirt and shorts but found only seminal stains (R. 793-4).

7. As to Specification 1 (rape).

The evidence for the prosecution is deemed sufficient to justify a finding that Mrs. Clark was raped. Her previous ill health and attendant condition and the surrounding circumstances clearly support such an inference.

To establish that accused was the individual who raped Mrs. Clark, prosecution introduced proof showing that accused, with Klasen, was left alone in the house with Mrs. Clark for about 30 minutes. During that period Mrs. Clark was raped. When Gould and Clark returned to the house accused was not present, but his hat was there. Shortly thereafter a man was seen to run from a field across the street from the Clark home and get into the truck which immediately left the scene. Accused was apprehended about an hour and a half later while driving the same truck at a point about 40 or 45 miles from the scene of the crime. Accused's clothing showed the presence of seminal fluid and spermatozoa. Seminal fluid and spermatozoa was also found on the sheets of Mrs. Clark's bed and in her vagina. Accused who

had put on fresh clothes that day denied having sexual intercourse or having masturbated or having any nocturnal emission during the course of the day. Accused stated that for some years he has had a discharge from his penis, but his clothing revealed no pus cells when examined and it was shown that spermatozoa is found only in seminal flud and not in any prostatic discharge. Accused who left the scene of the crime without his hat and without attempting to find his companions, explained that the trip ticket was issued to him, but admitted that Corporal Gould was in charge of the detail. Several witnesses testified that accused was introduced to Mrs. Clark. He denied either meeting her or knowing that she was present in the house. It was shown that accused earlier had a desire for intercourse (with Daisy), and that he left Club 888 and returned to Adairs, a distance of a mile or mile and a half, seeking the address of one of the white waitresses. Thus the explanation given by accused was thoroughly discredited. The other circumstances are consistent only with the guilt of accused. He made no successful attempt to explain any of these incriminating facts and the explanations he did choose to make are inconsistent with the facts, human nature, and science as applied to this case. In order to convict of an offense by circumstantial evidence,

> "* * * the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a moral certainty." (MCM, 1928, par. 78a.)

The general rule on the subject may be stated as follows:

> "Circumstantial evidence need not be such that no possible theory other than guilt can stand, but the theory of guilt must be beyond a reasonable doubt, i.e., the circumstances must not be consistent with innocence within a reasonable doubt. They must be inconsistent with, or such as to exclude, every reasonable hypothesis or theory of innocence. * * *
>
> "It is not necessary that each particular fact should be proved beyond a reasonable doubt if enough facts are proved to satisfy the jury, beyond a reasonable doubt, of all the facts necessary to constitute the crime charged. In other words, the rule does not require the jury to be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt, nor does it require that the evidence should produce absolute certainty in the minds of the jurors. It is sufficient if the evidence produces a moral certainty to the exclusion of every reasonable doubt." (Wharton's Criminal Evidence, 11th Ed., Sec. 922.)

Every act of accused on the night of the crime indicates that he is the guilty party. He admits having had a desire for intercourse. There is evidence that he wanted to call at the home of a white woman. He left the scene of the crime so fast and unexpectedly that he failed to take his hat. He hid in a field until he could make good his escape, then

took the only means of transportation and drove to his station some 40 miles distant, abandoning his companions of the day. The victim and her bed clothes revealed spermatozoa, and so did the clothing of accused. Accused denied having any orgasm that day, which is the only way the spermatozoa could be explained. Furthermore, despite the testimony of several witnesses, accused chooses to deny that he either met Mrs. Clark or knew she was present on the premises. These circumstances are sufficient to establish in the mind of a reasonable man that accused committed the offense of rape. A belief in the guilt of accused flows naturally from the circumstances proved. There is no reasonable hypothesis upon which the plea of innocence may be sustained. The evidence produces a moral certainty to the exclusion of every reasonable doubt.

8. As to motion to strike Specification 2 (murder).

Prior to arraignment, defense made a motion to strike Specification 2 of the Charge on the ground that it did not allege an offense cognizable at common law. Defense argued that under the rule of the common law to constitute a culpable homicide the cause of death must have been corporal, not nervous or emotional, and that if a person puts another in such an intense emotional state of grief, fear, or the like that death results, the killing is not by the law a foundation of criminal responsibility. The Board of Review does not deem it necessary to discuss the various citations given by defense, nor even to disagree with the rule of law for which defense so vigorously contends. In the present case death did not result simply from a stimulation of the imagination or from shock and excitement innocently caused. The death resulted from shock and excitement caused by a physical assault. The assault left scratches and bruises on the face of the victim, and caused tearing and bleeding of the vagina. It was made during the commission of a felony on a woman obviously ill. That death was not intended is immaterial. The fact that death was produced by the commission of a felony is sufficient to establish a culpable homicide (par. 148a, MCM). Murder at common law has been defined as follows:

> "* * * at common law, an unintentional homicide is murder if committed in the perpetration of a felony." (Order of United Commercial Travelers v. Meinsen, C.C.A., 131 Fed. (2d) 176.)

> "* * * it is declared by the old English text writers, as a general rule, that if the act on which death ensues be malum in se, it will be murder or manslaughter, according to the cirstances; if done in prosecution of a felonious intent, but death ensues against or beside the intent of the party, it will be murder; but, on the other hand, if the intent goes no further than to commit a bare trespass, it will be manslaughter." (Wharton's Criminal Law, 12th Edition, sec. 446.)

"An unintentional homicide committed by one in the commission of a felony such as rape * * * was murder at common law" (Commonwealth v. Exler, 89 Atl. 968).

"An unintended homicide, committed by one who at the time is engaged in the commission of some other felony, is murder both at common law and under statutes declaratory thereof, * * *." (40 C.J.S. Homicide, sec. 21a.)

To similar effect is the Federal law which is as follows:

"Murder is the unlawful killing of a human being with malice aforethought. Every murder * * * committed in the perpetration of * * * rape * * * is murder in the first degree. * * *" (18 U.S.C. 452).

Therefore if the death of Mrs. Clark was the result of a felonious act on the part of accused he will be guilty of murder. The court acted properly in denying defense motion that Specification 2 be stricken.

9. As to Specification 2 (murder).

Before accused can be held guilty of the murder of Mrs. Clark it must be conclusively shown that her death was the result of accused's unlawful act. The previous physical condition of Mrs. Clark is immaterial except in so far as it made the accomplishment of the murder more likely. If Mrs. Clark, in all reasonable probability, would not have died at the time except for the act of accused, then accused is guilty of murder. The testimony shows that her condition was such she might have lived for several years or might have died suddenly -- that is true with all mortals. Here, however, there was an attack made on a woman obviously ill, a physical assault sufficiently vigorous to leave scratches and bruises, sexual intercourse so forcible as to tear the mucosa of the vagina. The testimony of Mrs. Clark's attending physician and of the pathologist who performed the autopsy raise the legal question of whether the act of accused in raping Mrs. Clark was the cause of her death. The testimony is that "any unusual exertion might lead to sudden cardiac failure" and that the excitement of forcible intercourse would have "aggravated" her heart condition and caused the death by heart failure, also that the excitement incident to forcible sexual intercourse would have "contributed" to her death. Is this sufficient to show, through a chain of natural effects, that the rape was the direct and moving cause of death?

The general rule of law, to which no outstanding dissent has been found, is that a free moral agent who alters the normal course of events is not relieved of responsibility merely because there were other conditions which might, in addition to his own actions, produce the same result. In other words, "He who turns the scale is chargeable with the result." This

rule is supported by all modern textwriters examined on the subject.

"Hence, to accelerate the death of a person already mortally wounded or diseased is homicide." (Wharton's Crim. Law, 12th Ed., Sec. 197.)

"Even if a man is laboring under a mortal disease, those who hasten his death are responsible for the homicide. Nor is it any defense that the constitution, age, or habits of the deceased made him peculiarly susceptible to such disease as the wound inflicted would probably engender." (Ibid, sec. 201.)

"Responsibility attaches where the injury materially accelerates the death, although the death is proximately occasioned by a pre-existing cause. Thus if deceased was diseased or in feeble health and died from the combined effects of the injury and of his physical condition, or if the injury accelerated the death from his physical condition, he who inflicted the injury is liable, although the injury alone would not have been fatal had deceased been well." (40 C.J.S., Homicide, sec. 11.)

"It is equally well settled that the consequences of an act which is the efficient cause of the death of another are not excused, nor is the criminal responsibility for causing death lessened, by the pre-existing physical condition of the person killed, at the time the act was done, or by his low vitality, which rendered him unable to withstand the shock of the wound inflicted, and without which predisposed condition the blow would not have been fatal, if a casual connection between the blow and the fact of death is made to appear." (26 Amrican Jurisprudence, Homicide, sec. 52. See also sections 48 and 49.)

"When, on account of the deceased's condition, a blow of less force caused his death than would have been required to take the life of a healthy man, the person who gave the blow was guilty of felonious homicide although he did not know the true condition of deceased's health at the time." (Warren on Homicide, Vol. I, sec.58.)

"A person is liable for a homicide in accelerating the death of another whose death would necessarily have soon occurred from an existing incurable disease, and the degree of the homicide is not changed by the presence and effect of such disease. The fact that death might and probably would have occurred from other causes is no extenuation of defendant's guilt." (Ibid, sec. 59, p. 176.)

The courts have frequently applied this rule of law, arriving at the same conclusion as here reached by the court-martial. The Florida Supreme

Court has approved the following charge to the jury:

> "If you should find beyond a reasonable doubt, from the evidence in this case that the defendant unlawfully, and with intent to kill the deceased, T. R. McCormic, inflicted injuries upon the deceased in the manner and by the means as charged in either count of the indictment, and that at the time the deceased was suffering from some disease or malady and an attack of such malady, or disease, was brought on by such injuries, so unlawfully inflicted upon deceased by the defendant, if you find that the defendant did unlawfully and with intent to kill, inflict injuries upon the deceased, and that the deceased died from such attack brought on by such injuries so inflicted, then the defendant would be guilty of the death of the deceased, even though the injuries may not have caused death if he had not been suffering from such disease or malady." (Williamson v. State, 111 So. 245.)

It is to be noted that in the instant case the death occurred while accused was engaged in the commission of a felony, therefore, it is unnecessary to prove intent.

There are many other cases which, from a factual point of view, are more nearly akin to the present case. To cite them all is impractical, but to give a view of the reasoning of the courts we will refer to three of the cases.

In the case of State v. Frazier ((Mo.), 98 S.W. (2d) 707), the deceased was a hemophiliac, or "bleeder." The appellant struck him on the jaw once with his fist. The blow was a light one but caused a slight laceration on the inside of the mouth which produced a hemorrhage lasting ten days and ending in death. Appellant swore he did not know the deceased was a hemophiliac. The state's evidence showed the appellant's assault was unprovoked. Appellant contended that death was not caused by the blow struck, but by the disease. The examining physician testified that the death was caused by hemorrhage from the laceration in his mouth, the latter appearing to be the result of some sort of violence. The doctor further testified that, in his opinion, the injury to the jaw would not have caused decedent to bleed to death if he had not been a hemophiliac. The court, in holding appellant responsible, said:

> "Neither is it an excuse that appellant did not know the deceased was a hemophiliac, and that death would not have resulted but for that affliction. On this point 13 R.C.L. sec. 55, p. 750, says: 'The law declares that one who inflicts an injury on another and thereby accelerates his death shall be held criminally responsible therefor, although death would not have resulted from the injury but for the diseased or wounded condition of the person so injured.'

And the doctrine is more fully set out in 29 C. J. sec. 57, p. 1082, as follows: 'If the deceased was in feeble health and died from the combined effects of the injury and of his disease, or if the injury accelerated the death from the disease, he who inflicted the injury is liable, although the injury alone would not have been fatal. The same rule applies, although the disease itself would probably have been fatal, if the injury accelerated death. It is immaterial that defendant did not know that the deceased was in the feeble condition which facilitated the killing, or that he did not reasonably anticipate that his act would cause death.' See, also, 51 L.R.A. (N.S.) 877, Note; Ann. Cas. 1916C,693, note; 16 Ann. Cas. 578, note; 4 Ann. Cas. 958, note."

In the case of Rutledge v. State (Ariz.) 15 Pac. (2d) 255, the defendant was observed one night by several witnesses cursing and beating her mother, Mrs. Pyle, who was 85 years old, and threatening to kill her. The matter was reported to proper authorities and next morning an investigator found Mrs. Pyle lying on a bed in the house alone and unconscious. She was taken to the hospital and examined. Examination revealed that her body was covered with old and new bruises and scratches and showed some signs of a concussion of the brain. The examining physician testified as follows:

"Q. Now Doctor, from the examination that you conducted there in company with Dr. Craig, as you say, and from the disclosures that that examination afforded you, what would you say was the cause of the death of Mrs. Pyle?

"A. The condition that we found, I am of the opinion that her death was immediately caused by the accumulation of fluid in the bronchial tubes, that shut off her breathing, and that was the immediate cause of death. I would say that the contributory, or the cause of this condition, was from the woman being very old and delicate, that the violent blows, if it was blows, that caused the mild concussion of the brain and the various injuries that she had to her body brought about a condition of shock, a woman with a very weakened circulation caused from that, would soon begin what we call hypostatic pneumonia, which is what we found in the lungs, I think was caused from that."

Doctor Craig, who also examined Mrs. Pyle, testified as follows:

"Q. Doctor, basing your answer on the disclosures made to you there by virtue of your examination of Alice Pyle, what would you say caused her death?

"A. Her death was caused primarily, the primary cause of death was bilateral bronchial pneumonia, senility, concussion of the brain."

The court in holding the defendant guilty, said:

"It is the general rule that in a homicide case, if deceased was in feeble health and died from the combined effects of the injury and his disease, or if the injury accelerated the death from the disease, he who inflicted the injury is liable, although the injury alone would not have been fatal. The same rule applies, although the disease itself would probably have been fatal, if the injury accelerated death. We think the Supreme Court of Iowa in State v. Smith, 73 Iowa, 32, 34 N.W. 579,601, correctly states the law as follows: 'It surely ought not to be the law that because a person is afflicted with a mortal malady, from which he must soon die, whether his ailment be caused by natural or artificial causes, another may be excused for acts of violence which hasten or contribute to or cause death sooner than it would otherwise occur. Life at best is but of short duration, and one who causes death ought not to be excused for his act because his victim was soon to die from other causes, whatever they may be.'"

The case of Wells v. State ((Ga.) 167 S.E. 709) more closely parallels the case at bar from both the factual and legal standpoint as to the cause of death. In that case the decedent (Farmer) was a convict and the defendant was an employee of the state highway department having authority "to detain the convicts and keep them from escaping and to keep them on the job." About five days before the incident in question, the decedent "gave out" while at work. On the date of the incident the weather was extremely hot and decedent suddenly fell backwards from the vehicle he was operating. Defendant then caused decedent to get up and walk about 40 feet to a telephone pole where he was handcuffed to the pole, with his hands behind him and his back to the pole. The pole was in the sun and there were shade trees nearby. Within eight or ten minutes decedent slumped down the pole, apparently unconscious. Within a few minutes Farmer was released and taken to camp headquarters. The doctor arrived shortly after Farmer arrived, but Farmer died within twenty minutes after the doctor's arrival without having regained consciousness. The following is a brief quotation from the doctor's testimony:

"If a person becomes overheated, the best treatment to prevent a sunstroke is for him to stay out of the heat. * * * This was a rather hot day, in fact exceedingly hot. * * * My diagnosis was that he died from sunstroke. * * * I could not say positively that the effect of fastening him there in that position, under these conditions, actually brought about the sunstroke. * * * I would readily say that it was not the treatment to give a man in that condition."

The doctor's final response to the question as to what caused Farmer's death was as follows:

"I told Mr. Allen on cross examination that I can not give it

as my positive opinion that the chaining of this young man to the post would bring about the sunstroke. It would contribute to it. I would not say that that conduct would bring it about. No doctor can state positively what brings about anything."

The record reveals that Farmer was a splendid specimen of young manhood, and that, so far as the record discloses, he had no physical trouble other than caused by being overheated a few days previous to the day of his death. The court held the defendant responsible for the death, saying:

"While the doctor's statements were somewhat guarded, it occurs to us that the jury were warranted in concluding that it was the doctor's expert opinion that the defendant's conduct contributed to Farmer's death. With reference to prior causes, 29 C.J. p. 1082, sec. 57, says: 'If the deceased was in feeble health and died from the combined effects of the injury and of his disease, he who inflicted the injury is liable, although the injury alone would not have been fatal. The same rule applies, although the disease itself would probably have been fatal, if the injury accelerated death. It is immaterial that the defendant did not know that the deceased was in the feeble condition which facilitated the killing, or that he did not reasonably anticipate that his act would cause death. But if the death was solely due to disease and was not caused or hastened by the injury, defendant is not liable.' * * *."

"In the case of State v. Castello, 62 Iowa 404, 17 N.W. 605, 606, the evidence tended to show that deceased was a feeble man, though of large frame; that defendant struck the first blow; that no weapons were used; that defendant struck deceased two or three times with his fist. A post morten examination revealed the fact that deceased was far gone with consumption, and that there were extravasations of blood in the brain. The court in that case said: 'Surely it cannot be claimed that a homicide may be excused on the ground that the man-slayer was ignorant of the fact that his victim's feeble condition was not such as to enable him to resist the violence.' The defendant was convicted of manslaughter, and the verdict was affirmed. In State v. Matthews, 38 La. Ann. 795,797, Judge Fenner said: 'In a certain sense, every man is born and lives, mortally wounded; that is, subject to laws which inevitably doom him to death. No murder does more than to hasten the termination of life.' In cases where the deceased was suffering from disease prior to the injury, we think 2 Bishop on Cr. L. (New) sec. 638 (3), lays down the correct rule as follows: 'If the one attacked was enfeebled by disease, and what was done would not have been mortal to a well person, still, whether the assaulting person knew his condition or not, if he did what was mortal to the other the offense is committed.'"

Based upon the evidence and the foregoing rules of law, the court in the case at bar was authorized to find that accused was guilty of assaulting the deceased, and that as a result of that assault the accused's acts contributed to and accelerated the death of Mrs. Clark and were the proximate cause thereof. Since the assault (rape) is a felony, the crime of murder is complete.

10. The record of trial and the charge sheet reveals that accused was 33-2/12 years of age at the time the offense was committed. He is married and has two children. He was inducted at Fort Benning, Georgia, on 26 August 1943 to serve for the "duration plus six months." There is no evidence of any previous conviction by courts-martial.

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

Henry E. Ems, Judge Advocate

Charles A. Luckie, Judge Advocate

(On Leave), Judge Advocate

Charles S. Sykes, Judge Advocate

SPJGK - CM 284006 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 Corporal Charlie L. Wells (34758701), Squadron F, 3035th Army Air Forces Base Unit, Victorville Army Air Field, Victorville, California.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. The accused was found guilty of rape and murder in violation of Article of War 92, all members of the court present concurring. He was sentenced, all members of the court present concurring, to be shot to death with musketry. The reviewing authority approved the sentence but, because Private First Class Raymond W. Klasen, an alleged companion in the crime, was tried separately on these identical charges, found guilty and sentenced to life imprisonment, he recommended that the sentence as to Wells be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for life. The record of trial was forwarded for action under Article of War 48. The evidence shows that on 6 April 1945 the accused, colored, together with Corporal Gould and Private Klasen, both white, was on a laundry detail which left their station at Victorville Army Air Field about 0600 hours and proceeded to Camp Haan, California, where they stayed for lunch, leaving for the return trip to the Air Field about mid-afternoon. En route to their station they stopped at San Bernardino, California, and spent several hours, during which time accused drank beer and whiskey and the other two soldiers drank beer. Corporal Gould was a close friend of a Mr. and Mrs. Clark, residents of San Bernardino. Mrs. Clark had been suffering from acute heart trouble for some time and had been confined to her bed for the preceding thirty days. Corporal Gould mentioned Mrs. Clark's illness to the other two soldiers and requested that they accompany him to the Clark home to visit Mrs. Clark. The three soldiers arrived at the Clark home shortly after 2000 hours, where accused and Klasen were introduced to Mr. and Mrs. Clark. About 15 minutes after their arrival Gould suggested to Mr. Clark that the two of them go out and get some beer and a sandwich. Gould and Clark thereupon left accused and Klasen alone in the house with Mrs. Clark. They returned about 30 minutes later and failed to find either the accused or Klasen. They found Mrs. Clark lying nude diagonally across her bed with blood-specked foam coming from her mouth, scratches over her eyes, a bruise mark on her face, and the bedroom in disarray. Within ten minutes after Gould and Clark returned to the house Private Klasen also appeared on the scene. Almost immediately thereafter a man was seen getting into the truck and driving away. Shortly thereafter accused was apprehended driving the truck into the Victorville Army Air Field.

An autopsy was performed on Mrs. Clark within a few hours of her death and it was found that her vagina contained about 5 cc of spermatozoa of recent origin, and that there were two small lacerations of the mucosa of the vaginal introitus which could have been caused by forcible sexual intercourse. Mr. Clark testified he had not had sexual relations with his wife for at least a month prior to her death. Mrs. Clark's death was the result of heart failure, and could have been aggravated by the excitement and shock of forcible intercourse. Her attending physician testified that forcible intercourse would have contributed to her death. Accused's clothing was examined and found to contain evidence of seminal fluid and spermatozoa. Accused's attempted explanation of his absence from the scene of the crime and of the condition of his clothing was thoroughly discredited.

In a separate trial by a separate general court-martial (CM 284007) Private First Class Klasen was also found guilty of the rape and murder of Mrs. Clark in conjunction with accused Wells. Klasen was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½. The Board of Review, with the concurrence of The Judge Advocate General, has held the record of trial legally insufficient to support the findings of guilty. The opinion of the Board of Review in the Klasen case is also submitted for consideration in connection with this case.

The accused is 33 years and 3 months of age. He is married and has two children. He has been in the military service since 26 August 1943. A sergeant, a corporal, and a private first class, who had served with accused from ten to fourteen months, testified that accused's reputation for truth, honesty, and moral integrity was good; that he was devoted to his wife and children; and that he was an "A-1," efficient, straightforward soldier who always conducted himself in "a nice way."

While accused has been convicted of a horrible and revolting crime and the sentence may be justified, in view of the recommendation of the reviewing authority, I recommend that the sentence of death be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and to confinement at hard labor for life, and that a United States penitentiary 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.

THOMAS H. GREEN
Brigadier General, U.S.A.
Acting The Judge Advocate General

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

21

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life. GCMO 512, 12 Dec. 1945).

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

SPJGQ - CM 284023

UNITED STATES	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Greenville Army Air Base, Greenville, South Carolina, 11 July 1945. Dismissal, total forfeitures and confinement for three (3) years.
Second Lieutenant PRESTON K. BIRDWELL, JR. (0-862820), Air Corps.	)	

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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Preston K. Birdwell, Jr., Air Corps, Squadron F, 119th Army Air Forces Base Unit, Morris Field, Charlotte, North Carolina, did, at Morris Field, North Carolina, on or about 24 April 1945, with intent to defraud, wrongfully and unlawfully make and utter to Morris Field Exchange, a certain check in words and figures as follows, to wit:

April 24, 1945 No.

Citizens National Bank
Tyler, Texas

Pay to the Order Of Morris Field Exchange $20.00

Twenty & 00/100 - DOLLARS

/s/ Preston K. Birdwell, Jr.
0-862820

and by means thereof, did fraudulently obtain from Morris Field Exchange cash in the amount of $20.00, he the said Second Lieutenant Preston K. Birdwell, Jr., then well knowing that he did not have and not intending that he should have any account with said bank for the payment of said check.

Specifications 2,3,5,7,8,9,12,13,14,16,29,30,31,32,33 and 34: These are identical with Specification 1 except for the places, dates, amounts and payees, which exceptions are, respectively, as follows:

Specification	Date	Amount	Payee and Place
2	5 April 1945	$25.00	Barringer Hotels at Charlotte, North Carolina.
3	7 April 1945	20.00	Morris Field Officers Mess Fund at Morris Field, North Carolina.
5	9 April 1945	10.00	Officers Mess Fund at Morris Field, North Carolina.
7	10 April 1945	15.00	Barringer Hotels at Charlotte, North Carolina.
8	11 April 1945	15.00	Barringer Hotels at Charlotte, North Carolina.
9	13 April 1945	20.00	Officers Mess Fund at Morris Field, North Carolina.
12	17 April 1945	100.00	Parker-Gardner Co. at Charlotte, North Carolina.
13	20 April 1945	20.00	Officers Mess Fund at Morris Field, North Carolina.
14	21 April 1945	20.00	Officers Mess Fund at Morris Field, North Carolina.
16	27 April 1945	20.00	Morris Field Exchange at Morris Field, North Carolina.
29	6 March 1945	250.00	The Union National Bank at Charlotte, North Carolina.
30	12 March 1945	75.00	The Union National Bank at Charlotte, North Carolina.
31	29 March 1945	5.00	Selwyn Drug Store at Charlotte, North Carolina.

32	24 April 1945	$10.00	Parker-Gardner Co. at Charlotte, North Carolina.
33	26 April 1945	12.00	Duke Photo Company at Charlotte, North Carolina.
34	26 April 1945	5.00	Shufords Studio at Charlotte, North Carolina.

Specification 4: In that Second Lieutenant Preston K. Birdwell, Jr., Air Corps, Squadron F, 119th Army Air Forces Base Unit, Morris Field, Charlotte, North Carolina, did, at Charlotte, North Carolina, on or about 9 April 1945, with intent to defraud, wrongfully and unlawfully make and utter to himself and indorse to American Trust Company, Charlotte, North Carolina, a certain check in words and figures as follows, to wit:

Tyler, Texas 9 April 1945 No.

Citizens National Bank, Tyler, Texas

Pay to the Order of Preston K. Birdwell, Jr. $50.00

Fifty & 00/100 - Dollars

/s/ Preston K. Birdwell, Jr.
0-862820

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and by means thereof, did fraudulently obtain from American Trust Company cash in the amount of $50.00, he the said Second Lieutenant Preston K. Birdwell, Jr., then well knowing that he did not have and not intending that he should have any account with said bank for the payment of said check.

Specification 6, 10, 11: These are identical with Specification 4 except for the dates, amounts, payees and indorsees, which exceptions are, respectively, as follows:

Specification	Date	Amount	Payee	Indorsee
6	9 April 1945	$25.00	himself	Wachovia Bank and Trust Company at Charlotte, North Carolina.
10	17 April 1945	25.00	cash	Wachovia Bank and Trust Company at Charlotte, North Carolina.

11	17 April 1945	$60.00	Himself	American Trust Company at Charlotte, North Carolina.

Specification 15: In that Second Lieutenant Preston K. Birdwell, Jr., Air Corps, Squadron F, 119th Army Air Forces Base Unit, Morris Field, Charlotte, North Carolina, being indebted to First Lieutenant Richard S. Thomas in the sum of $50.00 for money borrowed, which amount became due and payable 30 November 1943, did, at Morris Field, North Carolina, from 30 November 1943 to December 1944 as to $20.00, and from 30 November 1943 to 8 May 1945 as to $30.00, dishonorably fail and neglect to pay said debt.

Specifications 18 to 23: These are identical with Specification 15 except for the places, dates, amounts, creditors and debts, which exceptions are, respectively, as follows:

Specification	Dates	Amount	Creditor	Debt
18	1 February 1943 to 7 May 1945	$41.00	Zale Jewelry Company, Incorporated, at Amarillo, Texas.	Merchandise purchased
19	14 June 1943 to 7 May 1945	94.50	Saks Fifth Avenue at New Haven, Connecticut.	Merchandise purchased
20	27 June 1944 to 7 May 1945	25.00	Wilson H. Price, Sr., Attorney-at-Law, at Charlotte, North Carolina.	Services rendered
21	1 December 1944 to 7 May 1945	35.02	Biltmore Dairy Farms at Charlotte, North Carolina.	Provisions delivered
22	1 October 1944 to 7 May 1945	22.50	Lou-Mac Kennels at Charlotte, North Carolina.	Services rendered
23	18 October 1944 to 7 May 1945	360.00	Commercial National Bank at Charlotte, North Carolina.	Money borrowed

Specification 17: In that Second Lieutenant Preston K. Birdwell, Jr., Air Corps, Squadron F, 119th Army Air Forces Base Unit, Morris Field, Charlotte, North Carolina, did, at York, South Carolina, on or about 21 January 1945, wrongfully and unlawfully marry,

take and have for his wife, one Jeannie C. Williamson, the said Second Lieutenant Preston K. Birdwell, Jr., then having a living wife, to wit: Gladys Birdwell.

Specification 24: In that Second Lieutenant Preston K. Birdwell, Jr., Air Corps, Squadron F, 119th Army Air Forces Base Unit, Morris Field, Charlotte, North Carolina, did, at Charlotte, North Carolina, on or about July 25, 1944, with intent to defraud, wrongfully and unlawfully make and utter to Selwyn Drug Store, Charlotte, North Carolina, a certain check in words and figures as follows, to wit:

Charlotte, N. C. 7-25-1944 No. S_____

Commercial National Bank

Pay to the
Order of Selwyn Drug Store $5.00
-- Five & 00/100 - - - - - - - - - - - - - - - - -Dollars

For Sq. T, Morris Field /s/ Preston K. Birdwell, Jr.
2nd Lt., AC

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and by means thereof, did fraudently obtain from Selwyn Drug Store cash in the amount of $5.00, he the said Second Lieutenant Preston K. Birdwell, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in said bank for payment of said check.

Specifications 25-28: These are identical with Specification 24 except for the dates, amounts and payees, which exceptions are respectively, as follows:

Specification	Date	Amount	Payee
25	26 January 1945	$10.00	R. F. Hill at Charlotte, North Carolina.
26	27 January 1945	9.22	Al Goodman's at Charlotte, North Carolina.
27	27 January 1945	35.64	The Lucielle Shops at Charlotte, North Carolina.
28	22 January 1944	5.00	Steak House, Inc., at Charlotte, North Carolina.

Specification 35: In that Second Lieutenant Preston K. Birdwell, Jr., Air Corps, Squadron F, 119th Army Air Forces Base Unit, Morris

Field, Charlotte, North Carolina, having been restricted to the limits of Morris Field, did, at Morris Field, Charlotte, North Carolina, on or about 29 March 1945, break said restriction by going into the City of Charlotte.

He pleaded guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions 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 a period of three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution was submitted in the form of a stipulation, to which were attached 37 exhibits (R. 16; Pros. Ex. 1). The 35 Specifications of the Charge can be conveniently classified into six groups and those in each group discussed together.

Specifications 1 to 3, 5, 7 to 9, 12, to 14, 16 and 29 to 34 (all inclusive).

It was shown that between 6 March 1945 and 27 April 1945 the accused made and uttered 17 checks totalling $642.00. These checks were drawn by the accused on the Citizens National Bank, Tyler, Texas. The accused at no time during the year 1945 had an account with this bank (Pros. Ex. 1, page 1). By means of these checks the accused obtained cash or merchandise from the various payees at Charlotte, North Carolina and Morris Field, North Carolina (Pros. Ex. 1; Ex. 2,3,4,6,8,9,10,13,14,15,17,30,31,32,33,34,35).

Specifications 4, 6, 10 and 11.

The accused made and uttered two checks on 9 April 1945 and two on 17 April 1945 totalling $160, of which three checks were drawn to the order of the accused and one to cash. All four were indorsed by the accused for the purpose of receiving cash from the American Trust Company or the Wachovia Bank and Trust Company, both of Charlotte, North Carolina. (Pros. Ex. 1; Ex. 5, 7, 11, 12). The checks were drawn on the Citizens National Bank, Tyler, Texas, where the accused did not have an account during the year 1945 (Pros. Ex. 1, page 1).

Specifications 15 and 18-23, inclusive.

Between 1 February 1943 and 1 December 1944 the accused contracted debts totalling $628.02 for money borrowed, merchandise purchased and services rendered. The accused failed and neglected to pay these debts, although repeatedly requested to do so (Pros. Ex. 1; Ex. 16,20A,20B, 21, 22,23,24A,24B,24C).

Specification 17.

The accused was lawfully married to Gladys Denney on 14 December 1941 at Wichita Falls, Texas. Gladys Denney is still living and the marriage has not been terminated by divorce or annulment proceedings (Pros. Ex. 1, page 3). On 21 January 1945 the accused married Jeannie C. Williamson

at York, South Carolina. (Pros. Ex. 1, pages 3, 4, Exs. 18A, 18B, 18C and 18D). At the time of his marriage to Jeannie Williamson, the accused was not under the influence of intoxicating liquors or narcotic drugs (Pros. Ex. 1, page 4, Ex. 19).

Specifications 24 to 28.

The accused made and uttered five checks, one in January 1944, one in July 1944, and three in January 1945, by means of which he obtained cash in the total amount of $64.86 from the payees. All five checks were drawn on the Commercial National Bank, Charlotte, North Carolina, and the accused knew, when he drew the checks, that he did not have sufficient funds in the drawee bank for the payment of the checks (Pros. Ex. 1, pages 5 and 6; Ex. 25, 26, 27, 28, 29).

Specification 35.

On 3 March 1945 the accused was directed in writing by the Commanding Officer of Morris Field, North Carolina, to remain on the base until he could furnish proof that he had "paid all outstanding bills and made good all checks held in this headquarters marked 'Not sufficient funds'". The accused acknowledged receipt of this order by a first indorsement (Pros. Ex. 1, page 7; Ex. 36). On 29 March 1945, while the restriction was still in effect, the accused went to, and was apprehended in Charlotte, North Carolina, by Major Little, the Base Legal Officer, and First Lieutenant Meade, the Base Provost Marshal (Pros. Ex. 1, page 7; Ex. 37).

4. After having his rights explained to him, the accused elected to be sworn as a witness (R. 17, 18). He testified that he was commissioned on 14 June 1943 and at that time had been in the Army for approximately three and one-half years (R. 18). He has never been in any previous difficulty (R. 18). He was married on 14 December 1941 and is supporting his wife's child by her first marriage in addition to their own child (R. 18). For about two years he had been having difficulties with his wife and about November 1944 he took her to her parents in California (R. 18). When he returned to Morris Field he "started running around quite a bit, drinking considerably after duty" (R. 18). It was then he met Miss Williamson, who was "the direct opposite of" his wife (R. 18). The first time he asked Miss Williamson to marry him was the night they were married (R. 18). When he got off duty that night he had several drinks in the bar at the Officer's Club. He met Miss Williamson and they went to the Officer's Club for dinner and to a dance (R. 18). During the evening they both "consumed quite a bit of alcohol" (R. 18, 19). After the dance was over, about one o'clock, they drove to York, South Carolina, and were married (R. 19). The accused was hazy about the drive to York and the events there (R. 19). He went to sleep on the divan in the living room of Miss Williamson's home, and when he woke up sober he told Miss Williamson about what they had done and made arrangements to have the marriage annulled (R. 19). He did not live with Miss Williamson subsequent to

the marriage ceremony (R. 19). He did not write the checks with the intent to defraud (R. 18). When he wrote each check he intended to send the money to the bank to cover it but he was never able to do so (R. 18). Most of the checks were written when the accused was intoxicated (R. 19). A lot of the money "went for whiskey" (R. 19). A check for $250.00 written to the Union National Bank was used to get cash so that Miss Williamson could go to Florida because of gossip over the annullment (R. 19). He was being paid all the time and there was no reason why he couldn't pay for the uniform which he bought from Saks Fifth Avenue for $94.50 (R. 20). He admitted that he was restricted and that Colonel Cunningham told him not to see Miss Williamson (R. 20). He admitted that he went to Charlotte on 24 March (apparently he was confused about the date), where he saw Miss Williamson and was apprehended at her house by Major Little and the Provost Marshal (R. 20).

For the defense there was introduced into evidence a report on the "mental status" of the accused, signed by Major J. H. Bohorfoush, Medical Corps (R. 16; Def. Ex. A). This report states, "He is in good health. The neurological examination is negative. He has no indications of insanity, and is normal mentally" (Def. Ex. A). A letter dated 24 May 1945 from Josh J. Roberts, Vice President of The Citizens National Bank, Tyler, Texas, to Major Little, the Legal Officer, was offered in evidence (R. 16; Def. Ex. B). This letter stated that the accused did not have an account with the bank from 1 January 1945 to the date of the letter. It further stated that the accused's father was confined to his bed and that accused's family "had lived in Tyler for many years and are among our best known citizens" (Def. Ex. B). A letter from the Honorable Gordon Simpson, Associate Justice of the Supreme Court of Texas, to the Commanding General, Greenville Army Air Base, requesting that accused's resignation be accepted and the court-martial charges be dismissed, was introduced (R. 17; Def. Ex.C). There was also introduced a telegram from Justice Simpson requesting that no imprisonment be adjudged (R. 17; Def. Ex. D). A receipt by certain of the payees acknowledging payment of 13 of the checks, totalling $397.65, was received in evidence (R. 17; Def. Ex. E). There was also evidence that on 2 April 1945 reimbursement was made by the accused through the Base Legal Officer for the $10 check issued by accused to R. F. Hill, as set forth in Specification 25 (Pros. Ex. 1; Ex. 37). A copy of a decree of annulment dated 1 March 1945 in the Court of Common Pleas of York County, South Carolina, in the case of Jeannie C. Williamson, a minor over the age of fourteen years, by her Guardian ad Litem, Mrs. Myrtle C. Williamson, Plaintiff, against, Preston K. Birdwell, Jr., Defendant, was received in evidence (R. 17; Def. Ex. F).

5. It is clear from the pleas of guilty and the evidence that the accused was properly found guilty of the offenses charged. With reference to the Specifications involving the issuance of "bad checks", the stipulation specifically excluded any admission on the part of accused that he did not intend to have an account or sufficient funds in the drawee bank to meet the checks. This was not wholly consistent with his pleas of

guilty, but no prejudice results, for there is not a scintilla of evidence that he took any steps to place sufficient funds on deposit to meet the checks. Since admittedly he knew that he had no account in the one bank and insufficient funds in the other, and there is nothing indicative of an intent to furnish the necessary funds, his guilt of the "bad check" Specifications is clear. His statement on the witness stand that he did not intend to defraud is contrary to the evidence and to his whole course of conduct. Accordingly, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty on the 26 "bad check" Specifications, totalling $866.86.

With reference to the Specifications relating to the dishonorable failure and neglect to pay debts (Specifications 15,18-23 inclusive), the evidence discloses a failure and neglect upon the part of accused to pay any of the seven obligations alleged, totalling $628.02, although repeated demands for payment were made. The length of time during which the obligations have run, and the complete disregard which the accused has displayed toward his creditors, are sufficient to characterize his failure and neglect to pay his debts as "dishonorable" (See CM 246776, Dittmer, 30 BR 157).

The pleas of guilty and the evidence support the conviction of bigamy and breach of restriction (Specifications 17 and 35). Although the accused, according to his testimony, had partaken liberally of intoxicating liquors prior to the ceremony, he appears to have been entirely aware of the relationship into which he was entering, for he discussed it next morning with Miss Williamson and arranged promptly for an annulment. Moreover, the person officiating at the ceremony asserted that the parties were not under the influence of intoxicating liquor.

6. War Department records show that the accused is 25 years of age, married and has one child. He is a native and resident of Tyler, Texas. He attended Texas Agricultural and Mechanical College for one year but did not graduate. In civilian life he was employed for one year as a rodman in the Engineering Department of the City of Tyler, Texas. He served in enlisted status in the Regular Army from 6 December 1939 to 14 June 1943, attaining the grade of technical sergeant before becoming an aviation cadet. He was appointed a second lieutenant, Army of the United States, on 14 June 1943 upon graduation from the Maintenance Engineering Course, Technical School, Army Air Forces Technical Training Command, Yale University, New Haven, Connecticut, and was ordered to active duty in the Air Corps. He has never been punished under Article of War 104. On 1 April 1945 he submitted his resignation for the good of the service in lieu of trial by court-martial and on 14 May 1945 the Secretary of War directed that his resignation not be accepted.

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 and the sentence and to warrant confirmation of the sentence. Dismissal is authorized for a violation by an officer of Article of War 96.

[illegible], Judge Advocate

[illegible], Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 284023 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 22 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 Preston K. Birdwell, Jr. (0-862820), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, making and uttering 26 checks in the total amount of $866.86, knowing either that he had no account or that he had insufficient funds in the drawee bank for their payment; of seven Specifications of dishonorable failure to pay debts totalling $628.02; of one Specification of bigamy; and of one Specification of breach of restriction, all in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 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 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.

Between 6 March 1945 and 27 April 1945 the accused made and uttered 21 checks totalling $802.00. All were drawn on a bank in which the accused did not have an account. He also made and uttered five checks totalling $64.86, which were drawn on a bank in which, as he knew, he did not have sufficient funds for their payment. One of these five checks was made in January 1944, one in July 1944, and three in January 1945. Before trial the accused paid 14 of the checks totalling $407.65.

The accused contracted debts totalling $628.02 between 1 February 1943 and 1 December 1944 for money borrowed, merchandise purchased, and services rendered. He failed and neglected to pay these debts, although repeatedly requested to do so.

On 21 January 1945 the accused married Jeannie C. Williamson at York, South Carolina, while he was still married to Gladys Denney, but did not live with her as man and wife subsequent to the ceremony. The following day he arranged for an annulment, which has been granted on March 1, 1945. On 29 March 1945, while restricted to Morris Field, North Carolina, the accused broke his restriction by going to Charlotte, North Carolina.

I recommend that the sentence be confirmed but that the forfeitures

be remitted and that the period of confinement be reduced to two years, that the sentence as thus modified be ordered executed, and that a United States Disciplinary Barracks be designated as the place of confinement.

4. Consideration has been given to a letter from the Honorable Gordon Simpson, Associate Justice of the Supreme Court of Texas, to which there is attached a letter from the accused to Justice Simpson. In view of the accused's previous good character and the high standing of his family in the community, Justice Simpson recommends that the confinement be remitted. The letter and inclosure 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
Major General
The Judge Advocate General

3 Incls
1. Rec of trial
2. Form of action
3. Ltr fr Hon Gordon Simpson, 10 Aug 45

(Sentence confirmed but forfeitures remitted and period of confinement reduced. GCMO 419, 28 Aug 1945).

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

SPJGN-CM 284066

UNITED STATES	)	FOURTH AIR FORCE
v.	)	Trial by G.C.M., convened at March Field, Riverside, California, 28 June 1945. Dishonorable discharge and confinement for one (1) year. Southwestern Branch, Disciplinary Barracks, Camp Haan, California.
Private EDDIE E. MEJIE (38462925), Squadron E, 420th Army Air Forces Base Unit.	)	

HOLDING by 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 soldier named above.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Eddie E. Mejie, Squadron E, 420th Army Air Forces Base Unit, did, at March Field, California, on or about the 15 October 1944, feloniously take, steal, and carry away one Gruen wrist watch, value about twenty-five dollars ($25.00), the property of Sergeant John C. McClelland.

The accused pleaded not guilty to, and was found guilty of, the Charge and the Specification thereunder. Evidence of one previous conviction by a summary court-martial for the wrongful use of a pass and for failure to repair for duty and evidence of one previous conviction by a special court-martial for the larceny of a watch were received in evidence. The accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority

might direct for one year. The reviewing authority approved the sentence, designated the Southwestern Branch, United States Disciplinary Barracks, Camp Haan, California, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The officer who purported to serve as the defense counsel in this case was none other than the accuser, the same officer who had officially instituted the prosecution, who recommended trial by general court-martial, and who had asserted under oath that the allegations in the Specification of the Charge were "true in fact, to the best of his knowledge and belief". At the beginning of the trial the Trial Judge Advocate and the accused engaged in a formal colloquy, as follows:

> "PROSECUTION (to accused): Captain Geist, who is the regularly appointed defense counsel, was also the accuser in this case. Were you notified of this fact prior to trial?
>
> ACCUSED: Yes sir.
> PROSECUTION: But you are still desirous of having Captain Geist act as your defense counsel?
> ACCUSED: I still wish Captain Geist to be defense counsel."
> (R. 3)

The action of the court in permitting the accused to be represented by his accuser presents the only question requiring discussion.

An examination of the history of court-martial procedure reveals that our military tribunals have not always recognized the right of an accused to be represented by counsel. Indeed, Winthrop states, "* * * The admission of counsel for an accused in military courts, is not a right but a privilege only * * *". He then states that the Sixth Amendment to the United States Constitution, which guarantees that, "* * * In all criminal proceedings the accused shall * * * have the assistance of counsel for his defense * * *", refers only to proceedings before criminal courts of the United States. Winthrop Military Law & Precedents, 2nd Ed., Reprint 1920, p. 165. Without attempting to determine the correctness of this broad conclusion it is sufficient to observe that in 1920 Congress rephrased our present Article of War 17 and enacted our present Article of War 11, thereby assuring to all officers and soldiers the same, equal, basic right to be fairly and faithfully represented by counsel when tried by court-martial as is possessed by private citizens when tried in a Federal court.

The zealous care with which the Supreme Court of the United States has sought to guard not only the right of an accused to be represented by counsel, but also the right to be faithfully represented, is illustrated in two recent cases. In the first case the Supreme Court asserted that:

"The Sixth Amendment guarantees that 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.' This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.

* * *

"* * * A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court--as the Sixth Amendment requires--by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake." Johnson v. Zerbst, Warden, 304 U.S. 458 (1938).

In the second case of Glasser v. United States, 315 U.S. 60 (1938), the Supreme Court held that the defendant, a former Assistant United States District Attorney, was deprived of the rights guaranteed to him by the Sixth Amendment because the court had also appointed his counsel to represent a co-defendant whose interests might be antagonistic. The court remarked:

"* * * Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment. This error requires that the verdict be set aside and a new trial ordered as to Glasser."

The right which the soldier acquired in 1920 by the enactment of Articles of War 11 and 17 is now also guaranteed by paragraphs 6, 43, and 55 of the Manual for Courts-Martial, 1928. Paragraph 55 states that defense counsel "* * * will guard the interests of the accused by all honorable and legitimate means known to the law" and will represent him "with undivided fidelity". To this end paragraph 43 provides:

"When it appears to the president of the court or to the defense counsel himself that the latter is for any reason, including bias, prejudice, or hostility in a particular case, disqualified or unable properly and promptly to perform his duties, the facts will be reported at once to the appointing authority through appropriate channels". MCM, 1928, par. 43a.

If the duties enjoined by this paragraph had been faithfully performed, there can be no doubt that the appointing authority would have provided other defense counsel and accused would not have been confronted with the necessity of deciding in open court whether or not to accept Captain Geist,

his commanding officer, as defense counsel. The language quoted reveals very clearly that it is the present purpose of military law to provide an accused not merely with defense counsel but with defense counsel not "disqualified or unable" for any reason "to perform his duties". In CM 194200, Sanderson, 2 BR 125, and in CM ETO 4155, Broadus, the Board of Review recognized that the appointment of the accuser to serve as defense counsel was an error affecting the accused's substantial rights. Similarly in CM 211878, Mitchell, and CM 211941, McMullen, the Assistant to the Judge Advocate General "condemned" the appointment of an investigating officer to serve as the defense counsel in a case which he had investigated.

Although at the beginning of his trial the accused, in response to a question by the Trial Judge Advocate, stated that he wished to be defended by the regularly appointed defense counsel, we cannot assume from this answer that the accused appreciated the full significance of such a choice or that he realized the inconsistent position in which defense counsel would be placed. Defense counsel, on the one hand, by his sworn statement asserted his belief in the guilt of the accused and, on the other hand, entered for the accused a plea of not guilty and undertook the duty of conducting the defense with undivided fidelity and by all honorable means known to the law. To expect the court to hear the accused's testimony, without being prejudiced by the defense counsel's pre-trial actions as the accuser, is to require the performance of a mental feat beyond the compass of ordinary minds. Article of War 8 provides that, "No officer shall be eligible to sit as a member of such court when he is the accuser". Thus military law forbids the accuser to sit in judgment upon the man he has accused. For equally good reasons, the law forbids an accuser to purport to defend the man he has accused. For an accuser to serve in such inconsistent capacities is unfair to himself, unfair to the court, and a mockery of the requirement that he must serve the accused with "undivided fidelity" and by all "honorable and legitimate means known to the law". Observance of these simple principles compel the conclusion that the record of trial is legally insufficient to sustain the findings of guilty and the sentence.

Abner E. Lipscomb, Judge Advocate.

Robert Kenner, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 284066 1st Ind 21 Au

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

TO: Commanding General, Fourth Air Force, San Francisco, California.

1. In the case of Private Eddie E. Mejie (38462925), Squadron E, 420th Army Air Forces Base Unit, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. For the reasons stated in the holding by the Board of Review I recommend that the findings of guilty and the sentence be vacated.

2. Under the provisions of Article of War 50½, the record of trial is transmitted for vacation of the sentence in accordance with the foregoing holding and for a rehearing or such other action as you may deem proper.

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

(CM 284066).

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 25, D. C.

SPJGH-CM 284107

AUG 1945

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 19 July 1945. Dismissal.
	)	
Captain CARL P. ANDERSON (0-163836), 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 61st Article of War.

Specification 1: In that Captain Carl P. Anderson, Seventh Detachment, Squadron "R", 301st Army Air Forces Base Unit, Third Air Force Personnel Depot, Drew Field, Tampa, Florida, did, while enroute from Gulfport Army Air Field, Gulfport, Mississippi, to Drew Field, Tampa, Florida, without proper leave, absent himself from his organization at Drew Field, Tampa, Florida, from about 31 March 1945, to about 14 April 1945.

Specification 2: In that Captain Carl P. Anderson, Seventh Detachment, Squadron "R", 301st Army Air Forces Base Unit, Third Air Force Personnel Depot, Drew Field, Tampa, Florida, did, without proper leave, absent himself from his organization at Drew Field, Tampa, Florida, from about 16 April 1945, to about 23 April 1945.

Specification 3: In that Captain Carl P. Anderson, Seventh Detachment, Squadron "R", 301st Army Air Forces Base Unit, Third Air Force Personnel Depot, Drew Field, Tampa, Florida, did, without proper leave, absent himself from his organization at Drew Field, Tampa, Florida, on or about 30 April 1945, and did remain so absent until he was apprehended in Lakeland, Florida, on or about 25 June 1945.

He pleaded guilty to and was found guilty of the Charge and all Specifications thereunder. No evidence of any previous convictions was introduced. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution failed to present any evidence to establish the initial absence of accused while enroute from Gulfport Army Air Field, Gulfport, Mississippi, to Drew Field, Tampa, Florida, as alleged in Specification 1 of the Charge but by accused's plea of guilty he admitted this essential fact. Prosecution introduced evidence showing that accused reported for duty to his organization at Drew Field, Tampa, Florida, 14 April 1945, but again absented himself without leave 16 April 1945, and did not return to duty until 23 April 1945, as alleged in Specification 2 of the Charge. On 30 April 1945, accused absented himself without leave for the third time and remained absent until apprehended by military authorities in Lakeland, Florida, 25 June 1945, as alleged in Specification 3 of the Charge (R. 4, 5; Pros. Ex. A).

4. Following an explanation to accused of his rights as a witness, he elected to make an unsworn statement through counsel which was as follows:

"I am presently 44 years of age. I was married in 1925 and at present I have two children, two girls, one 18 and one 13. My home is in Portland, Oregon. During civilian life I was a construction engineer. I was commissioned in 1922 in the Infantry Reserve. From 1922 until the beginning of the war I went to CCC Camps and to the CMTC as a regular Reserve Officer in the grade of Captain. It is my desire to remain in the service. During 1920 I was an enlisted man in the Regular Army, serving in Panama. During all my period of service I have never been AWOL and never have been confined or restricted. I have never been court-martialed. I have been in and out of Army hospitals ever since my Army Service. I contracted malaria while serving in Panama. All my ratings have been excellent. I was then assigned during the war as an intelligence officer, which I do not feel qualified for, and I received a 'U'. This worried me because I have qualified as an engineering officer, but do not feel I am qualified as an intelligence officer. I feel I can handle the job as an engineering officer and my ratings bear me out. This has made me constantly nervous because of my uncertainty in my job. I came on active duty in July 1942."

5. The evidence introduced at the trial together with accused's pleas of guilty, which do not appear to have been entered improvidently, show clearly that accused was absent without leave from 31 March 1945 to 14 April 1945 (Charge, Specification 1); was again absent without leave from 16 April 1945 to 23 April 1945 (Charge, Specification 2),

and was absent without leave for the third time from 30 April 1945 until 25 June 1945, on which latter date he was apprehended by military authorities at Lakeland, Florida (Charge, Specification 3). The record, accordingly, is legally sufficient to support the findings of guilty of the Charge and all Specifications thereunder.

6. War Department records show that accused is 44 years of age. He is married and has two children. He graduated from high school and pursued a course in mechanical engineering and drafting at Michigan Agricultural College for one year. In civil life he owned and operated a garage and machine shop. During the first World War he served as an enlisted man from December 1917 to November 1918. He was commissioned a Second Lieutenant, Infantry Reserve, 23 October 1922, promoted to First Lieutenant, Infantry Reserve, 22 June 1928, and promoted to Captain, Infantry Reserve in July 1934. He performed ten 14-day tours of active duty entering upon extended active duty 31 July 1942. Accused claims that during 1920 he was an enlisted man in the Regular Army and served in Panama. At the time the offenses here involved were committed, accused was scheduled to appear before a board for reclassification based upon his inattention to duty and inability to perform assigned duties.

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

Thomas J. Toffey, Judge Advocate,

William H. Gamble, Judge Advocate.

Robert E. Trevellian, Judge Advocate.

SPJGH-CM 284107 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 Carl P. Anderson (0-163836), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absence without leave from 31 March 1945 to 14 April 1945 (Chg. Spec. 1), of absence without leave again from 16 April 1945 to 23 April 1945 (Chg. Spec. 2), and of absence without leave for a third time from 30 April 1945 to 25 June 1945, on which latter date he was apprehended by military authorities (Chg. Spec. 3), all in violation of Article of War 61. 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 may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. I concur in that opinion.

On 31 March 1945, while enroute from Gulfport Army Air Field, Mississippi, to Drew Field, Florida, accused absented himself without leave. He reported for duty at Drew Field, Florida, from such unauthorized absence on 14 April 1945, but again absented himself without leave from Drew Field, Florida, on 16 April 1945 and did not return until 23 April 1945. On 30 April 1945 he absented himself without leave from Drew Field, Florida, for a third time and remained absent until apprehended by military authorities in Lakeland, Florida, on 25 June 1945.

Accompanying the record of trial there is a petition for clemency signed by five of the six members of the court before whom accused was tried, urging that the sentence of dismissal be suspended.

Accused served as an enlisted man during World War I, served as an enlisted man in the regular Army in the Panama Canal Zone in 1920, and has held a Reserve Officers Commission since October 1922. I recommend that the sentence 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 confirmed. GCMO 417, 28 Aug 1945).

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

SPJGN-CM 284108

UNITED STATES	ARMY AIR FORCES ARMY AIRWAYS COMMUNICATIONS SYSTEM
v.	Trial by G.C.M., convened at Asheville, North Carolina, 10 July 1945. Dismissal, total forfeitures and confinement for one (1) year. Disciplinary Barracks.
Second Lieutenant RAY A. SIMPSON (O-588642), 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 Charges and Specifications:

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

Specification: In that Second Lieutenant Ray A. Simpson, Air Corps, 75th Army Air Forces Base Unit (Headquarters Complement, Army Airways Communications System, Army Air Forces), did, at Chicago, Illinois, on or about 6 June 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Asheville, North Carolina, on or about 26 June 1945.

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

Specification: In that Second Lieutenant Ray A. Simpson, Air Corps, 75th Army Air Forces Base Unit (Headquarters Complement, Army Airways Communications System, Army Air Forces), did, at Greenville, South Carolina, on or about

20 June 1945, wrongfully, unlawfully and bigamously marry one Rachael Dolores Capps of West Asheville, North Carolina, having at the time of said marriage to Rachael Dolores Capps, a lawful wife then living, from whom he was not divorced, to-wit: Catherine Conradsen Simpson.

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

Specification 5: In that Second Lieutenant Ray A. Simpson, Air Corps, 75th Army Air Forces Base Unit (Headquarters Complement, Army Airways Communications System, Army Air Forces), did, at Asheville, North Carolina, on or about 20 June 1945, with intent to defraud, wrongfully and unlawfully make and utter to E. S. Galyean a certain check in words and figures as follows, to-wit:

Asheville, N.C. 20 June 1945 No._____
FIRST NATIONAL BANK AND TRUST COMPANY
Pay to the
Order of Cash - - - - - - - - - - - - - - - - - $15.00
Fifteen and no/100 - - - - - - - - - - - - - Dollars
For_____
Lt Ray A. Simpson 0-588642
Hq AACS Asheville

and by means thereof, did fraudulently obtain from E. S. Galyean the sum of $15.00; he, the said Ray A. Simpson, then well knowing that he did not have, and not intending that he should have, sufficient funds in the First National Bank and Trust Company for the payment of said check.

Specification 6: Identical to Specification 5 as to date, amount, and drawee bank, but alleging amount payable to the order of S. J. Couch.

Specification 7: Identical to Specification 5 as to date, amount, drawee bank, and payee.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification of Charge I, except the words "desert"

and "in desertion", substituting therefor respectively the words "absent himself without leave from" and "without leave"; not guilty of Charge I, but guilty of a violation of Article of War 61; not guilty of Specifications 1, 2, 3, and 4 of Charge III; and guilty of all other Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that by special orders, dated 19 May 1945, issued at Headquarters, Army Airways Communications System, Asheville, North Carolina, the accused was instructed to proceed to the Separation Center, Fort Douglas, Utah, for processing preparatory to relief from active duty (Pros. Ex. 1). By orders issued on 2 June 1945 at Fort Douglas, Utah, he was directed to return to his former station at Asheville for further assignment and duty as of 7 June 1945 (Pros. Ex. 2). He failed to comply with this directive and was dropped as absent without leave as of 8 June 1945 by the organization to which he was assigned at Asheville (R. 7; Pros. Ex. 3).

On the twentieth day of that month he made and cashed, at the place of business of Mr. E. H. Galyean in Asheville, a check for $15.00. This instrument was dishonored, but shortly thereafter it was redeemed at full face value (R. 20, 37; Pros. Ex. 6). On what "must have been the 20th of June 1945", the accused, at Jack's Cafe in Asheville, executed a second check for $15.00 and obtained its face amount in cash. Mr. S. J. Couch, the proprietor, had not noticed that the entry above the dateline was "20 Jan 1945" and stated that the date "was supposed to be June 20th". Payment was refused by the drawee bank, but Mr. Couch was reimbursed within a few days (R. 27-28, 37; Pros. Ex. 8). Mr. Carl Banks, in late June 1945, had cashed a third check in the sum of $15.00 for the accused, but had never presented it for payment. Although Mr. Banks was unable to identify Prosecution's Exhibit 7, dated 20 January 1945, as the check which he had handled, the defense stipulated that it was, in fact, negotiated by accused on or about 20 June 1945. Full restitution was subsequently made (R. 22-25; Pros. Ex. 7). The accused, on 25 April 1945, had opened an account in the First National Bank and Trust Company, Asheville, North Carolina, the drawee bank named in the three checks. He was charged with an overdraft of $6.84 on 20 June 1945 and credited with a deposit of $250.00 six days later (R. 37, 38; Pros. Ex. 12).

The accused had married Catherine Conradsen at Salt Lake City, Utah, on 23 July 1942. Representing that this union had been dissolved by divorce, he married Rachael Dolores Capps at Greenville, South Carolina, on 20 June 1945 (R. 14; Pros. Exs. 4, 5). Miss Capps denied that she had had pre-marital sexual relations with him or that she had

urged marriage because of her supposed pregnancy (R. 18). On the date of his espousal to her he signed "Lieutenant and Mrs. Ray A. Simpson" on the registry of the Langren Hotel, which was less than two city blocks from the headquarters unit in Asheville to which the accused had been directed to report. Several officers with whom he had previously served were quartered there (R. 10).

At the time of his apprehension in Asheville on 26 June 1945 he stated that he was on his way to the Post Office and had planned to report immediately afterwards to headquarters (R. 13, 14). Later that day in the office of Captain Neil Shanahan, Provost Marshal, the accused accounted for his delay in returning to duty. Realizing that his recall to Asheville was occasioned by financial irregularities, he became worried and, upon reaching Chicago, remained there four or five days before boarding a train for Asheville. Upon his return to the latter city he rented a room in "West Asheville", cashed several checks, and, on 20 June 1945, married Rachael Dolores Capps, in Greenville, South Carolina. He told Captain Shanahan that he had made arrangements to redeem the worthless checks and pointed to an entry made that morning in his bank book indicating a deposit sufficiently large for that purpose (R. 9-12). The accused was in uniform when taken into custody (R. 13).

The court ordered Specifications 6 and 7 amended so as to state the date of the execution and negotiation of the checks therein described as "on or about 20 June 1945" (R. 29).

4. Major William B. Britton, a defense witness, was officer in charge of the overseas unit to which accused was assigned as an enlisted man from December 1942 to August 1943. The accused was an excellent radio operator, a good maintenance man, and exhibited such outstanding administrative ability that he was promoted to master sergeant and made "noncommissioned officer in charge". He was industrious, resourceful, and, during the early hard days in Guadalcanal, was invaluable to the success of "our mission". Major Britton felt that he would have been "at a loss without him". The accused was returned to the States to attend Officer Candidate School (R. 41, 42).

After his rights relative to testifying or remaining silent had been explained, he elected to make an unsworn statement through counsel. This revealed that the accused, while stationed at Las Vegas, Nevada, had become financially involved and requested transfer in order to put his affairs in order. He volunteered for duty at an "isolated outpost in the northeast" but was subsequently sent to "Headquarters" at Asheville, North Carolina. His financial difficulties having continued, he requested separation from the service, "only to have a better chance on settling my debts, without bringing any more disgrace on the uniform of an officer of the United States Army". He was sent to Fort Douglas, Utah, but before receiving "separation papers" which would have

enabled him to procure sufficient money to pay his debts, he was ordered back to Asheville. He became apprehensive as to what would happen upon his return, his chief concern being his wife, who expected another baby in September. Remaining in Chicago, "literally in a daze", from 4 June 1945 to 11 June 1945, he reached Asheville on 12 June and went directly to the home of Mrs. Ramsey, whose daughter, Dolores Capps, he had known during his previous tour of duty there. The girl informed him that she was pregnant and, in spite of her knowledge of his former marriage, "begged" him to marry her. She promised to procure a divorce as soon as he left Asheville. Fearful that Mrs. Ramsey, upon learning of her daughter's pregnancy, would either kill her or report the fact that he was implicated to the Provost Marshal, and assuming that he could be divorced "before anyone realized the situation", the accused decided to marry Miss Capps. The ceremony took place in Greenville, South Carolina, on 20 June 1945. Afterwards the prospective divorce was discussed, and Mrs. Ramsey, who was conversant with the facts, promised to institute proceedings for her daughter at "any time that she wished". It developed that Miss Capps was not pregnant. He realized that "things could not go on that way", so, on 25 June 1945, wired his sister-in-law for $500.00. He received the money that same afternoon, deposited a portion of it the following morning, and planned to "turn * * * in" at Headquarters after obtaining money orders for payment of his debts at Las Vegas. He was apprehended while on his way to the Post Office. He never intended to desert or to use the checks as instruments of fraud. As evidence of his innocent intent, he pointed to his return to Asheville and his act in depositing sufficient money in the drawee bank to redeem the checks (R. 42-43).

5. The Specification of Charge I, as modified by the findings of the court, alleges that the accused "did, at Chicago, Illinois, on or about 6 June 1945, absent himself without leave from the service of the United States and did remain absent without leave until he was apprehended at Asheville, North Carolina, on or about 26 June 1945". The court found the accused guilty of a violation of Article of War 61.

The accused was directed to depart Fort Douglas, Utah, so as to arrive, on 7 June 1945, at the 75th Army Air Forces Base Unit in Asheville, North Carolina. He failed to report at the appointed time and was apprehended on the streets of Asheville on 26 June 1945. The truth of these facts was acknowledged by him, and he voluntarily supplied an account of the events which took place during his absence from military control. His statement included an implied admission that he absented himself without leave in Chicago on 6 June 1945. The alleged period of absence and its unauthorized character having been established beyond any question of doubt, the finding of guilty predicated thereon should be sustained.

6. The Specification of Charge II alleges that the accused did, "on or about 20 June 1945, wrongfully, unlawfully, and bigamously marry one Rachael Dolores Capps of West Asheville, North Carolina, having at the time of said marriage to Rachael Dolores Capps, a lawful wife then living,

from whom he was not divorced, to-wit: Catherine Conradsen Simpson". This offense allegedly violates Article of War 96.

The prosecution's evidence established the two alleged marriages. It remained for the accused, however, by repeated references to his legal wife, to supply proof that the former marriage had remained in effect. He stated, indeed, that concern for the members of his family and a desire to avoid trouble for their sake prompted him to marry Miss Capps, with the expectation that an early divorce, dissolving the second marriage, would rectify matters "before anyone realized the situation". Conceding the truth of his explanation, he was guilty of more than bad judgment. His conduct, manifestly, involved a high degree of moral turpitude and, necessarily, brought discredit upon the military service. The evidence is ample to sustain the finding that the accused, in contracting the bigamous marriage, offended Article of War 96.

7. Specifications 5, 6, and 7 of Charge III each alleges that the accused did, "with intent to defraud, wrongfully and unlawfully make and utter * * * a certain check * * * and by means thereof, did fraudulently obtain" the face value thereof in cash, "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 check". The three checks, each for $15.00, were allegedly drawn on the First National Bank and Trust Company of Asheville, North Carolina. The instrument described in Specification 5 was allegedly written on 20 June 1945 while the date named in both Specifications 6 and 7 was 20 January 1945. At the direction of the court Specifications 6 and 7 were amended to specify 20 June 1945 as the date of the alleged offenses. They were set forth as violations of Article of War 95.

When consideration is given to the fact that the accused was not stationed in Asheville in January, 1945; that he did not open an account in the drawee bank until April of that year; that the persons who cashed the checks were positive that the transactions took place in late June, 1945; that the accused was married at Greenville, South Carolina, on the twentieth day of that month, thus revealing an occasion for the use of money; and that the defense stipulated that one of the checks which was dated 20 January 1945, was in fact, made and negotiated on 20 June 1945; it is clear that the January date appearing on the face of the drafts described in Specifications 6 and 7 was the result of inadvertence. The defense did not complain of the amendments, and, since their effect was corroborated by the accused's testimony, they did not operate to his prejudice.

At the time of his return to Asheville on 12 June 1945 the accused, admittedly, was in financial straits. Since his bank account was overdrawn and since this condition remained unchanged at the time he cashed the three checks, it is clear that he acted with the certain knowledge that inadequate funds existed for their payment. No deposit was made in the drawee bank until 26 June 1945, subsequent to the presentment and dishonor of at least two of the checks. This behavior, exhibiting financial irresponsibility and disregard for the rights of others, was patently

fraudulent in character and seriously compromised the accused's standing as an officer and gentleman. MCM, 1928, par. 151. The finding that he violated Article of War 95 is amply sustained by the evidence.

8. The accused is about 30 years of age and is married. After completing ten years of public school, he was employed for three years at the San Antonio, Texas, Air Depot. While there he studied radio mechanics at vocational school. He served as an enlisted man in the Texas National Guard from November, 1937, to December, 1938. He enlisted in the Army on 9 August 1940 and, after attending several Army radio schools, went overseas with a unit of Army Airways Communications System. After serving as a noncommissioned officer in charge of his group on Guadalcanal, he returned to continental United States to attend Officer Candidate School and was commissioned a Second Lieutenant on 5 August 1944.

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 sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 and Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Robert Gunner, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 284108 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 Ray A. Simpson (O-588642), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from 6 June 1945 to 26 June 1945, in violation of Article of War 61; of contracting a bigamous marriage, in violation of Article of War 96; and of making and uttering three worthless checks, each in the sum of $15, all in violation of Article of War 95. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. 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, by orders issued at Fort Douglas, Utah, was required to report, on 7 June 1945, at Headquarters, Army Airways Communications Center, Asheville, North Carolina. While en route to Asheville he stopped over, on 4 June 1945, in Chicago and, instead of leaving Chicago by 6 June 1945 to comply with his orders, he remained there until 11 June 1945. Upon arriving in Asheville on 12 June 1945, he failed to report to his station but went to the home of Mrs. Ramsey whose daughter, Dolores Capps, he had known during his previous, recent tour of duty in Asheville. According to the accused, Miss Capps knew of his existing marriage, but, stating that she was pregnant, urged him to marry her. She promised an early divorce. Miss Capps, on the other hand, denied any pre-marital sexual relations and relied on his representation that his former marriage had been dissolved by divorce. On 20 June 1945 he cashed three checks, each for $15, at different business establishments in Asheville, and, on that date, married Miss Capps at Greenville, South Carolina. It developed that she was not pregnant. At the time the accused gave the checks, his account in the drawee bank was overdrawn and the two checks which were presented were dishonored. He redeemed all of the checks within a few days and, when apprehended in Asheville on 26 June 1945, stated his intention to report to the military authorities that day.

The accused enlisted in the Army in 1940, had an excellent record as an enlisted man and, after some nine months of service in the Southwest Pacific, was returned to the United States to attend Officer Candidate School. He received his commission in August 1944. Since becoming an officer, he has shown a general lack of responsibility in financial matters and his conduct, as revealed by the record in this case, indicates a character so weak and unstable as to render him unfit to serve as an officer in the Army. I recommend that the sentence be confirmed but that the forfeitures and confinement 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

(Sentence confirmed but forfeitures and confinement remitted. GCMO 445,21 Sept 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGQ-CM 284149

UNITED STATES v. First Lieutenant PAUL J. BROWN (O-1291575), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Maxwell Field, Alabama, on 3 July 1945. Dismissal, total forfeitures and confinement for two (2) years. Disciplinary Barracks.

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

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

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

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

Specification 1: In that 1st Lt. Paul J. Brown, Air Corps, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Montgomery, Alabama, on or about 22 May 1944, with intent to defraud, falsely make in its entirety a certain check, in the following words and figures, to-wit: "May 22 1944. No. ___. 1st National Bank, Tulsa, Okla., Pay to the order of cash——— $25.00. Twenty Five and no-100 Dollars. C. R. Taylor 1st Lt. A.C. 479663 A.C", which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 2: In that 1st Lt. Paul J. Brown, Air Corps, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Montgomery, Alabama, on or about 14 July 1944, with intent to defraud, falsely make in its entirety a certain check, in the following words and figures, to-wit: "Customers Draft. The First National Bank of Montgomery, Montgomery, Ala July 14 1944. Pay to the order of Cash---$25.00. Twenty Five and no/100 Dollars. Value Received. With exchange and collection charges. To 1st Nat'l Bank, Denton, Tex. Aubrey C. Renton, 1st Lt. A.C.", which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 3: In that 1st. Lt. Paul J. Brown, Air Corps, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Montgomery, Alabama, on or about 8 July 1944, with intent to defraud, falsely make in its entirety a certain check, in the following words and figures, to-wit: "8 July 1944. The First National Bank, Tyler Texas. Pay to the order of Cash, $25.00. Twenty Five and no/100----. T. K. Moore," which said check was a writing of a private nature, which might operate to the prejudice of another.

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

Specification 1: In that First Lieutenant Paul J. Brown, Air Corps, Section C, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Montgomery, Alabama, on or about 10 November 1944, with intent to deceive, wrongfully and unlawfully make a check payable to cash, and utter the same to Captain (Chaplain) Francis A. Masin, in words and figures as follows:

"Tel #2162
Nov. 10 1944 No._____

1st Natl Bank
Gurdon, Arkansas

Pay to the Order of cash $50.00

Fifty and no/100 Dollars

/s/ Paul J. Brown
1st Lt. AC"

and by means thereof, did fraudulently obtain from Captain (Chaplain) Francis A. Masin the sum of $50.00, he, the said First Lieutenant Paul J. Brown, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Gurdon, Arkansas, for the payment of said check.

Specifications 2, 3, 4, 5, 6, 7, and 8: These are identical with Specification 1 except for the dates, amounts, and persons receiving the checks, which exceptions are, respectively, as follows:

Specification	Date	Amount	Recipient of Checks
2	13 November 1944	$25.00	Captain (Chaplain) Francis A. Masin

Specification	Date	Amount	Recipient of Checks
3	15 November 1944	$40.00	Major Roy L. Broyles, Jr.
4	16 November 1944	15.00	First Lieutenant John W. Cox
5	18 November 1944	25.00	First Lieutenant Solomon S. Lieberman
6	2 December 1944	50.00	Second Lieutenant Joseph W. Queen
7	4 December 1944	50.00	Maxwell Field Exchange
8	18 December 1944	50.00	Maxwell Field Exchange

ADDITIONAL CHARGE I: Violation of the 94th Article of War.

Specifications 1, 2, 3 and 4: (Findings of not guilty.)

Specification 5: In that First Lieutenant Paul J. Brown, Air Corps, Squadron H, 2132nd AAF Base Unit, Maxwell Field, Alabama, did, at Maxwell Field, Alabama, on or about 15 September 1944, for the purpose of obtaining the payment of a claim against the United States, present to the Finance Officer, Maxwell, Field, Alabama, an officer of the United States, duly authorized to approve, pay, and allow such claims, a certain writing for approval and payment, to-wit: War Department Form 336, Revised, Pay and Allowance Account, for the month of September 1944, which said writing as he, the said First Lieutenant Paul J. Brown, Air Corps, then knew contained a statement that the sum of One Hundred Fourteen Dollars and Thirty Cents ($114.30) was due him, which statement was false and fraudulent, in that said statement omitted as a debit a Class "E" Allotment in the sum of One Hundred Dollars ($100.00), payable to the said First Lieutenant Paul J. Brown's account at the First National Bank, Gurdon, Arkansas, and was then known by the said First Lieutenant Paul J. Brown, to be false and fraudulent.

Specifications 6, 7, 8 and 9: These are identical with Specification 5 except for the dates, the months for which the claims were filed and the amounts alleged to have been due, which exceptions are, respectively, as follows:

Specification	Date	Month	Amount
6	15 October 1944	October 1944	$115.00

Specification	Date	Month	Amount
7	15 November 1944	November 1944	$114.30
8	15 December 1944	December 1944	65.00
9	15 January 1945	January 1945	115.00

The accused pleaded guilty to Specifications 7 and 8, Charge II, and to Charge II, and not guilty to all other Specifications and Charges. He was found not guilty of Specifications 1, 2, 3 and 4, of Additional Charge I. He was found guilty of all other Specifications and of all the Charges. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct, for five (5) years. The reviewing authority approved only so much of the findings of guilty of Specifications 3 and 6, Charge II, as involved findings of guilty of wrongfully failing to maintain a sufficient bank balance to pay the checks therein mentioned, approved the sentence, remitted three years of the confinement imposed, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence with regard to those Specifications as to which findings of guilty were returned is as follows:

At the time of the offenses alleged the accused was assigned to duty on the Range at Maxwell Field, Alabama (R. 55, 73, 74).

Charge I and Specifications:

For the prosecution:

The cashier of the Union Bank and Trust Company, Montgomery, Alabama, testified that a check in the sum of $25.00, drawn on the First National Bank of Tulsa, Oklahoma, "C. R. Taylor, 1st Lt., AC," as maker, came into possession of his bank in the normal course of business, and was marked "OK" by him for cashing (R. 25, 26). The bank directory revealed that there was no such bank in Tulsa (R. 25) so "when it came back we sent it to every other bank in Tulsa----none of them had any such account there" (R. 26). An Army officer presented the check for payment but the witness did not remember who passed it (R. 26; Pros. Ex.12).

The employee of the Officers' Club, Maxwell Field, who was in charge of accounts receivable at the Club, testified that the customer's draft, signed "Aubrey C. Renton, 1st Lt. AC," and the check, signed "T.K. Moore," were presented to the Club in the ordinary course of business (R. 22, 23; Pros. Ex. 10,11). The Club did not receive "payment" (R. 22) or "credit" (R. 24) upon either instrument.

Captain Totman, Assistant Courts and Boards Officer, Maxwell Field, testified that he knows the accused (R. 27) and that on 20 December 1944 he witnessed several handwriting specimens executed by the accused (R. 28, 29). These specimens, consisting of a paragraph known as "the London Letter" (R. 28, 33; Pros. Ex. 13), and several writings of the names "C. R. Taylor" (R. 29; Pros. Ex. 14), "Aubrey C. Renton" (R. 29; Pros. Ex. 15), and "Paul J. Brown" (R. 29; Pros. Ex. 16), were identified and introduced in evidence without objection.

Dr. C. J. Rehling, director of the Laboratory of the State Department of Toxicology and Criminal Investigation, Auburn, Alabama, testified that he was a graduate of Alabama Polytechnic Institute in Chemical Engineering and also held a Master's Degree from such institution and "a Doctorate from the University of Wisconsin" (R. 31), that he had been a student of handwriting for three or four years, and had testified as a handwriting expert in "six or seven---courts-martials" (R. 32). He made a study of the handwriting of Paul J. Brown based upon Prosecution's Exhibit 13 which is "a copy script of the London Letter," a "standard letter in form" used "in a handwriting case" (R. 32, 33), several writings of the names "Aubrey C. Renton," "C. R. Taylor" (apparently Prosecution's Exhibts 15 and 14, respectively), and "the signature of Paul J. Brown written a number of times" (apparently Prosecution's Exhibit 16) (R. 33). He also studied Prosecution's Exhibits 12, 10 and 11 (the instruments involved in Specifications 1, 2 and 3, Charge I, respectively) (R. 33, 34). He prepared photographic card display enlargements of the three instruments involved and of the specimen writings which were introduced in evidence (R. 34, 35; Pros. Ex. 18, 19, 20, 21-A, 21-B). Dr. Rehling stated his conclusion that the questioned writings (Pros. Exs. 10, 11, and 12) and the group of standard or known writings (Pros. Exs. 13, 14, 15, and 16) "were written by one and the same person" (R. 35). The witness then testified at length as to the characteristics of all of these writings and demonstrated through the use of these exhibits his reasons for reaching such conclusion (R. 35-39).

It was stipulated that on 22 May 1944 there was no First National Bank of Tulsa, Oklahoma, that on 14 July 1944 there was no First National Bank of Denton, Texas, and on 8 July 1944 therewas no First National Bank of Tyler, Texas (R. 39). It was further stipulated "that the records of the Adjutant General's Office, War Department, Washington, D. C,, indicates that there are no such officers serving in the Army of the United States as Aubrey C. Renton, 1st Lt., Air Corps, or C. R. Taylor, 1st Lt., Air Corps" and that "the serial number 0 479 663 is assigned to 1st Lt. Anthony W. Scavotta, Dental Corps" (R. 39, 40).

Captain Totman further testified that on 13 January 1945 he carefully explained to accused his rights under Article of War 24 and thereafter accused made a written statement (R. 53,54; Pros. Ex. 27). In this statement accused admitted execution of each of the three checks

described in Specifications 1, 2 and 3, Charge I, that such "checks were made and cashed by me to obtain money again, to either continue in a game of poker, or to pay losses incurred through playing poker" (Pros. Ex. 27, page 2).

For the defense:

Having been warned of his rights (R. 56), the accused elected to be sworn and testify. He testified that he executed the checks signed "C. R. Taylor," "Aubrey C. Renton" and "T. K. Moore" at the Officers' Club, Maxwell Field, at various times to obtain poker chips to play in poker games. He put the checks in "the pot" and received poker chips in the respective amounts of the checks (R. 58, 59, 73). He did not know any of "the fellows" in these games but he intended to "take up" the checks later (R. 72). He lost "more than" $1800 playing poker at this Officers' Club and had himself been "stuck" for $650.00 in worthless checks given by others in these poker games (R. 59, 60), but he has paid all his obligations including those checks to which he did not sign his name (R. 60).

Charge II and Specifications:

For the prosecution:

Stipulated testimony of Francis A. Masin, formerly a Captain in the Corps of Chaplains, showed that on 10 November 1944 he received a check from accused drawn on the First National Bank of Gurdon, Arkansas, in the sum of $50.00 and that he gave accused currency for the check which was sent through regular banking channels and returned to the witness marked "insufficient funds" and the check deducted from his bank account (R. 17, 18). The same witness on 13 November 1944 cashed another and similar check for accused in the sum of $25.00 which was also returned marked "insufficient funds" and the amount deducted from Masin's bank account (R. 18; Pros. Exs. 4, 5).

Major Broyles testified that on 15 November 1944 accused gave him a check (for $40.00) in settlement of money accused lost in a poker game, which the witness deposited to his bank account and which was returned with the notation "insufficient funds" and deducted from his bank account. Since then he was paid in full by accused (R. 14,15; Pros. Ex. 1).

Stipulated testimony of First Lieutenant Cox showed that on 6 November 1944 he cashed a check in the sum of $15.00 for accused which the witness, in turn, cashed at the Officers' Club, Maxwell Field. He has never been notified that the check had been returned for insufficient funds and no claim was ever made upon him for reimbursement for the check (R. 19, 20; Pros. Ex. 7). Stipulated testimony of First Lieutenant Liberman was to the effect that on 22 December 1944 he was advised that a check dated 18 November 1944 in the sum of $25.00 signed by accused

and endorsed by the witness had been returned marked "insufficient funds," that on 24 December 1944 he told accused about it and was paid $25.00 (R. 18, 19; Pros. Ex. 6).

Stipulated testimony of Second Lieutenant Queen showed that on 2 December 1944 he received a check in the amount of $50.00 from accused "on a bet he and I put up *** on a football game," that the check was run through regular banking channels and later the check was returned marked "insufficient funds" and the witness went to the bank and "gave them fifty dollars in cash for the check" (R. 20, 21; Pros. Ex. 8).

The cashier of the Post Exchange, Maxwell Field, testified that on 4 December 1944 a check in the sum of $50.00, payable to cash, made and indorsed by accused, was "put through" her office and later returned for redeposit and that on 18 December 1944 another check in the same amount with accused as maker was cashed there and it was not paid (R. 15, 16, 17; Pros. Ex. 2, 3). She did not know whether the two checks had been "made good" (R. 17).

A ledger sheet from the records of the First National Bank, Gurdon, Arkansas, showing the account of accused from 4 January 1944 to 14 April 1945 (R. 40, 43; Pros. Ex. 24) revealed that during the period in which these eight worthless checks were written, 10 November 1944 to 18 December 1944, inclusive, a single deposit of $49.99 was credited to the checking account of accused, on 5 December 1944. This represented the sum credited out of a $100.00 allotment to the bank, less $50.00 repaid to the bank upon a loan, less $0.10 service charge upon the check (R. 40). The ledger showed the following balance in the account of accused upon each of the respective dates indicated:

7 November 1944	$18.35
21 November 1944	8.35
24 November 1944	7.85
5 December 1944	57.75
8 December 1944	47.75
12 December 1944	32.75
26 December 1944	32.25

In Prosecution's Exhibit 27, a statement of accused executed 13 January 1945, specific references are made to each of the eight checks made the basis of the Specifications of Charge II and Charge II. "All of the *** checks were given, either during my participation in a poker game or games, with the exception of the two that were made and given

to the Maxwell Field Post Exchange for cash. This cash, however, was to be used to take up and pay other checks that I have given for gambling losses" (Pros. Ex. 27). Statement of accused's account with the First National Bank, Gurdon, Arkansas, from 5 October 1944 to 26 December 1944 was introduced in evidence (R. 21; Pros. Ex. 9), showing the same situation as Ex. 24, above mentioned, for the pertinent period.

For the defense:

The accused testified that the two checks he gave Chaplain Masin (Pros. Ex. 4, 5) were in payment of money he borrowed during poker games to pay for gambling losses sustained, that Masin was in the game and winning money (R. 56, 57). The check to First Lieutenant Cox (Pros. Ex. 7) was also for losses sustained in a poker game, that accused later gave the money to Captain Totman to send to Cox and still later made the check good, but First Lieutenant Cox did not send the money back (R. 57). The check to First Lieutenant Liberman (Pros. Ex. 6) was for losses in a poker game, the check to Second Lieutenant Queen (Pros.Ex. 8) for losses on a football game (R. 58). He has "taken up" all obligations incurred by these checks (R. 60). He knew he did not have sufficient funds in the bank to pay these checks when he wrote them (R. 65).

Additional Charge and Specifications:

For the prosecution:

Photostatic copies of WD AGO Form 29 "Authorization for Allotment of Pay" and ASF WD AGO Form 674 (Work Sheet), pertaining to a Class "E" Allotment established by accused, were introduced in evidence upon the stipulated testimony of the custodian of the originals (R. 40; Pros. Ex. 22, 23). Prosecution's Exhibit 22 shows authorization by the accused for a Class "E" Allotment of accused's pay in the sum of $100.00 per month commencing 1 January 1943 and payable indefinitely to the First National Bank, Gurdon, Arkansas. Prosecution's Exhibit 23 shows voucher payments of $100.00 per month from January 1943 through March 1945 to the "First National Bank", together with the number of the voucher for each month. On or about 8 March 1945 accused executed WD AGO Form No. 30 discontinuing this allotment effective 31 March 1945, which was transmitted to the Finance Officer with a copy to the Office of Dependency Benefits, Newark, New Jersey, (R. 43, 44, 45; Pros. Ex. 25).

The stipulated testimony of the cashier of the First National Bank of Gurdon, Arkansas, showed that this bank received a United States Treasury check in the sum of $100.00 each month from September 1943 to April 1945, inclusive, all of which checks were credited to the account of the accused, that on 10 February 1944 accused borrowed $100.00 from the bank and authorized it to deduct $50.00 a month from his account until the note was paid, that on 20 March 1944 accused borrowed $500.00 from the bank and authorized it to deduct $50.00 a month beginning in May 1944 from his allotment check until the note was paid, that the note

was fully paid on 4 January 1945, that in March 1945 the bank received a notice stating the Class "E" allotment of accused to the bank was discontinued effective 31 March 1945, that the bank received no other notice of discontinuance of this allotment, and that the witness did not "recall ever receiving notification" from the accused that he was discontinuing the allotment (R. 40, 41, 42, 43,; Pros. Ex. 24). The bank did not require the accused to make or continue the allotment, as his father's endorsement was sufficient security, acceptable to the bank.

Major Brian testified that he knows the accused and that on 9 June 1945 he advised accused of his rights under Article of War 24 and thereafter accused made a statement which was reduced to writing, read, and signed and sworn to by accused (R. 30, 31; Pros. Ex. 17). In this writing accused stated that in August 1942 he made a $100.00 allotment to his credit in the First National Bank of Gurdon, Arkansas, and in December 1943, a $25.00 allotment to his credit in the First National Bank of Montgomery, Alabama. On 1 March 1944 he went to the Personnel Section in Post Headquarters and told them he wanted to cancel the allotment to the Arkansas bank and increase his allotment to the Alabama bank to $75.00. He notified the Arkansas bank of such cancellation but in June 1944 he received from it a deposit slip showing the deposit was still coming through. He then paid $100.00 to Base Finance, Maxwell Field, because of the overpayment. In October 1944 he received a bank statement from the Arkansas bank and discovered that he had been receiving credit for the $100.00 allotment "all this time." As he did not have the money to repay at the time, he did nothing about it. "About two months ago" (apparently April 1945) he cancelled both allotments. He spent all the money received from the allotments and continued to spend the $100.00 allotment after he realized in October 1944 that he was receiving it. He never entertained any idea of defrauding the Government. He repaid his "entire indebtedness to the Government on 4 June 1945" (Pros. Ex. 17).

The Finance Officer, Maxwell Field, testified that his records disclosed that from May 1944 through January 1945 no Class "E" allotment was deducted in the sum of $100.00 from the pay of the accused but that there was a Class "E" allotment for $75.00 for all those months. True copies of War Department Form No. 336a for the months from May 1944 to January 1945, inclusive, each showing the monthly pay and allowance account of accused, as reflected in the records of the Base Finance Office, were thereupon identified and introduced in evidence (R. 45, 46, 47, 48; Pros. Ex. 26-A, 26-B, 26-C, 26-D, 26-E, 26-F, 26-G, 26-H, 26-I). Each of these vouchers reflects claim by and payment to the accused of his full pay and allowances as specified without deduction of the $100 monthly allotment, though with deductions for the $75 allotment and for an insurance premium of $6.70 monthly. The voucher for December 1944 shows an additional deduction of $50 for another purpose. All of these vouchers were paid to the accused by check (R. 47). If the vouchers had not been signed, no payments would have been made thereon (R. 51).

An officer must certify on each pay voucher that it is a true and correct statement of his pay account, including all allotments in effect (R. 51).

For the defense:

The records in the Finance Office, Maxwell Field, show that in March 1944 accused repaid to the Treasury of the United States $100.00 to cover an erroneous non-deduction of Class "E" allotment (R. 48, 49; Def. Ex. B), and that on 1 March 1944 accused made an allotment (Class "E") of $75.00 to the First National Bank of Montgomery, Alabama, effective that month (R. 49; Def. EX.A), this allotment being a substitute to a $25.00 a month allotment to that bank (R. 49). So far as the records of the Finance Officer, Maxwell Field are concerned, accused did not owe the Government anything at the time of trial (R. 49, 50).

The accused testified that he did not go to the bank in Gurdon, Arkansas, to make the two loans mentioned but his father "made the loan for me at the bank" (R. 60, 71). He never told the bank that he had an allotment to cover the loan (R. 61). In March 1944 he went to Post Headquarters and told Mrs. Black (the clerk) "or the other lady who worked there" that he wanted to increase the $25.00 allotment to $75.00 (apparently referring to the one to the Alabama bank) and cancel the $100.00 allotment (apparently referring to the one to the Arkansas bank). He signed some form and "she said that would take care of them" (R. 62, 67). When he received his next pay voucher, he received $115.00 and got a statement from the bank showing he had received credit for $100.00 there so he went to the Finance Officer on 13 April and paid him $100.00 (R. 61,62). and was told it was an "oversight" and would be taken care of. Later, he wrote some checks which he expected to "bounce" but they did not do so (R. 63). He then wrote the bank and received a statement in September showing that the money ($100.00 per month) was still going to the bank but at that time he did not have the money to pay back to the Government and did not say anything to the Finance Department because, not having the money, he wasafraid to do so (R. 64). He then wrote the checks and "gambled real hard trying to get the money to pay the Government back. That was the cause of all this mess. All because of an erroneous non-deduction" (R. 68, 69). He always lost in playing poker but thought sooner or later he might win (R. 69, 70). He did not offer to repay the money or do anything further to stop or cancel the allotment (R. 67). It was on 8 March 1945 that he sent in a discontinuance (R. 68; Pros. Ex.25).

Evidence was introduced that accused performed his duties as an officer in an excellent manner (R. 55), and his efficiency ratings from 29 October 1942 to 15 April 1945 were shown to include two "Superior," six "Excellent," and one "Satisfactory," and the period 1 January 1945 to 15 April 1945, "Unknown" (R. 73, 74).

4. The accused was charged with and, as approved by the reviewing authority, convicted of forging three negotiable instruments, of making

and uttering six worthless checks with intent to deceive and fraudently obtaining money in the total sum of $215.00 thereon, of making and uttering two worthless checks in the total sum of $90.00 , and of presenting five false and fraudulent claims against the United States by omitting a debit of a Class "E" allotment in the sum of $100.00 monthly from each of five pay and allowance account vouchers. The evidence for the prosecution and the admissions of accused, both in and out of court, clearly establish the commission of these offenses. All the offenses involving forgery and issuance of worthless checks grew out of various gambling transactions in which the accused participated during the months of May, July, November and December 1944.

The three instruments which accused forged in their entirety (two checks and a customer's draft) were made and issued during various poker games, being placed in "the pot" and used to draw poker chips in the respective amounts of the instruments. The purported banks upon which they were drawn were non-existent and fictitious names were affixed as makers. Every necessary element of the offense of forgery was clearly proved in each case (MCM, 1928, par. 149i). The fact that the forged instruments were used to obtain poker chips is no defense. The accused fabricated the three checks and consequently is charged absolutely with the knowledge of their false and forged character. The fraudulent intent of the accused is demonstrated by his putting the checks into the "poker pot," knowing that the winner or winners of the "pot" would pick them up at the end of the game and negotiate them and knowing, too, that only if he (the accused) should win, which he did not, would the spurious instruments be returned to him.

Between 10 November and 18 December 1944, inclusive, accused wrote eight checks against his checking account in the First National Bank of Gurdon, Arkansas. Reference to the ledger sheet of that bank showing the condition of the account of accused during these months shows that on 7 November 1944 the balance credited to his account was $18.35, and that on 21 November 1944, it was $8.35. Between these dates, accused made and passed five checks in the total sum of $155.00 (Specifications 1-5, Charge II). On 24 November 1944, the balance in the account was $7.85. Before another deposit was credited on 5 December 1944, accused made and passed two more checks, each in the sum of $50.00 (Specifications 6 and 7, Charge II). On 12 December 1944 the balance was $32.75 and on 18 December 1944 accused passed another check in the sum of $50.00 (Specification 8, Charge II). The balance on deposit was insufficient to pay any of the eight checks upon the respective dates of their issuance, except for the $15.00 check written on 16 November 1944 and then it would only have been honored if it had reached the bank ahead of three earlier checks, any one of which would have completely exhausted the account.

The court and the reviewing authority in retaining in the findings the words "intent to deceive" and "fraudulently obtain" as to

all Specifications under Charge II, except Specifications 3 and 6, leave accused convicted not only of conduct unbecoming and officer and gentleman but also of the commission of a criminal offense involving moral turpitude, that of passing worthless checks with intent to defraud (CM 249006 Vergara, 32 BR 5, 13). Was there sufficient evidence from which fraud could properly be inferred or implied? The act of delivering a check, presently payable, in exchange for cash is in itself a representation that the check will be honored when presented for payment at the bank upon which it is drawn. If the check is dishonored because of lack of funds on deposit belonging to the maker of the check, fraud may be implied from those facts alone (CM 245507 Payne, 29 BR 189, 192). Accused admitted that he knew when he gave the checks that he had insufficient funds on deposit to pay the checks. Other evidence disclosed that he received cash for the checks described in Specifications 1, 2, 4, 7 and 8. Clear and affirmative evidence that accused received cash from First Lieutenant Liberman, to whom he gave the check described in Specification 5, is lacking. However, accused admitted that he gave all of these checks under similar circumstances and it was shown that accused paid the amount of that check in cash to the holder upon being notified that it had been dishonored. The inference is plain that he did receive cash for this check, too.

These checks were not thrown into a poker "pot," as were the forged checks under Charge I. They were actually cashed. The fact that accused thereafter used the proceeds to gamble does not in any way affect or alter the character of his wrongful acts. Under all the circumstances, considering the issuance by accused of a large number of checks when he knew he did not have sufficient funds in the bank for the payment of such checks and his utter indifference to the status of his bank account, the conclusion is warranted that he negotiated the checks with intent to defraud.

The checks involved in Specifications 3 and 6, Charge II, were given in payment of gambling losses and to pay a wager on a football game, respectively. The reviewing authority approved only so much of the findings of guilty as involved findings of guilty of wrongfully failing to maintain a sufficient bank balance to pay the checks, thus eliminating the element of intent to deceive or defraud. There was no proof that accused received cash or anything of value for these checks. The holder of the check given for the gambling loss testified that accused paid him in full for that worthless check and accused himself testified that he had "taken up" all obligations incurred by these worthless checks. Upon this evidence, it was clearly proper for the reviewing authority to eliminate intent to defraud from the findings as to these two Specifications (CM 249006 Vergara, 32 BR 5). All elements of the offenses which would bring them within the purview of Article of War 95 having been eliminated, the findings of guilty of Specifications 3 and 6, Charge II, constitute offenses in violation of Article of War 96 only (Dig. Op. JAG 1912-40, sec. 453 (22); CM 248031 Raquet, 31 BR 81, 87).

Several of the recipients of the worthless checks testified that accused had repaid them. The accused himself testified that he had "taken up" all of the bad checks. But subsequent reimbursement is no defense (CM 237522 Duggan, 24 BR 31, 38) and does not affect the findings of guilt.

The evidence that accused presented five false claims through his monthly pay and allowance vouchers from September 1944 through and including January 1945 in which he omitted the Class "E" allotment of $100.00 per month to his bank is too clear to require any extended discussion. The accused himself testified that in September 1944 he received a statement from his bank indicating that the allotment of $100.00 a month (which he had originally made in January 1943) was still being received by the bank, although he states he undertook to cancel it in March 1944. But even after direct notice that he was receiving credit to his bank account in this manner, he failed to take any steps to correct the situation. His culpable and inherently dishonest conduct is clearly established by his continued practice of submitting monthly vouchers, certifying each of them as true and correct, none of which contained any reference to this $100.00 allotment. Though he knew of the monthly payments by the Government to his credit in September 1944, he continued to collect $100.00 each month to which he was not entitled, and he did not discontinue the allotment until 8 March 1945. His excuse for this conduct was that he did not have the money to repay the Government when he discovered that the allotment credits had been continued and that he wasafraid to mention it to the Finance Department for that reason. He simply took to writing more checks and, in his own words, gambling "real hard to get the money to pay the Government back." It appears from one of the pre-trial statements executed by accused and introduced in evidence that the accused repaid his "entire indebtedness to the Government on 4 June 1945." The Finance Officer, Maxwell Field, testified that at the time of trial the records of his office showed that accused did not owe the Government anything. Restitution is no defense and the findings of guilty are amply supported by the evidence.

5. War Department records show accused is 27 years of age and married. He is a high school graduate. In civil life he was engaged in oil field construction and similar work from May 1938 to September 1940. He served in enlisted status in the Regular Army from 28 October 1940 to 26 August 1942, at which latter date he was discharged to accept a commission in the Army of the United States. He was immediately ordered to active duty as a Second Lieutenant, Infantry. He was promoted to First Lieutenant on 21 September 1943. On 1 December 1944 the accused was given a reprimand and ordered to pay a forfeiture of $50.00 of his pay as disciplinary punishment under Article of War 104 for cashing two checks in the total sum of $90.00 without having suffidient funds in the bank for the payment of such checks.

6. 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 if trial is legally sufficient to support only so much of the findings of guilty of Specifications 3 and 6, Charge II, as involves findings of guilty of wrongfully failing to maintain a sufficient bank balance to pay the checks therein mentioned in violation of Article of War 96, legally sufficient to support all other findings of guilty and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized for violation of Articles of War 93 and 96 and mandatory upon conviction of violation of Article of War 95.

_____, Judge Advocate.

R. A. Kiser Jr., Judge Advocate,

Donald D. Hickman, Judge Advocate.

SPJGQ - CM 284149 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 3 SEP 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 Paul J. Brown (O-1291575), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of three Specifications involving forgery in violation of Article of War 93 (Specifications 1 through 3, Charge I), of eight Specifications alleging the making and uttering of eight worthless checks with intent to deceive and fraudulently obtaining money thereon in the aggregate sum of $305.00, in violation of Article of War 95 (Specifications 1 through 8, Charge II), and of five Specifications alleging the presentation of false and fraudulent claims against the United States by omitting a debit of a Class "E" allotment in the sum of $100.00 monthly from each of five pay and allowance vouchers, in violation of Article of War 94 (Specifications 5 through 9, Charge III). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved only so much of the findings of guilty of Specifications 3 and 6, Charge II, as involved findings of guilty of wrongfully failing to maintain a sufficient bank balance to pay the checks therein mentioned, approved the sentence, remitted three years of the confinement imposed, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. 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 findings of guilty of Specifications 3 and 6, Charge II, as involves findings of guilty of wrongfully failing to maintain a sufficient bank balance to pay the checks therein mentioned, 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 course of poker games with officers not personally known to the accused, in May and July 1944, at Montgomery, Alabama, the accused made three checks for $25 each, which he played into the games for chips, and lost. All three checks were signed with fictitious names and drawn on nonexistent banks. The accused testified that he intended to "take up" the checks later. Between 10 November and 18 December 1944, inclusive, accused made and uttered eight checks

on his account in a bank at Gurdon, Arkansas, four for $50 each, two for $25 each, one for $40, and one for $15, totalling $305. His account was insufficient to pay any of the checks in due course, as he knew. Six of the checks were cashed for the accused by other officers and the proceeds expended in poker games. The checks involved in Specifications 3 and 6, Charge II, were given for a past gambling loss and a lost wager on a football game, respectively. From 1 January 1943, the accused had an authorized Class "E" allotment to his account with his bank at Gurdon, Arkansas, which was credited there each month until April 1945. Accused asserted that he directed the cancellation of this allotment in March 1944, but the allotment remained in force on the records and in fact. The accused presented, certified, and received payment upon pay and allowance vouchers through the Finance Officer, Maxwell Field, Alabama, each month from September 1944 to January 1945, inclusive, all without reference to or deduction of his $100 monthly allotment, which he continued to receive at his home bank. He admitted that he learned in September 1944, that the allotment was still in effect, but testified that he then did not have the money to repay the Government for the overdrawn amounts and was afraid to say anything about it, so let matters run and "gambled real hard trying to get the money to pay the Government back." Restitution to the Government and to the holders of the checks involved was ultimately made by or on behalf of the accused.

The accused is 27 years of age, married, in March, 1945. A child is expected. He comes from an Arkansas farm family of good repute and standing. During his commissioned service he has received two performance ratings of superior, six of excellent, and one of satisfactory. War Department records show that on 1 December 1944 accused was reprimanded and that a forfeiture of $50.00 of his pay was imposed as disciplinary punishment under Article of War 104 for cashing two worthless checks in the total sum of $90.00.

It appears that, with the possible exception of his poker game forgeries, the discreditable course of conduct of the accused arose out of financial embarrassment originating in his gambling propensities and in his misapprehension concerning the termination of his $100 monthly allotment to his bank, but after carelessly expending for some months this extra money which he did not know that he had and to which he was not entitled, he then, after discovery of that fact, resorted to his course of dishonesty and deceit in the specious hope of restoring his fortunes by gambling, lacking the moral courage to face his predicament even to call upon his father for the help which ultimately it appears that he did receive from that source.

I recommend that the sentence be confirmed, but that the forfeitures be remitted and, in the belief that promised supervision of the accused by worthy members of his family will accomplish his redemption better than long confinement in this particular case, I recommend that the period of confinement be reduced to one year, that the sentence as thus modified be ordered executed, and that a

United States Disciplinary Barracks be designated as the place of confinement.

4. Consideration has been given to the following: matters in extenuation presented to the Board of Review by the wife and sister of the accused at oral hearing on 15 August 1945; a letter from the wife of the accused, dated 28 July 1945, addressed to the President; a letter from the Honorable John L. McClellan, United States Senator from Arkansas, inclosing a letter dated 3 August 1945 from C. S. Brown, father of the accused; another letter from C. S. Brown, also dated 3 August 1945, addressed to the Honorable J. W. Fulbright, United States Senator from Arkansas; a letter from the Honorable Oren Harris, United States Representative from Arkansas also inclosing a letter dated 3 August 1945 from C. S. Brown; a communication from the Honorable George Grant, United States Representative from Alabama, dated 13 August 1945, to the Legislative and Liaison Division, War Department General Staff, bespeaking such lenient consideration for accused as possible; a letter dated 26 July 1945 from Mrs. Ethel King Barnett, mother-in-law of the accused, addressed to The Adjutant General, all referred to this office, and a letter dated 9 August 1945 from Mrs. Barnett addressed to Lieutenant Colonel Fletcher R. Andrews, Chairman, Board of Review No. 4, in this office, all such letters urging clemency in behalf of the accused.

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

Myron C. Cramer

MYRON C. CRAMER
Major General
The Judge Advocate General

9 Incls
1 - Record of trial
2 - Form of action
3 - Ltr fr Mrs. Paul J. Brown to the President, 28 July 45
4 - Ltr fr Hon John L. McClellan, 6 Aug 45
5 - Ltr fr C. S. Brown to Hon J. W. Fulbright, 3 Aug 45
6 - Ltr fr Hon Oren Harris, 7 Aug 45
7 - Cy ltr to Hon George Grant, 14 Aug 45
8 - Ltr fr Mrs. Ethel King Barnett, 26 July 45
9 - Ltr fr Mrs. Barnett, 9 Aug 45

(Sentence confirmed but forfeitures remitted and confinement reduced. GCMO 448, 21 Sept 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGH-CM 284157

21 AUG 1945

UNITED STATES	ARMORED CENTER
v.	Trial by G.C.M., convened at Fort Knox, Kentucky, 20 July 1945. Dismissal, total forfeitures, and confinement for five (5) years.
Second Lieutenant ALBERT J. WILLEY (0-1171841), Field Artillery.	

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

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

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

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

Specification: In that Second Lieutenant Albert J. Willey, Field Artillery, Armored Command Officers Replacement Pool, Armored Replacement Training Center, did, at Fort Knox, Kentucky, on or about 1 February 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Lordsburg, New Mexico, on or about 30 March 1945.

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

Specification 1: In that Second Lieutenant Albert J. Willey, Field Artillery, Armored Command Officers Replacement Pool, Armored Replacement Training Center, being indebted to Hotel Southern, Fort Smith, Arkansas, in the sum of $24.50 for room and hotel services, which amount became due and payable about 14 February 1945, did, at Fort Smith, Arkansas, from about 14 February 1945, to about 16 April 1945, dishonorably fail and neglect to pay said debt.

Specification 2: In that Second Lieutenant Albert J. Willey, Field Artillery, Armored Command Officers Replacement Pool, Armored Replacement Training Center, did, at Fort Knox, Kentucky, on or about 12 January 1945, with intent to defraud, wrongfully and unlawfully make and utter to Fort Knox Exchange, a certain check in words and figures as follows, to wit:

THE FIRST NATIONAL BANK DATE 12 Jan 19 45
Name of Bank

FT. SMITH, ARK.
City or town

Pay to the
order of FT. KNOX EXCHANGE $ 55.00

FIFTY FIVE & NO/100----------DOLLARS

For the purpose of obtaining payment of this check I hereby represent that the amount stated therein is on deposit in said bank in my name subject to this check and is hereby assigned to the payee or holder hereof

/s/ ALBERT J. WILLEY
0-1171841 2d Lt. F. A. #770

and by means thereof, did fraudulently obtain from the said Fort Knox Exchange the sum of $55.00, lawful money of the United States, the said Second Lieutenant Willey then well knowing that he did not have, and not intending that he should have sufficient funds in the First National Bank at Fort Smith, Arkansas, for payment of said check.

Specification 3: Same allegations as Specification 2 except check dated 16 January 1945 and is in the amount of $50.

Specification 4: Same allegations as Specification 2 except check dated 19 January 1945 and is in the amount of $20.

Specification 5: Same allegations as Specification 2 except check dated 20 January 1945 and is in the amount of $20.

Specification 6: Same allegations as Specification 2 except check dated 19 January 1945 and made and uttered to Fort Knox Officers' Club in the amount of $10.

Specification 7: Same allegations as Specification 2 except check dated 20 January 1945 and made and uttered to Fort Knox Officers' Club in the amount of $10.

Specification 8: Same allegations as Specification 2 except check dated 25 January 1945 and made and uttered to Fort Knox Officers' Club in the amount of $10.

Specification 9: Same allegations as Specification 2 except check dated 27 January 1945 and made and uttered to Fort Knox Officers' Club in the amount of $10.

Specification 10: Same allegations as Specification 2 except check dated 29 January 1945 and made and uttered to Fort Knox Officers' Club in the amount of $10.

Specification 11: Same allegations as Specification 2 except check dated 11 January 1945 and made and uttered to Jose Gonclaves in the amount of $1.00.

Specification 12: Same allegations as Specification 2 except check dated 26 January 1945 and made and uttered to A. R. T. C. Officers' Mess in the amount of $38.42.

Specification 13: Same allegations as Specification 2 except check dated 3 February 1945 and made and uttered to the Richman Brothers Company in the amount of $22.95.

Specification 14: Same allegations as Specification 2 except check dated 29 March 1945 and made and uttered to El Hidaglo Hotel in the amount of $21.12.

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

Specification: In that Second Lieutenant Albert J. Willey, Field Artillery, Armored Command Officers Replacement Pool, Armored Replacement Training Center, did, at Louisville, Kentucky, on or about 2 February 1945, feloniously embezzle by fraudulently converting to his own use a certain check in words and figures as follows, to wit:

WAR
Finance Fort Knox, Ky., JAN 31 1945 238,266

TREASURER OF THE UNITED STATES
(SEAL) 15-51
Pay $***144 Dollars and .70 cts $144.70
To the
order of ***Nelson L. Ireland***
2d Lt. Inf. ARTC

Vo. No. ____

Object for which drawn:

S J Spalia
Finance Officer

7485
KNOW YOUR ENDORSER - REQUIRE IDENTIFICATION 211,402
212-526

of the value of $144.70, the property of Second Lieutenant Nelson L. Ireland, entrusted to him for Second Lieutenant Nelson L. Ireland by Lieutenant Thomas E, Gaynor.

By appropriate substitutions and exceptions accused pleaded not guilty to desertion but guilty to absence without leave under Charge I and its Specification, pleaded not guilty to Specification 1 of Charge II and to Charge III and its Specification, and pleaded guilty to Charge II and guilty to Specifications 2 to 14, inclusive, of that Charge except the words "with intent to defraud" and "fraudulently." He was found not guilty of desertion but guilty of absence without leave under Charge I and its Specification and guilty of all other Charges and Specifications. No evidence of any previous conviction was introduced. He was sentenced to dismissal, total forfeitures and confinement for twenty-five years. The reviewing authority approved the sentence but reduced the period of confinement to five years and forwarded the record of trial for action under Article of War 48.

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

a. Charge I and its Specification.

Competent morning report entries were admitted in evidence establishing that on 1 February 1945 accused absented himself without leave from his organization at Fort Knox, Kentucky, and was subsequently confined in the station hospital, Lordsburg, New Mexico, on 30 March 1945 (R. 14; Pros. Exs. 1, 2). It was stipulated by the prosecution, defense and the accused that the distance between Fort Knox and Lordsburg is 1800 miles (R. 14).

b. Charge II, Specification 1.

From 6 February 1945 through 12 February 1945, accused occupied a room in the Hotel Southern, Fort Smith, Arkansas, having entered on the hotel register the names "Lt. and Mrs. A. J. Willey, Fort Knox, Ky." He behaved in no unusual manner during his stay at the hotel except that on 13 February 1945 he departed from the hotel with all of his personal effects without notifying the hotel authorities that he was leaving and without paying his hotel bill of $24.50 (R. 14; Pros. Ex. 3).

c. Charge II, Specifications 2-14, inclusive.

It was stipulated by the prosecution, defense and the accused that the latter made and uttered the following described checks to the respective payees thereof, receiving in exchange therefor the following consideration, viz (R. 14-18; Pros, Exs. 4-16):

Spec.	Date of Check	Amount	Payee	Consideration Received	Drawee Bank
2.	12 Jan 1945	$55	Ft Knox Exchange	Cash	1st Nat.Bk. of Ft. Smith, Ark.

Spec.	Date of Check	Amount	Payee	Consideration Received	Drawee Bank
3	16 Jan 45	$50	Ft Knox Exchange	Cash	1st Nat Bank of Ft. Smith, Ark.
4	19 Jan 45	$20	"	"	"
5	20 Jan 45	$20	"	"	"
6	19 Jan 45	$10	Ft Knox Officers' Club	"	"
7	20 Jan 45	$10	"	"	"
8	25 Jan 45	$10	"	"	"
9	27 Jan 45	$10	"	"	"
10	29 Jan 45	$10	"	"	"
11	11 Jan 45	$ 1	Jose Gonclaves	"	"
12	26 Jan 45	$38.42	ARTC Officers' Mess	Credit	"
13	3 Feb 45	$22.95	Richman Bros.Co.	Cash	"
14	29 Mar 45	$21.12	El Hidalgo Hotel	"	"

It was further stipulated that on the date each check (except El Hidaglo Hotel check) was drawn and uttered there were insufficient funds on deposit in the drawee bank to cover it and that each check (except El Hidalgo Hotel check) was forwarded in due course to the drawee bank for payment but was returned unpaid because of insufficient funds. It was also stipulated by the prosecution, defense and the accused that if one Nat Gammon were present he would testify that the El Hidalgo Hotel check for $21.12 (Spec. 14) "was not deposited in due course for collection inasmuch as word was received from the First National Bank at Fort Smith, Arkansas, that the account of the said Albert J. Willey had been closed January 26th" (R.14-18).

d. Charge III and Specification.

It was stipulated by the prosecution, defense and the accused that if First Lieutenant Thomas E. Gaynor were present he would testify that on 31 January 1945 he handed accused the monthly pay checks of all officers of Company D, 14th Armored Replacement Battalion, for delivery to the officers entitled thereto. One of these checks was dated 31 January 1945, was drawn on the Treasurer of the United States in the amount of $144.70, and was payable to Lieutenant Nelson L. Ireland for whom it was intended (R. 19). It was further stipulated that if First Lieutenant Nelson L. Ireland were present he would testify that on 1 February 1945 he asked Lieutenant Gaynor for his pay check and was informed that all company officers' pay checks had been turned over to accused. Subsequent inquiry by Lieutenant Ireland revealed that all pay checks except his had been given to the company first sergeant. On 3 February 1945, Lieutenatn Ireland saw accused in Louisville and when he requested his pay check accused stated he had mailed it to him the day before. Lieutenant Ireland then asked accused where he had been to

which the latter replied that he had become drunk and had been "all over." After stating that he was about to turn himself in at the camp accused hurried away through the crowded street. Lieutenant Ireland never received his pay check, never indorsed it and never received the proceeds thereof (R. 19). A photostat of the check was received in evidence without objection (R. 19). On the reverse side the name "Nelson L. Ireland" appeared as the first indorsement and below it appeared the name "Albert J. Willey" as the second indorsement and thereafter that of another individual as the last indorsement (Pros. Ex. 17).

4. For the defense it was stipulated by the prosecution, defense and accused that if Major E. W. Williams, Chief of the Neuropsychiatric Section of the Regional Hospital, Fort Knox, were present he would testify that after observing accused from 30 April 1945 to 9 May 1945 he was of the opinion that accused "suffered from a hysterical amnesia—a loss of memory for a varying period due to emotional and not organic changes," that accused's "conflicts resulted from a combination of events producing an amnesia, during which time he committed offenses" and that accused "is mentally responsible for his acts and does recognize right from wrong" (R. 20).

After full explanation of his rights accused elected to give sworn testimony in his own behalf, the pertinent part of his testimony being as follows: He was commissioned 15 October 1942 after completing Field Artillery Officer Candidate School at Fort Sill, Oklahoma (R. 29). He was transferred to Fort Knox in November, apparently the year 1944. Two months prior thereto while at Camp Chaffee he commenced experiencing headaches and found that he was unable to remember matters he was expected to teach. This condition persisted after his transfer to Fort Knox and because of it he felt he was incompetent to hold his commission and sought to resign (R. 21, 29).

Accused testified that he remembered being in charge of the pits on the rifle range around 1 February 1945 but remembered nothing thereafter until he was apprehended by a lieutenant colonel and a first lieutenant in a hotel room he was occupying in Lordsburg, New Mexico. He did not remember how he lived or with whom he lived during his absence (R.21,24-26). After his apprehension he was hospitalized at the Regional Hospital, Fort Knox, and at Darnall General Hospital, Danville, Kentucky. He claimed that the treatment he received had improved his condition (R. 22). He had never before suffered from amnesia (R. 28).

Although he recalled cashing some checks at the Post Exchange and the Officers' Club, he could not remember uttering any of the individual checks with which he was charged except the check dated 26 January 1945, in the amount of $38.42, which he gave to the officers' mess in exchange for a previous check he had uttered and which had been returned because of insufficient funds (R. 21-23). He remembered that on one occasion he deposited $90 in the First National Bank of Fort Smith, Arkansas, but he

was unable to recall the date. He admitted that, according to his bank statement, he had a balance of but $10.10 on deposit in that bank on 10 January 1945 and he believed that statement to be correct (R. 26, 27).

So far as Lieutenant Ireland's check was concerned accused did not remember receiving it and the other checks for the company officers from Lieutenant Gaynor, did not remember disposing of any of them, did not recall speaking to Lieutenant Ireland on 3 February 1945, in Louisville, Kentucky, and did not know who placed the purported indorsement of Lieutenant Ireland on that pay check (R. 25, 28, 30).

Within a week or ten days prior to trial accused visited the finance office seeking pay due him which he intended to apply on the indebtedness created by his worthless checks. He was not paid, however, inasmuch as it had not been determined whether he was indebted to the United States because of the disposition made of Lieutenant Ireland's check (R. 31).

5. To rebut the evidence introduced by the defense, the prosecution presented testimony to show that Sergeant Aaron E. Holm, first sergeant of accused's organization, saw him and conversed with him almost daily from Christmas time 1944 to 1 February 1945 and observed nothing unusual in accused's behavior (R. 31, 32). Accused's platoon sergeant, Sergeant James M. Geeslin, was in daily contact with accused for a month or six weeks and also observed nothing unusual in accused's conduct (R. 34). On 31 January 1945, the accused gave Sergeant Holm the pay checks for all of the company officers of accused's organization except the check for Lieutenant Ireland. Accused stated at the time that he would deliver Lieutenant Ireland's check to him personally (R. 33).

It was stipulated by the prosecution, defense and the accused that if Captain Martin Grotjahn, Medical Corps, Darnall General Hospital, were present he would testify that after careful observation of accused for a period of time after 9 May 1945, a board of officers convened and found accused suffering from no such mental disorder as disqualified him from full military duty (R. 35; Pros. Ex. 18). It was similarly stipulated that if Major William W. Davis, Medical Corps, were present he would testify that a board of officers observed accused at the Regional Hospital, Fort Knox, Kentucky, and on 26 June 1945, reported that accused "was responsible for his actions and knew the difference between right and wrong from 12 January 1945 to 26 June 1945" and "is mentally responsible for his actions at the present time and knows the difference between right and wrong"(R. 35, 36; Pros. Ex. 19).

6. a. Charge I and its Specification.

The evidence fully sustains the findings of guilty of the lesser included offense of absence without leave under this Charge and Specification and demonstrates that accused's plea of guilty to that offense was not improvidently entered. Although accused contended that this absence occurred while he was suffering from amnesia there is substantial

evidence in the record establishing that such was not the fact. Accordingly, the matter of accused's mental condition was for the court to determine and it is without the province of the Board of Review to disturb the court's findings thereon in view of the conflicting evidence (Dig. Op. JAG 1912-40, sec. 395 (36)).

b. Charge II, Specification 1.

The failure of an officer to pay a debt constitutes a military offense if the officer's conduct with respect thereto is dishonorable. If the failure to pay a debt springs from an intent to defraud, deceive or to escape payment, as distinguished from mere financial inability to pay, the failure to pay is dishonorable (CM 253254, Robertson, 34 B.R. 321). Here accused furtively evacuated his room at a hotel without paying his bill and without advising the hotel authorities that he was leaving. Clearly he intended to evade payment of his bill. The record fully sustains the findings of guilty of this Charge and Specification.

c. Charge II, Specifications 2-14 inclusive.

The evidence and accused's pleas fully establish that he made and uttered thirteen checks aggregating $278.49 in amount without having sufficient funds on deposit in the drawee bank to pay any one of the checks either when uttered or when presented for payment. The only matter in issue is whether or not accused intended to defraud when he uttered these checks. These checks were all uttered during the period from 12 January to 29 March 1945, twelve of them having been issued by 3 February 1945. On 10 January 1945 accused had a balance of but $10.10 in his account. In the face of such evidence the burden fall upon accused to establish that dishonor of these checks resulted from an honest mistake rather than from his own misconduct (CM 280302, Nelson; CM 249232, Norren, 32 B.R. 95, 3 Bull. JAG 290). He sought to explain his conduct by contending that he suffered from amnesia at the time these checks were uttered. However, there was abundant evidence to demonstrate that such was not the fact and the court was warranted in so concluding. Having failed satisfactorily to explain his conduct, the only reasonable conclusion left for the court to draw was that accused was content to issue all of these checks with complete disregard as to the adequacy of his deposits to cover them. Such reckless indifference as to the sufficiency of his bank balance brands accused's conduct as fraudulent in uttering these checks (CM 270061, Sheridan; CM 280302, Nelson).

The evidence offered under Specification 14 of this Charge II indicates that the check for $21.12 given to El Hidalgo Hotel was not presented for payment because the hotel had received information that accused's account in the drawee bank had been closed on 26 January 1945. This evidence as to the condition of accused's bank account was hearsay and accordingly can receive no consideration upon review of this record. Were there nothing else in the record of trial we would be compelled to

disapprove the court's findings of guilty of this Specification for lack of proof of the condition of accused's bank account on 29 March 1945 when this check was uttered. However, by his plea accused admitted he had insufficient funds on deposit to pay this check both when it was issued and when presented for payment. Accordingly, only the issue of fraud was presented to the court under this Specification 14 and, as shown above, we cannot say that the court incorrectly determined that issue.

d. Charge III and Specification.

Under this Charge and Specification it is alleged that accused embezzled Lieutenant Ireland's pay check for $144.70. Accused had possession of the check, evaded delivery of it to Lieutenant Ireland and in fact never did deliver it to him. Lieutenant Ireland's name was forged as the first indorsement on the reverse side of the check and immediately below it appears the name of accused as second indorser. Having before it thirteen examples of accused's signature as they appeared upon various checks (Specs. 2-14, incl., Chg. II), the court was entitled to compare his known signatures with the second indorsement an Lieutenant Ireland's check and conclude therefrom as a matter of fact whether or not such indorsement had been written by accused (CM 280627, Tyree). The obvious similarity in handwriting compels us to conclude that the record sustains the court's determination that accused signed his name as second indorser on Lieutenant Ireland's check. From these facts the only reasonable inference to be drawn is that accused wrote, or knowingly procured another to write, Lieutenant Ireland's name on this check and that he thereafter placed his own indorsement below it. With a third indorsement appearing below that of accused it can only be concluded that accused negotiated this check to another. All this was done without the authority or approval of the payee of the check. Accordingly, this evidence fully sustains the court's conclusion that accused embezzled this check by fraudulently converting it to his own use. It was unnecessary to present any evidence to show that collection was in fact made upon the check. Mere negotiation of the check by accused to a third person establishes accused's conversion of it to his own use. The evidence sustains the findings of guilty of this Charge and Specification.

7. Accused is 31 years of age. War Department records reveal that following graduation from high school in 1932 he was employed as an automobile mechanic until September 1940 when he enlisted in the Regular Army. On 15 October 1942, he was commisssioned a second lieutenant, Army of the United States, after successfully completing the course of instruction at the Field Artillery School, Fort Sill, Oklahoma.

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

opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of that sentence. Dismissal is authorized upon conviction of a violation of Article of War 58, Article of War 96 or Article of War 93.

Thomas N. Jaffy Judge Advocate.

William H. Gambrell Judge Advocate.

Robert C. Newthan Judge Advocate.

SPJGH-CM 284157 1st Ind

AUG 28 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 Albert J. Willey (0-1171841), Field Artillery.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absenting himself without leave from 1 February 1945 to 30 March 1945, in violation of Article of War 61 (Chg I, Specification); was found guilty of dishonorably failing to pay a debt of $24.50 and of fraudulently making and uttering thirteen worthless checks aggregating $278.49 in amount, all in violation of Article of War 96 (Chg II, Specifications 1-14 incl.); and was found guilty of embezzling a certain check in the amount of $144.70, in violation of Article of War 93 (Chg III, Specification). He was sentenced to dismissal, total forfeitures and confinement for twenty-five years. The reviewing authority approved the sentence but reduced the period of confinement to five years and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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. During the period from 12 January 1945 to 29 March 1945, accused fraudulently made and uttered thirteen checks aggregating $278.49 in face amount and received cash or credit therefor without having sufficient funds on deposit to pay any of the checks (Chg II, Specifications 2-14 incl.). He absented himself without leave on 1 February 1945 and remained absent for a period of eight weeks and two days until apprehended on 30 March 1945 some 1800 miles from his station (Chg I, Specification). On 6 February 1945, during his unauthorized absence, he dishonorably failed to pay a hotel bill of $24.50, secretly evacuating his room without notifying the hotel authorities (Chg II, Specification 1). Sometime around the first of February 1945, he embezzled another officer's pay check for the month of January 1945, in the face amount of $144.70, indorsing it under the forged signature of the payee and thereafter negotiating it (Chg III, Specification).

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 carried into execution and that a United States Disciplinary Barracks be designated as the place of confinement.

4. Consideration has been given to a letter from Congressman Frank L. Chelf, dated 8 August 1945, to a letter from Senator Glen H. Taylor, dated 12 August 1945, and to the inclosures accompanying these letters, all of which are transmitted herewith.

5. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation 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 Rep Chelf, 8 Aug 45 w/incls
3. Ltr fr Sen Taylor, 17 Aug 45 w/incls
4. Form of action

(Sentence as approved by reviewing authority is confirmed, but forfeitures are remitted. GCMO 432, 28 Aug 1945).

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

SPJGN-CM 284190

UNITED STATES	) 27TH HEADQUARTERS & HEADQUARTERS DETACHMENT, SPECIAL TROOPS, 2ND ARMY
v.	) Trial by G.C.M., convened at Fort Bragg, North Carolina, 10-12 July 1945. Dismissal, total forfeitures and confinement for five (5) years.
First Lieutenant MEYER J. ABGOTT (0-1182046), 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 93d Article of War.

Specification 1: In that 1st Lieutenant Meyer J. Abgott, did, at Fort Bragg, North Carolina, on or about 9 March 1945, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit:

"Fayetteville, N. C., March 9 1945, No. 127

First Citizens Bank & Trust Co.

Pay to the order of ___Cash___ $75 00/100 Dollars

(signed) Harold A. Cohen, 0-543770

1st Lt 560 FA Bn"

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

Specification 2: In that 1st Lieutenant Meyer J. Abgott, did, at Fayetteville, North Carolina, on or about 13 March 1945 with intent to defraud falsely, make in its entirety a certain check in the following words and figures, to wit:

"Fort Bragg, N. C. March 13 1945 No. 66-931

First Citizens Bank & Trust Co.

Pay to the order of Cash $25 00/100

Twenty-five and no/100 . . . Dollars

(signed) Harold A. Cohen O-543770

1st Lt. 560 F.A. Bn"

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

Specification 3: In that 1st Lieutenant Meyer J. Abgott, did, at Fort Bragg, North Carolina, on or about 14 March 1945, with intent to defraud, falsely make in its entirety, a certain check in the following words and figures, to wit:

"Fayetteville N. C. March 14 1945 No. _____

First Citizens Bank & Trust Co.

Pay to the order of Green Cleaning Company. $25 00/100

Twenty-Five and No/100 Dollars

(signed) Albert D. Neusbaum, O-1174766

1st Lt 560 F. A. Bn."

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

Specification 4: In that 1st Lieutenant Meyer J. Abgott, did, at Fort Bragg, North Carolina, on or about 12 March 1945, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

"Fayetteville, N. C. March 12 1945 No. 66 - 833 5

First Citizens Bank & Trust Co.

Pay to the Order of Ft Bragg Post Exchange $20 00/100

Twenty and No/100 ---------- Dollars

(signed) Harold A. Cohen 0-543770

1st Lt. 560 F.A. Bn."

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

Specification 5: In that 1st Lieutenant Meyer J. Abgott, did, at Fayetteville, North Carolina, on or about 10 March 1945, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

"Fort Bragg, N. C. March 10 1945 No._____

First Citizens Bank & Trust Co. 66 - 931

Pay to the order of Royal Jewelers $12 25/100

Twelve and 25/100 Dollars

For _____ (signed) Albert D. Neusbaum 0-1174766

1st Lt 560 F.A. Bn."

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

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

Specification 1: On 9 March 1945, uttering as true and genuine the check described in Specification 1, Charge I.

Specification 2: On 13 March 1945, uttering as true and genuine the check described in Specification 2, Charge I.

Specification 3: On 14 March 1945, uttering as true and genuine the check described in Specification 3, Charge I.

Specification 4: (Finding of not guilty).

Specification 5: (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 4 and 5 of Charge II; guilty of Speci-

fication 5 of Charge I, except the figures and words "560 F. A. Bn", substituting therefor the figures and words "576 F. A. Bn"; and guilty of all other Specifications and the Charges. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the First Citizens Bank & Trust Company is a banking corporation with establishments in Fayetteville and Fort Bragg, North Carolina (R. 15, 21, 54). The accused's account, which was in the Fayetteville Branch, was closed at his instance during the latter part of February, 1945 (R. 56). On 9 March 1945, an officer presented himself at the Fort Bragg Branch and by using an "old style AGO card", which was folded so as to reveal only the name and serial number, identified himself as Harold A. Cohen. He presented a check signed in that name, dated 9 March 1945, made to the order of cash in the amount of $75.00, and drawn on the Fayetteville Branch. Mr. James A. Baker, Cashier, examined the check, which had not been written in his presence, and, finding that the signature of the maker "compared favorably" with that appearing on the identification card, cashed the check. He identified the accused at the trial as the person who had presented himself as Harold A. Cohen (R. 15, 16, 20, 22, 23, 25; Pros. Ex. 3). The check was returned unpaid by the drawee bank (R. 17).

Around two o'clock on the afternoon of 10 March 1945 an officer in "dress uniform", purchased a "billfold" and "finger nail file clip" at Royal Credit Jewelers in Fayetteville. He identified himself, by use of "dog tags", as Albert D. Neusbaum and in that name executed and presented a check for $12.25 in payment of the merchandise. The check was written on the Fort Bragg Branch of the bank above mentioned and was dishonored upon presentment, there being no account in the name of Neusbaum (R. 20, 22; Pros. Exs. 1, 2, 9). Mr. Elwood D. Moore, the jewelry store clerk who dealt with the accused, observed nothing "peculiar" about the manner in which the check was written. On 25 March 1945 Mr. Moore, accompanied by Sergeant Aaron LeWinter, Military Police Detachment, and "a Lieutenant", went to Fort Bragg and, after suggesting that the accused change from "fatigues" to his "blouse and pinks", identified him as the officer who negotiated the check in the name of Albert D. Neusbaum (R. 76-79; Pros. Ex. 1).

On 12 March 1945 Miss Wande McLeod, an employee in the Post Exchange at Fort Bragg, cashed a check for an officer, after first obtaining the approval of Mr. George E. Russell, Assistant Manager of the Clothing Department. Mr. Russell, who at the time noticed the accused standing at the nearby "insignia counter", concluded that the check was cashed at his behest (R. 35, 36, 39, 40, 211). Russell did not see the execution of the

check nor did he see the salesgirl deliver the currency to anyone and he admitted that he was uncertain as to the identity of the person whom he had previously identified as the accused (R. 40, 45, 47, 48). It was stipulated that Miss McLeod was unable to point out the accused as the person who negotiated the check (R. 47, 48, 211). The instrument was made to the order of the Fort Bragg Post Exchange in the amount of $20.00, was drawn on the Fayetteville Branch of the bank mentioned, and was signed "Harold A. Cohen, 0-543770, 1st Lt., 560 F.A. Bn." (Pros. Ex. 4).

On 13 March 1945 a check for $25.00, drawn on the Fort Bragg Branch, and signed in the name of Harold A. Cohen, was presented to Mrs. Kathryn Service, the teller of the aforesaid bank at Fayetteville. After obtaining authority from Mr. G. B. Brantley, an official of the bank, Mrs. Service cashed the check (R. 50-52; Pros. Ex. 5). She was unable to state that the accused was the person who presented it, but Mr. Brantley, who "looked up and recognized the party", was positive in his identification (R. 52, 54, 56, 211). Mr. Brantley asserted that the accused wore a helmet and was dressed "kind of in fatigues" (R. 16). On the following day the check was again brought to the attention of Mr. Brantley, who, recalling that he had seen the officer in question at the home of Mr. Louis Green, obtained from him the name of accused (R. 52, 57-59). The check was returned unpaid by the drawee bank (R. 22).

On the afternoon of 14 March 1945 an officer executed and cashed a check for $25.00, drawn on the Fayetteville Branch, and signed in the name of Albert D. Neusbaum, at the office of Green Cleaning Company, Fort Bragg (R. 65, 66, 69; Pros. Ex. 6). According to Mr. Gilbert M. Honeycutt, the officer in question, whom he identified as the accused, wrote the check in a "normal manner", while "standing up and leaning over on the desk". No "peculiarity" was observed. The witness recalled that the accused was dressed in "fatigues", but did not remember whether he wore a raincoat (R. 65, 66, 69, 70, 71). Mrs. Leona Farrell, an employee of the cleaning company, to whom the check was presented was unable to identify the accused as the person involved (R. 210).

During the course of the afternoon of 14 March 1945 several persons gathered at the office of Lieutenant Colonel Hayes, Commanding Officer of the 538th Field Artillery Battalion, Fort Bragg, in an effort to establish the identity of the maker of certain of the checks above mentioned. Among those present were Mr. Baker, Mr. Brantley, Mr. Russell, Corporal LeWinter, and a Lieutenant Byers (R. 19). As the group walked into the Headquarters Building, Mr. Brantley recognized the accused "from his back" and called the accused's presence to the attention of Mr. Baker (R. 53). About an hour later Mr. Baker identified the accused as the latter walked into the office "along with several others" (R. 20). On the following morning certain members of the group again met in the Headquarters office for the purpose of obtaining samples of the accused's handwriting (R. 20-21). After Lieutenant Byers explained the meaning and effect of Article of War

24 and after the accused had indicated reluctance to provide handwriting specimens, Lieutenant Colonel Hayes advised the accused that "if he was innocent he had nothing to lose by signing the checks but that if he was guilty he would be doing a foolish act by signing them". Stating that he "knew he was innocent so he didn't mind signing * * *", the accused wrote on several blank checks the names of Harold A. Cohen and Albert D. Neusbaum (R. 20, 21, 72, 82; Pros. Exs. 7, 8). These handwriting specimens were submitted to the laboratory of the Federal Bureau of Investigation (R. 73).

Mr. Joseph L. Pennington, a special agent of the Federal Bureau of Investigation, who was shown to be trained in the comparison and identification of handwriting, was permitted to testify as an expert witness on that subject. He testified that he had compared the four checks described in Specifications 1, 2, 3, and 4 which were signed in the names of Albert D. Neusbaum or Harold A. Cohen with sample signatures of those two names written by the accused and in his opinion the four checks in question were all written by the same person (R. 94-96; Pros. Exs. 3-8). In expressing his opinion that the accused had written all of the four checks in question, Mr. Pennington pointed out nine points of similarity between the sample signatures and the signatures in issue.

A search of the accused's quarters, including "barracks bags, shelves, cupboards, clothes", failed to disclose the leather wallet and nail clip which, according to Mr. Moore, had been purchased at the Royal Credit Jewelers, and no identification cards or "dog tags", bearing the names of Harold A. Cohen or Albert D. Neusbaum, were found (R. 77). These names did not appear on the Officers' Directory of the XXXII Corps Artillery or of Pope Field, Fort Bragg, and the records of the First Citizens Bank & Trust Company, both at Fayetteville and Fort Bragg, revealed no such depositors (R. 20, 54, 115-119).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to make a sworn statement in his own behalf. His testimony consisted of a brief description of his military record, an unequivocal denial of the offenses alleged, and, by way of alibis, a rather detailed account of his activities at the time the crimes were allegedly committed.

He had served overseas as an enlisted man from February, 1942, to February, 1943, when returned to the United States to attend Officer Candidate School. Since receiving his commission in May, 1943, he was stationed at Fort Bragg, North Carolina (R. 126).

At about 7:30 o'clock on the morning of 9 March 1945, he went from his home in Fayetteville to his organization at Fort Bragg. His battalion had been alerted for overseas service and, as "Packing and Crating Officer", he spent the morning supervising the loading of boxes and

in compiling certain records needed immediately by Warrant Officer Buffone, Battalion "S-4". The accused worked that day with Mr. Buffone, Major Albers, and three or four enlisted men. In the evening he attended a "farewell party at the Gunners' Lodge" with several other officers. At no time during the day of 9 March did he see Mr. Baker or visit the Fort Bragg Branch of the First Citizen's Bank & Trust Company (R. 131, 132). The accused pointed out that, as custodian of the 100th Division Artillery Mess Fund, he had made deposits in the Fort Bragg bank, and "from eight to ten occasions" had dealt with Mr. Baker, who thus had an opportunity to observe him and to become familiar with his signature (R. 128).

The accused's wife recalled that he returned home at about 2:00 o'clock on the afternoon of 9 March and that they attended the "Battalion farewell party" that evening (R. 175, 176).

The accused, in recounting the events of 10 March 1945, stated that he dressed in O.D. uniform, went to Fort Bragg in the early morning, attended a gymkhana "between the battalions that were leaving", and, about 11:15 a.m., returned to his home in Fayetteville. After lunch he put on a necktie and overseas cap and, at about 1:00 o'clock, went with his wife to "Fleishman's Store" to purchase a pair of boots. They then walked to "The Jewel Box" for the purpose of saying goodbye to Mr. Louis Green, the proprietor, for whom Mrs. Abgott had worked (R. 142, 143). The accused was able to make purchases at a discount at The Jewel Box but had never bought anything at Royal Credit Jewelers, which also was owned by Mr. Green. The accused had no occasion to make the purchases related by Mr. Moore. He already had a good wallet and could not use a "fingernail clip" since contracting a skin and nail infection while overseas (R. 143, 144, 166). He referred to the fact that the search of his person made a few days later by Corporal LeWinter failed to disclose these items or any identifying cards or tags bearing the names of Cohen or Neusbaum (R. 144).

Both Mr. Green and the accused's wife testified concerning the visit to The Jewel Box at about 2:00 o'clock on the afternoon of 10 March. Mrs. Abgott added that the accused then accompanied her to the Jacqueline Beauty Shoppe and waited while she had her hair combed, that they attended the movies at the Colony Theatre, and, in the evening, joined friends at the Fort Bragg Officers' Club. She was in the presence of her husband continuously after noon on 10 March and was positive in her assertion that he did not visit Royal Credit Jewelers (R. 172-175).

Lieutenant Donald C. Wilson, the officer who investigated the charges, described the manner in which Mr. Moore, the jewelry store employee, identified the accused. Mr. Moore was directed to walk the length of the "Group Headquarters Building" and to point out the person who made and presented the check. When he failed to recognize the accused, who was sitting with two enlisted men in the "back room", LeWinter took Moore aside into "Colonel Buckley's room". When they emerged, Mr. Moore suggested

that the accused dress in "blouse and pinks" and, upon his complying, identified him as the officer who made and cashed the check at Royal Credit Jewelers (R. 190, 191).

As for the events of 12 March 1945 the accused testified that he, after meeting his wife about noon at the Fort Bragg bus station, walked to the Post Exchange, made several purchases, and then went into the "officers' section" in search of insignia. They had lunch at the "Main Post" and returned to the bus station (R. 141). He did not cash a check at the Post Exchange or at any other place that day. Mrs. Abgott corroborated this testimony in practically every detail (R. 176). Lieutenant Wilson indicated that during his investigation he was impressed by Mr. Russell's hesitancy and uncertainty in identifying the accused as the officer at whose instance the check was cashed at the Post Exchange (R. 187).

On Tuesday, 13 March 1945, the accused, with the permission of his Commanding Officer, remained at his house to assist with the moving and packing of his household effects. He slept late and, when Mr. Mason and the other "movers" arrived, was still in pajamas and bathrobe. The work required over an hour's time and, after the men departed around 11:15 or 11:30 o'clock, the accused dressed, "had something to eat", and went to the Eastern Radio Store to get a radio which had been left there for repairs by a Captain B. D. Stone. Finding that the radio was not ready for delivery, he walked toward the bus station to obtain transportation to Fort Bragg. He hailed two officers of his organization who passed in an Army vehicle and went with them to "the Armory", the Coca-Cola plant, the place of business of A. M. Fleishman, the liquor store, and last of all to Fort Bragg, arriving there about 1:15 o'clock. That afternoon the accused participated in the "final review" parade. At no time during the day did he enter the bank in Fayetteville (R. 133-135). Before his account was closed about 7 March 1945 he was often in the bank and, at least "ten times", had transacted business with Mr. G. B. Brantley, with whom he had become rather well acquainted, for both Mrs. Abgott and Mrs. Brantley worked together for Mr. Green at The Jewel Box (R. 129, 130, 178). The accused and his wife had been together "very often" in the bank at Fayetteville (R. 178). She, too, recalled that their furniture and other effects were moved on the morning of 13 March 1945 and that the accused, when he left the house dressed in O.D. uniform, stated his intention to obtain Captain Stone's radio (R. 179). The records of Eastern Radio Supply revealed that the radio in question was at the repair shop from 10 March until 14 March (R. 160).

Mr. Douglas E. Mason and Mr. Charles Holleman, the "movers" referred to, testified that upon their arrival at the accused's house on the morning of 13 March they found him dressed in bathrobe and pajamas. The task of packing and removing the furniture and other effects required more than an hour and the workmen left the house between 10 and 10:45 o'clock (R. 181-184).

Mr. James E. McDavid, teller at the bank in Fayetteville, who verified the fact that accused's account had been closed on 7 March 1945, did not see him in the bank on 13 March 1945 (R. 206).

The accused, according to his testimony, went to Fort Bragg at about 7:00 o'clock on the morning of 14 March 1945 and spent several hours arranging for baggage cars in which to pack "T-A-T equipment". He supervised the delivery of the equipment from the battery areas to the railroad cars and, from 1:00 to 4:00 o'clock that afternoon, worked with Corporal Rubin in the preparation of bills of lading. When he left his office at the motor shop, it was only for ten or fifteen minutes to visit the various battery supply rooms (R. 136, 137). Rubin, now a Staff Sergeant, supported the accused in his statement that the two worked together for several hours on that rainy afternoon (Def. Ex. O). At about 4:00 o'clock the accused was called to Major Ledford's office where he was confronted by Mr. Brantley, Mr. Baker, Mr. McDavid, and Mr. Honeycutt, all bank employees (R. 137). The accused recalled that it rained during the afternoon and evening, a fact which was verified by the records at the Pope Field weather station, and he wore a raincoat that day (R. 140, 202). He denied ever being in Mr. Honeycutt's presence at Green Cleaning Company (R. 135). With respect to the latter's testimony that the check given to Green Cleaning Company was written in a "normal manner", it was shown that the accused wrote naturally with his left hand (R. 135). The specimen written by his right hand was ineptly done (Def. Ex. M).

Considerable evidence as to the good character of accused was introduced by the defense. The following citizens of Buffalo, New York, attested to his trustworthiness, honesty, dependability, patriotism, reputation, and good standing in his home city:

Harry J. Forhead, Referee, New York Department of Labor (R. 163).
Patrick J. Keeler, Judge of the City Court (R. 164).
Thomas V. Meegan, Chief of City Detectives (R. 164).
Michael T. Sullivan, Attorney at Law (R. 164).
Bertha P. Roetter (R. 171).
Arnold H. Rickler, Attorney at Law (R. 171).
John D. Hiller, Chief Judge, City Court (R. 172).
Alfred R. Racini, Assistant District Attorney, Erie County (R. 204).
John C. Montana, President, Van Dyke Taxi and Transfer (R. 205).

By stipulation it was shown that Lieutenant Colonel E. T. Hayes, Commanding Officer of the Battalion of which the accused had been a member since 1 October 1944, would testify that the accused had performed his assigned duties in a superior manner, that "neither officially or socially" had he committed any acts which would reflect on his standing as an officer or gentleman, and that he would be welcomed to "my command as an officer at any time" (R. 163).

Major Raymond H. Albers and Captain B. D. Stone, officers under whom the accused had served, found his integrity, honesty, character, and trustworthiness "of the highest order". Both would be glad to have him back in their command (R. 184, 185).

According to Mr. Harry Latham, who "for a long time" lived next door to the accused, the latter enjoyed an "excellent" reputation, and Mr. Louis Green thought the accused was well liked by the townspeople of Fayetteville (R. 167, 200). The accused's "66-1" record showed one performance rating of "Very Satisfactory" and ten of "Excellent" (Def. Ex. P).

5. Each of the five Specifications of Charge I alleges that the accused did, "with intent to defraud falsely make in its entirety a certain check * * * which said check was a writing of a private nature which might operate to the prejudice of another". The checks, as to date, payee and amount, were allegedly as follows:

	DATE	PAYEE	AMOUNT
Spec. 1	9 March 1945	Cash	$75.00
Spec. 2	13 March 1945	Cash	25.00
Spec. 3	14 March 1945	Green Cleaning Company	25.00
Spec. 4	12 March 1945	Ft. Bragg Post Exchange	20.00
Spec. 5	10 March 1945	Royal Jewelers	12.25

Specifications 1, 2, and 4 allege that the checks therein described were signed in the name of Harold A. Cohen. Specifications 3 and 5 allege that the name of Albert D. Neusbaum was used. These offenses are set forth as violations of Article of War 93. The Specifications of Charge II allege that the accused did "with intent to defraud, wilfully, unlawfully, and feloniously utter and pass, as true and genuine", the same five checks, then well knowing that they were "falsely made and forged". These offenses allegedly violate Article of War 96.

The evidence for the prosecution as presented by the testimony of Mr. Pennington, who was shown to be a handwriting expert, shows that the four checks described in Specifications 1 to 4 inclusive were signed in the handwriting of the accused. The opinion testimony of Mr. Pennington is strengthened and corroborated by the testimony of witness Baker who identified the accused as the person who uttered the check described in Specification 1, Charges I and II. Similarly, witness Brantley emphatically identified the accused as the person who uttered the check described in Specification 2. Furthermore, witness Honeycutt identified the accused as the person who uttered the check described in Specification 3.

Although the check described in Specification 5 was not clearly included within the testimony of Mr. Pennington it was before the court

and was presumably compared by the court with the admitted handwriting of the accused.

In considering the weight and credibility to be given to the testimony of a handwriting expert and the function of the fact finding body in determining the authorship of disputed signatures, it has been authoritatively stated, as follows:

> "The value of the witness' opinion will depend on the clearness with which he demonstrates its correctness and the circumstances of the particular case. The probative force of the evidence is ordinarily a question for the jury, or other triers of fact, who are not required to follow the opinion of experts, and whose action is not controlled by the action of the court in admitting the standard as general" (32 C.J.S., Sec. 621).

In view of the above principle which places the ultimate responsibility for the determination of the identity of the author of a questionable signature in the hands of the court, and since the court had before it evidence which clearly established that the accused fraudulently made each of the five checks in question, and uttered those described in Specifications 1, 2, and 3, Charge II, the court was justified in reaching its findings of guilty. We must conclude, therefore, that the record is legally sufficient to support the findings of guilty and the sentence.

6. The records of the War Department show that the accused is approximately 27 years of age. He graduated from high school and attended the University of Buffalo for 2½ years. Thereafter he held the positions of an inventory clerk for a public utility corporation, a collector for a liquidating corporation, a collector for an investment company, and a liquidator for an insurance organization. He enlisted in the service on 15 January 1941 and served overseas in Hawaii from 10 March 1942 to 2 February 1943. He was commissioned a second lieutenant, Army of the United States, on 20 May 1943, and was promoted to the rank of first lieutenant on 1 February 1945. On 3 April 1945 he submitted his resignation for the good of the service in order to avoid the consequences of trial by court-martial. In view of pending court-martial charges against him his resignation was not favorably considered and trial by general court-martial was recommended.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Lanner, Judge Advocate.

On Leave, Judge Advocate.

NOV 2 1945

SPJGN-CM 284190 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Meyer J. Abgott (0-1182046), Field Artillery.

2. Upon trial by general court-martial this officer was found guilty of forging five checks, aggregating $157.25, in violation of Article of War 93; and of uttering as true and genuine three of the same checks, totalling $125, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof.

The accused, while stationed at Fort Bragg, North Carolina, from 9 March 1945 to 14 March 1945, forged a series of five checks, all of which were drawn either on the Fort Bragg Branch or the Fayetteville Branch of the First Citizens Bank and Trust Company. Three of the checks were signed in the name of Harold A. Cohen and two in the name of Albert D. Neusbaum. The accused identified himself as the maker of three of the checks and passed them as true and genuine, receiving $125 in cash. There was considerable question as to whether he actually uttered the remaining two checks, amounting to $32.25, and he was acquitted of these alleged offenses.

The conduct of the accused, prior to the offenses of which he stands convicted, was apparently exemplary. Because of his good record as an enlisted man, including eleven months overseas service, he qualified for, and graduated from, Officer Candidate School in May 1943. He was then assigned to Fort Bragg where he apparently impressed his superior officers for his Battery and Battalion commanders praised the manner of his performance of duty as an officer and his conduct and high standing as a gentleman. Both expressed a willingness to have him returned to their commands. Almost a dozen prominent personages of Buffalo, New York, including outstanding lawyers and judges, attested his reputation for honesty, integrity, and trustworthiness, and the high esteem and honor in which he was held by the people of his home city. The accused's conduct, however, as revealed by the present record was highly

reprehensible and of a culpable nature which cannot be tolerated by officers in the Army. The accused has clearly demonstrated his unfitness and unworthiness to be an officer, but in view of his excellent military as well as civilian record, the extension of some clemency is warranted. I recommend, therefore, that the sentence be confirmed, but that the forfeitures be remitted; that the period of confinement imposed be reduced to one year; that the sentence as thus modified be ordered executed; and that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

4. Consideration has been given to the remarks of Mr. Alexander Taylor, attorney of Buffalo, New York, who appeared before the Board of Review, and to the letter of the Honorable W. G. Andrews, member of Congress, urging clemency in behalf of the accused, as well as to the letter of Honorable Robert P. Patterson, which accompanied the communication of Mr. Andrews.

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

THOMAS H. GREEN
Brigadier General, U.S.A.
Acting The Judge Advocate General

4 Incls
Incl 1 - Record of trial
Incl 2 - Form of action
Incl 3 - Ltr. fr. Hon. Robert P. Patterson.
Incl 4 - Ltr. fr. Hon. W. G. Andrews

(Sentence confirmed, forfeitures remitted and confinement reduced. GCMO 469, 15 Nov 1945).

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

SPJGK - CM 284193

9 AUG 1945

UNITED STATES	)	THE INFANTRY SCHOOL
	)	
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 24 July 1945. Dismissal.
	)	
First Lieutenant BURNHAN T. TAYLOR (O-423204), Infantry	)	

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

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

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

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

Specification: In that 1st Lieutenant Burnhan T. Taylor, Officers Replacement Pool, Infantry Replacement Training Center, Camp Hood, Texas, attached Officers Replacement Pool, The Infantry School, then attached 16th Company, 1st Student Training Regiment, The Infantry School, did, without proper leave, absent himself from his organization and station at Fort Benning, Georgia, from about 0730 7 June 1945 to about 1100 7 June 1945.

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

Specification 1: In that 1st Lieutenant Burnhan T. Taylor, ***, did, at or near Fort Benning, Georgia, on or about 7 June 1945, wrongfully unfit himself for the performance of military duty by drinking intoxicating liquor.

Specification 2: In that 1st Lieutenant Burnhan T. Taylor, * * *, having been administratively restricted to the limits of the Company Area, did, at Fort Benning, Georgia, on or about 13 June 1945, break said restriction by going beyond the limits thereof.

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

Specification: In that 1st Lieutenant Burnhan T. Taylor, * * *, did, without proper leave, absent himself from his organization and station at Fort Benning, Georgia, from about 0735 29 May 1945 to about 1320 29 May 1945.

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

Specification 1: In that 1st Lieutenant Burnhan T. Taylor, * * *, was at Fort Benning, Georgia, on or about 14 May 1945, drunk while on duty as a student in the 16th Company, 1st Student Training Regiment, The Infantry School.

Specification 2: In that 1st Lieutenant Burnhan T. Taylor, * * *, having been administratively restricted to the limits of the Company Area, did, at Fort Benning, Georgia, at or about 1000 12 June 1945, break said restriction by going beyond the limits thereof.

Specification 3: In that 1st Lieutenant Burnhan T. Taylor, * * *, having been administratively restricted to the limits of the Company Area, did, at Fort Benning, Georgia, at or about 2000 12 June 1945, break said restriction by going beyond the limits thereof.

Specification 4: (Finding of guilty disapproved by the reviewing authority).

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Specification 4 of Additional Charge II, approved only so much of the sentence as provides for dismissal, and forwarded the record of trial for action under the provisions of Article of War 48.

3. For the prosecution.

On 16 April 1945, the accused became a member of the 16th Company, First Student Training Regiment, The Infantry School, Fort Benning, Georgia, for the purpose of attending Officers' Special Basic Course No. 70 as a student. Accused successfully completed the course and was graduated on 12 May 1945 (R. 13,14,46).

The evidence, insofar as pertinent to the Specifications and Charges not disapproved, is summarized, chronologically, as follows:

a. Specification 1, Additional Charge II (drunk on duty). About 1155 hours on 14 May 1945, Captain Clayne Robison, company commander of the

aforesaid 16th Company, saw accused in the "company parade, just outside the orderly room." The company had "just moved back to the area" from training. Accused "appeared to be drunk." Captain Robison ordered accused to report to him in the orderly room promptly upon the dismissal of the formation. Less than five minutes later, accused complied with this order. He had "alcohol on his breath," his speech was "erratic and thick," his eyes were "very bloodshot" and his face was "extremely red." He did not have "full control over his physical self" and had difficulty in forming his lips to talk. In the opinion of Captain Robison the accused was "drunk." Accused admitted to Captain Robison that he had been "drinking heavily." Accused, however, attended classes that afternoon (R. 17-19, 42-45,54).

b. Specification, Additional Charge I (AWOL). About 0730 hours on 29 May 1945, accused was reported absent from the company formation. Captain Robison observed accused was not in his proper place "in ranks" and was not able to find him. Accused had no permission or authority to be absent at that time. About 1320 hours on that day, accused personally reported to the company commander in the orderly room. At this time, accused appeared to be drunk and stated that he had driven to La Grange, Georgia, to "ship" some dogs to Atlanta, that on the return trip his car had broken down and that car trouble had prevented his return to the morning formation of the company. (R. 19,20,38,40,52,53).

c. Specification, Charge I (AWOL). At the company formation about 0730 hours on 7 June 1945, accused was again reported absent. After "personally observing" that accused was not in formation, the company commander made an inspection of the "company area" and was unable to find accused who had no authority or permission to be absent. About 1100 hours on that day, a medical officer was summoned to a room in the Rankin Hotel, Columbus, Georgia, where he saw accused in the condition discussed in the next subparagraph. About 1530 hours accused was arrested in the hotel by the military police and returned to his company at Fort Benning about 1700 hours (R. 20,21,29,59,60,62-64).

d. Specification 1, Charge II (unfit for duty by drinking). Captain David F. Ryan, M.C., in response to a "call" saw accused in a room in the Rankin Hotel, Columbus, Georgia, about 1100 hours on 7 June 1945. Accused was in bed. His eyes were "puffy and bleary, bloodshot," he had a "strong alcoholic odor to his breath" and he seemed "slow-witted, dull." In the medical officer's opinion, accused showed evidence of "recent heavy drinking" and "was unfit to carry on his duties." About 1500 hours, the accused still had "a strong odor of alcohol on his breath," his face was "somewhat flushed," his eyes were "bloodshot" and his speech was "somewhat thick" but "understandable" (R. 59,60,63,64).

e. Specifications 2 and 3, Additional Charge II (Breaking restriction). By order of the Commanding Officer, First Student Training

Regiment, The Infantry School, Fort Benning, Georgia, the accused was on 7 June 1945, "administratively restricted" to the "company area" of the 16th Company of the regiment from that date to 14 June 1945. The order was given to accused by his company commander about 1745 hours on 7 June 1945 who pointed out the limits of the area and told him that the order would apply except when he was undergoing training, according to the training schedule, with the company. About 1000 hours on 12 June 1945, the company commander, after receiving a report, made a "thorough search of the entire company area" and failed to find the accused who had no permission to be absent at the time. The company was then in the company area with a scheduled formation at 1030 hours. Accused was at the formation and when told by his company commander that he had wanted to see him that morning about 1000 hours accused informed him that he "had gone to the telephone exchange." The telephone exchange is located approximately a block from the company area. About 2000 hours on the same day, the company commander started another "search of the company area for the accused." In the "process of searching," he saw accused in an automobile drive up Ingersoll Avenue from the direction of Main Theatre. The car was stopped in front of the barracks and accused got out and walked into the barracks. The car was "definitely" not within the company area. Accused had no permission or authority to be absent at the time (R. 13,14,22-29,31-34,46-48; Pros. Ex. 1).

f. Specification 2, Charge II (breaking restriction). About 1430 hours on 13 June 1945 when accused was still under the administrative restrictions to his company area, discussed in the last subparagraph, Captain Robison received a certain communication after sending for accused. He made a "thorough search" of the company area and was unable to find accused who had no permission to be absent. About 1500 hours, accused reported to Captain Robison in the orderly room (R. 28,30).

4. For the defense.

It was stipulated that if G. W. Cody were present he would testify that the records of the Repair Department of Wells Motors disclose that on 29 May 1945 a Mercury automobile of accused was "towed in" and the motor replaced; and that he learned from an employee of the "shop" that the car had been "towed" from a point about 20 miles out on the Warm Springs Road (R. 67; Def. Ex. B).

Accused, whose rights as a witness were explained to him by the law member, made an unsworn statement through counsel to the following effect:

He was commissioned on 16 August 1941 and called to active duty on 19 February 1942. He denied that he was drunk on duty (Spec. 1, Add'l Chg. II). He might have had a beer. Accused admitted his being absent without leave from 0730 to 1320 on 29 May 1945 (Spec., Add'l Chg. I), but explained that he was returning from La Grange in ample time to report to his class

when his automobile broke down, at which time he called battalion headquarters and reported his difficulties. He returned to his company as soon as possible. With reference to the Specification of Charge I and Specification 1 of Charge II (AWOL and unfitting himself for duty by drinking), accused admitted his absence without leave and that he had too much to drink on that date. In extenuation, he explained that he and his wife had been estranged for several months, that he met her at the Rankin Hotel in Columbus, that he was "very worried" over his family troubles, and that he had too much to drink and as a result failed to report to duty. Accused denied violating restriction on 12 June 1945 (Spec. 2 and 3, Add'l Chg. II) and explained that the only time he left the company area on that day was when he attended graduation exercises. Regarding violation of restriction on 13 June 1945 (Spec. 2, Chg. II), accused stated he did not leave the company area. He did, however, sit in a car parked in the company area where he could have been found had a thorough search been made (R. 68-71).

5. Captain Robison was recalled to the stand as a witness for the court. He testified that on 12 June 1945 he saw accused in a car on Ingersoll Avenue. The car turned in at the barracks and stopped at the parking lot. The car at no time was in the company area (R. 71-73).

6. The evidence for the prosecution, supported as to the Specification of Additional Charge I, the Specification of Charge I and Specification 1 of Charge II by confessions in the unsworn statement of accused, amply sustains the court's findings of guilty of the approved Charges and Specifications.

On 14 May 1945, the accused was drunk in a company formation (Spec. 1, Add'l Chg. II). He was clearly on duty and under a degree of intoxication sufficient to sensibly impair the rational and full exercise of his mental and physical faculties (MCM, 1928, par. 145).

The absence without leave of accused on 29 May 1945 (Spec., Add'l Chg. I) was due to a breakdown of his car while returning to his station. Such a misfortune is an extenuating circumstance but not a defense.

Unfitting himself for military duty by drinking (Spec. 1, Chg. II) and the attendant absence without leave on 7 June 1945 (Spec., Chg. I) were not legally excused by the accused's explanation that his offenses resulted from domestic difficulties. The offenses are separate and distinct and accused was properly charged and found guilty of both of them (CM 186486, Dig. Op. JAG 1912-1940, sec. 428 (5)).

That the accused was administratively restricted to his company area and that on the three occasions alleged (Specs. 2 and 3, Add'l Chg. II; Spec. 2, Chg. II) he broke such restriction is established by competent direct testimony which was uncontradicted in any material degree.

7. The Board of Review desires to comment on certain other questions presented in the record of trial.

a. Accused interposed a plea in bar on the ground of unnecessary accumulation of charges and attendant delay in trial (R. 7). The plea was denied (R. 8). It is permissible to delay trial when a good reason exists, such as exhibiting a continued course of conduct in the interest of discipline, if the person is not in arrest or confinement (MCM, 1928, par. 26). In this case, the first offense occurred on 14 May 1945. No restraint was imposed on accused until 7 June 1945. He was tried on 24 July 1945. The court under the circumstances acted within its province in denying the plea.

b. Accused pleaded "former punishment" regarding his absence without leave on 29 May 1945 (R. 9). In support of the plea, accused testified that on return to his station, he was "reprimanded" by his battalion commander who told him he was "wrong" in his conduct (R. 10). On cross-examination, accused testified that he was not asked if he demanded court-martial trial rather than accept the reprimand, and was not told that he had the right to appeal the "reprimand" (R. 11). Accused further testified that the reprimand and circumstances regarding it were entirely verbal. Such a reprimand is not to be construed as punishment for the offense (see CM ETO 1015, 3 Bull. JAG, page 102; CM 232961, 19 B.R. 259), and the court properly ruled against accused (R. 12).

8. War Department records show that accused is 28 years of age. He graduated from the Infantry ROTC Course at the University of Alabama on 15 May 1939. He was commissioned a second lieutenant on 16 September 1941, and was called to active duty on 12 February 1942. He was assigned to the 706th Tank Destroyer Battalion, Camp Chaffee, Arkansas. His promotion to first lieutenant occurred on 15 March 1943.

9. 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 of guilty of the Specifications and Charges as approved by the reviewing authority and to warrant confirmation of the sentence of dismissal. Dismissal is authorized for a conviction of a violation of Articles of War 61 and 96.

Percy G. Eyer, Judge Advocate

Charles G. Luckie, Judge Advocate

(On leave), Judge Advocate

Charles H. Sykes, Judge Advocate

SPJGK - CM 284193 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 First Lieutenant Burnhan T. Taylor (O-423204), Infantry.

2. Upon trial by general court-martial this officer was found guilty of absences without leave on the mornings of 29 May and 7 June 1945, in violation of Article of War 61; of being drunk on duty as a student at the Infantry School on 14 May 1945, of unfitting himself for the performance of duty by drinking intoxicating liquor on 7 June 1945, and of breaking administrative restrictions to the limits of his company area on three occasions on 12 and 13 June 1945, all in violation of Article of War 96. Accused was also convicted of failing to obey the order of his superior officer in violation of Article of War 96, but this conviction was disapproved by the reviewing authority. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal 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 the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof.

The accused made an unsworn statement through counsel that the first absence without leave was caused by the breakdown of his car while he was en route to Fort Benning, and that the second absence without leave was caused by his excessive drinking induced by worry about marital and family difficulties that became intensified when he met his formerly estranged wife in Columbus, Georgia, on the night before this unauthorized absence. While standing alone none of the offenses would likely justify the execution of a sentence of dismissal, it is felt that the number and type of the offenses, all of which were committed within a period of approximately two weeks, indicate that accused does not possess the degree of responsibility required of an officer. The Staff Judge Advocate states that the accused's conduct while he was a student was entirely unsatisfactory, that numerous

additional charges could have been preferred against him, and that he is a confirmed alcoholic. I recommend that the sentence to dismissal 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.

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. GCMO 428, 28 Aug 1945).

20 AUG 1945

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

SPJGQ - CM 284200

UNITED STATES	)	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 2
v.	)	Trial by G.C.M., convened at Fort Ord, California, 24 July 1945. Dismissal and total forfeitures.
Captain GEORGE JOSEPH ENNIS, JR. (0-1172445), Field Artillery.	)	

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: In that Captain George J. Ennis, Jr., Company "D", Officers School, Army Ground Forces Replacement Depot No. 2, Fort Ord, California, did, without proper leave, absent himself from his organization at Fort Ord, California, from about 23 June 1945, to about 12 July 1945.

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

Specification: In that Captain George J. Ennis, Jr., Company "D", Officers School, Army Ground Forces Replacement Depot No. 2, Fort Ord, California, did, at Fort Bragg, North Carolina, on or about 22 May 1945, with intent to deceive, wrongfully and unlawfully make and utter to First Lieutenant Arthur A. Abel, Detachment "F", Headquarters and Headquarters Detachment, Office of Strategic Services, Washington, D. C., a certain check, in words and figures as follows, to wit:

22 May 1945 No.

FIRST NATIONAL BANK, FAYETTEVILLE N. C.

Pay to
the order
of Cash $20.00

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

/s/ GEORGE J. ENNIS, JR.

in payment of a debt of twenty dollars ($20.00) lawful money of the United States due and owing First Lieutenant Arthur A. Abel, he the said Captain George J. Ennis, Jr., then well knowing that he did not have and not intending that he should have any account with a First National Bank, Fayetteville, North Carolina, for the payment of said check.

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 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. Specification and Charge I

The evidence for the prosecution shows that by paragraph 4, Special Orders No. 135, Headquarters Field Artillery Replacement Training Center, Fort Bragg, North Carolina, 6 June 1945, the accused was relieved from assignment at Fort Bragg and assigned to the Army Ground Forces Replacement Depot No. 2, Fort Ord, California, where he was to arrive by 1200 hours, on 22 June 1945 (R. 7; Pros. Ex. 2). It was stipulated in writing by the accused, defense counsel, and the trial judge advocate that on or about 8 June 1945 the accused "was officially issued and duly received an extract true copy" of the aforesaid order (R. 7; Pros. Ex. 1). By paragraph 44, Special Orders No. 172, Headquarters Army Ground Forces Replacement Depot No. 2, Fort Ord, California, 21 June 1945, the accused was attached unassigned to Company D, Officers School, effective 22 June 1945 (R. 8; Pros. Ex. 3). The Morning Report of Company D, Officers School, Army Ground Forces Replacement Depot No. 2, Fort Ord, California, for 2 July 1945 shows the accused "Atchd unasgd enroute; not jd, AWOL as of 0001, 23 Jun 45" (R. 8; Pros. Ex. 4). The Morning Reports of the Ninth Service Command Military Police Station Detachment show that the accused was confined on 12 July 1945 at 1730 and released with a guard on 15 July 1945 at 0700 (R. 8; Pros. Ex. 5).

The accused was questioned on 17 July 1945 by Captain Herr, the investigating officer appointed pursuant to Article of War 70 (R. 14, 15). After being advised of his rights the accused made a statement in writing which he swore to and signed on 18 July 1945 (R. 15, 16).

He stated that he left Fort Bragg, North Carolina, on or about 8 June 1945, pursuant to orders to report at Fort Ord, California, on 22 June 1945. He was absent without leave from 23 June 1945 to 12 July 1945 when he was taken into custody by Military Police in Los Angeles, California. During the period of his absence he wore his proper uniform and always intended to return to military control (R. 16, 17; Pros. Ex. 7).

Specification and Charge II

First Lieutenant Arthur A. Abel has known the accused since March 1945 (R. 9). While they were both stationed at Fort Bragg the accused borrowed $20 from First Lieutenant Abel during a poker game in which they were both playing (R. 10, 13, 14). When First Lieutenant Abel was leaving Fort Bragg on the night of 22 May 1945 he asked the accused to repay the $20 which he had borrowed (R. 10). The accused was unable to pay and First Lieutenant Abel procured a blank check for the accused (R. 10, 11). The accused drew the check on the First National Bank, Fayetteville, North Carolina, to the order of Cash for $20 and gave it to First Lieutenant Abel (R. 11, 12; Pros. Ex. 6). Fayetteville, North Carolina is about eleven or twelve miles from Fort Bragg and so for as First Lieutenant Abel knew, the First National Bank at Fayetteville actually existed (R. 11). First Lieutenant Abel went to Trenton, New Jersey, where he gave the check to his wife, who cashed it (R. 12). The check was returned to his wife and he returned to his wife the $20 which he received from her when he gave her the check (R. 12). It was stipulated in writing by the accused, defense counsel and the trial judge advocate that "there was no bank in existence or doing business on the 22nd of May 1945 or at any time thereafter in Fayetteville, North Carolina, by the name of First National Bank, Fayetteville, North Carolina" (R. 17, 18; Pros. Ex. 8).

In his sworn statement to Captain Herr, the investigating officer, the accused admitted owing $20 to First Lieutenant Abel for a gambling debt and that he gave him the check drawn on the First National Bank of Fayetteville, North Carolina. He was mistaken in the name of the bank and meant to draw the check on the First-Citizens Bank and Trust Company of the same city. He did not have and never had an account in this latter bank and knew there would be no funds to cover the check. It was his intention to send the money to First Lieutenant Abel later but in the confusion of clearing Fort Bragg the matter slipped his mind (Pros. Ex. 7).

4. The accused, after having his rights explained to him, elected to make an unsworn statement through his defense counsel (R. 22). Most of the statement consisted of biographical data not pertinent to the offenses involved in the present case. As to those offenses, he stated, through his counsel, that he left Fort Bragg, North Carolina, on or about 8 June 1945, and went to Los Angeles, California, where he remained until 12 July 1945. He was in uniform during the whole period. Complete restitution has been made to Lieutenant Abel on the check.

First Lieutenant O'Hara, who served under the accused, and Second Lieutenants Cushman and Boggs testified that they had known the accused since March 1945 at Fort Bragg, that his general reputation was excellent

and that he was considered to be a good soldier and officer (R. 18-22). The accused's WDAGO Form No. 66-1 shows four ratings of superior and six of excellent (R. 22; Def. Ex. A).

5. The evidence and the pleas of guilty sustain the findings of guilty of the Specifications and the Charges. The accused was convicted of absence without leave in violation of Article of War 61, and of making and uttering a check knowing that he did not have and not intending that he should have any account with a bank upon which it was drawn, in violation of Article of War 96.

The accused left Fort Bragg, North Carolina, on or about 8 June 1945 under orders to report to the Army Ground Forces Replacement Depot No. 2, Fort Ord, California by 22 June 1945. He did not report on 22 June 1945 or at any time thereafter and remained absent without leave until he was apprehended on 12 July 1945 in Los Angeles, California by the Military Police.

The accused, being indebted to First Lieutenant Abel in the amount of $20 for a gambling debt, gave him a check in payment of this debt in the amount of $20, drawn to cash on the First National Bank, Fayetteville, North Carolina. The accused knew that no such bank was in existence but claimed that he meant to draw the check on the First-Citizens Bank and Trust Company, Fayetteville, North Carolina, in which bank, however, he had no account and knew that there would be no funds to cover the check. The drawing of a check upon a non-existent bank is conduct of a nature to bring discredit upon the military service and is especially reprehensible when such a check is given by a senior to a junior officer in purported payment of a debt.

6. War Department records show that the accused is 27 years of age and married. He has one child. He is a native of Pennsylvania and a resident of Phoenixville, Pennsylvania. He is a graduate of Phoenixville High School and of the Cincinnatti College of Embalming. In civilian life he was employed as an embalmer and funeral director. He served in enlisted status with the Pennsylvania National Guard from 29 October 1940 to 16 February 1941 and on active duty in the Army from 17 February 1941 to 28 October 1942, attaining the grade of staff sergeant. He was appointed a second lieutenant, Army of the United States, on 29 October 1942 upon graduation from the Field Artillery School, Fort Sill, Oklahoma, and ordered to active duty in the Field Artillery. He was promoted to the grade of first lieutenant on 17 September 1943 and to the grade of captain on 29 September 1944. He has served in commissioned status as Battery Officer, Platoon Officer, Battery Executive Officer, Platoon Leader and Battery Commander. He successfully completed the Officers' Motor Course, Fort Sill, Oklahoma.

7. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of accused were committed. 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 for violation by an officer of Article of War 61 and Article of War 96.

On Leave
_____, Judge Advocate

_____, Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 284200 1st Ind

Hq ASF, JAGO, Washington 25, D. C. AUG 22

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 George Joseph Ennis, Jr. (O-1172445), Field Artillery.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absenting himself without leave for a period of 19 days from his organization and station, in violation of Article of War 61 and of wrongfully, unlawfully and with intent to deceive making and uttering a check for $20 knowing that he did not have and not intending that he should have any account for the payment of the check. 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. 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.

The accused officer left Fort Bragg, North Carolina, on or about 8 June 1945 under orders to report to Army Ground Forces Replacement Depot No. 2, Fort Ord, California by 22 June 1945 "for Shpmt No. GM-B 816 (d) - A". He did not report and remained absent without leave for nineteen days until he was apprehended by the Military Police on 12 July 1945 in Los Angeles, California. The accused gave a check in the amount of $20 to another officer in payment of a gambling debt. The check was drawn on a bank that the accused knew did not exist. He later stated that he meant to draw the check on another bank which did exist but in which he had no account. The staff judge advocate states that restitution was made by the accused just prior to trial.

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.

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 422, 28 Aug 1945).

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

SPJGH-CM 284260

30 AUG 1945

UNITED STATES v. First Lieutenant J. C. HAYES (0-683692), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Lockbourne Army Air Base, Columbus 17, Ohio, 9 July 1945. Dismissal.

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

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

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

CHARGE I: Violation of the 61st Article of War. (Finding of guilty disapproved by reviewing authority).

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

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

Specification 1: In that First Lieutenant J. C. (I.O.) Hayes, Air Corps, Squadron H, 2114th Army Air Forces Base Unit, Pilot School, Specialized 4-E and Instructor School, Lockbourne Army Air Base, Columbus 17, Ohio, for the purpose of obtaining the approval, allowance, and payment of a claim against the finance officer at Lockbourne Army Air Base, Columbus 17, Ohio, an officer of the United States duly authorized to approve, pay and allow such claims, did, at Lockbourne Army Air Base, Columbus 17, Ohio, on or about 28 February 1945, make a certain paper to wit: War Department Form Number 336, War Department Pay and Allowance

Account, which said paper, as he, the said First Lieutenant J. C. (I.O.) Hayes, then knew contained a statement that he had participated in regular and frequent flights while in a duty status sufficient to meet the requirements of Executive Order Number 9195, 7 July 1942 (AR 35-1480), which statement was false in that he had not participated in regular and frequent flights while in a duty status sufficient to meet the requirements of Executive Order Number 9195, 7 July 1942 (AR 35-1480), and was then known by the said First Lieutenant J. C. (I.O.) Hayes to be false.

Specification 2: Same allegations as Specification 1 except that false Pay and Allowance Voucher made on or about 31 March 1945.

Specification 3: Same allegations as Specification 1 except that false Pay and Allowance Voucher made on or about 30 April 1945.

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

Specification 1: In that First Lieutenant J. C. (I.O.) Hayes, * * *, did wrongfully fail to maintain a sufficient bank balance to pay a certain check, to wit: "No. ___, San Antonio, Texas, 4-5-1945, 30-65, National Bank of Fort Sam Houston at San Antonio, Pay to the order of Hotel Deshler Wallick, $20.00, Twenty and no xx/100 dollars," signed "J. C. Hayes, 1st. Lt., 0-683692, L.A.A.B.," made and uttered by said First Lieutenant J. C. (I.O.) Hayes.

Specification 2: Same allegations as Specification 1 except check dated 7 April 1945 and in the amount of $30.

Specification 3: Same allegations as Specification 1 except check dated 9 April 1945 and in the amount of $10.

Specification 4: Same allegations as Specification 1 except check dated 12 April 1945 and payable to cash in the amount of $52.

Specification 5: Same allegations as Specification 1 except check dated 13 April 1945 in the amount of $25.

Specification 6: Same allegations as Specification 1 except check dated 16 April 1945 and payable to cash in the amount of $25.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous conviction was introduced. Accused was sentenced to dismissal, total forfeitures and confinement for one year. The reviewing authority disapproved the findings of guilty

of Charge I and its Specification, approved the sentence but remitted the forfeitures and the confinement and forwarded the record of trial for action under Article of War 48.

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

a. Charge II, Specifications 1 to 3 inclusive:

It was stipulated by the prosecution, defense and the accused that (R. 22, 23; Pros. Exs. H, I, J):

(1) Accused signed three Pay and Allowance Accounts, W.D. Forms No. 336a, on or about 28 February 1945, 31 March 1945 and 30 April 1945, respectively;

(2) he claimed flying pay for the month of February in the amount of $87.50 on the first voucher, flying pay for the month of March in a like amount on the second voucher, and flying pay for the month of April also in the same amount on the third voucher;

(3) on the reverse side of each Pay and Allowance Account appeared an unsigned certificate stating that the claimant was required to participate in regular and frequent aerial flights and did participate in sufficient flights to meet the requirements of Executive Order No. 9195, July 7, 1942; and,

(4) accused presented these vouchers for payment at the office of the Finance Officer, Lockbourne Army Air Base, Columbus, Ohio, and received in cash the difference between the total amount of pay and allowances claimed by him, including the above-mentioned flying pay, and the total amount of the debits appearing on the vouchers.

AAF Forms No. 1 are official daily records or logs that remain in each Army aircraft and on which at the conclusion of each flight are entered the names of individuals participating therein plus other pertinent information with respect to the flight. For each individual on flying status there is maintained an AAF Form No. 5, Individual Flight Record, on which is posted from relevant AAF Forms No. 1 all flights made and flying time accumulated by the individual (R. 26). Pursuant to paragraph 22, Special Orders No. 25, Headquarters, Pilot School, Lockbourne Army Air Base, 25 January 1945, accused was suspended from flying status. The finance officer at accused's station, Lockbourne Army Air Base, learned of that fact for the first time from accused on 30 April 1945 (R. 24, 25, 27; Pros. Ex. L). Not only were there no AAF Forms No. 1

on file in accused's organization indicating that accused had accumulated any flying time during the months of February, March and April, 1945, but furthermore on accused's AAF Form No. 5, maintained at his station, Lockbourne Army Air Base, for the months of February, March and April 1945, there appeared the entry "No flying time this station for the months of February, March and April" (R. 26; Pros. Ex. K).

b. Charge III, Specifications 1 to 6 inclusive:

It was stipulated by the prosecution, defense and the accused that accused made and uttered the following checks, on the dates thereof, to the following persons and received in exchange therefor the face amounts thereof in cash, viz (R. 18, 19, 22; Pros. Exs. B-G):

Spec.	Date of Check	Amount	Check Cashed By	Drawee Bank
1	5 Apr 45	$20	Hotel Deshler Wallick	Natl Bk of Fort Sam Houston
2	7 Apr 45	$30	" " "	" " " " " "
3	9 Apr 45	$10	" " "	" " " " " "
4	12 Apr 45	$52	City Natl Bk & Trust Co	" " " " " "
5	13 Apr 45	$25	Hotel Deshler Wallick	" " " " " "
6	16 Apr 45	$25	City Natl Bk & Trust Co	" " " " " "

N.B. The two checks cashed by City National Bank & Trust Company were drawn payable to cash and the four other checks were drawn payable to the hotel cashing them.

It was stipulated by the prosecution, defense and the accused that if Mr. H. D. Davenport, Assistant Cashier of City National Bank & Trust Co., Columbus, Ohio, were present he would testify that the two checks cashed by his bank (Specs. 4, 6) were forwarded to the drawee bank for payment but were returned unpaid because of insufficient funds (R. 20). It was also stipulated that if Mr. Kenneth B. Glass, Manager of the Hotel Deshler Wallick, Columbus, Ohio, were present he would testify that the four checks given to his hotel by accused were returned unpaid by the drawee bank because of insufficient funds (R. 20). It was further stipulated that if Mr. W. L. Bailey, Assistant Cashier of the National Bank of Fort Sam Houston, San Antonio, Texas, were present he would testify that he was the custodian of the original records of all commercial checking accounts with his bank and that such records indicated that from 1 April to 2 April 1945, accused's balance on deposit was $2.40; from 3 April to 4 April 1945, the balance was $14.40; from

from 5 April to 10 April 1945, the balance was $4.40; and from 11 April 1945 until 17 May 1945, when the account was closed, accused's balance never exceeded the last mentioned figure (R. 21).

4. For the defense it was stipulated by the prosecution, defense and accused that on 30 April 1945 accused repaid the finance officer the sum of $176.60 received by him on his April pay and allowance account (R. 27).

The defense also introduced evidence to show that accused participated in thirty aerial combat missions in the European Theater of Operations, serving as co-pilot of a B-17 type bomber plane. He received efficiency ratings of "Excellent" for his foreign service and also was awarded the Distinguished Flying Cross, the Air Medal with three Oak Leaf Clusters, the European Theater of Operations ribbon with one Bronze Star, and the Unit Citation (R. 28, 29).

A full history of the medical observation and examination made of accused was admitted in evidence. On or about 11 May 1945, accused's condition was diagnosed at the station hospital as "Anxiety state, moderately severe, manifested by tension and instability" (R. 29, 30). He was thereafter sent to Fort Hayes for consultation with the psychiatrist at that installation. That psychiatrist reported that accused appeared to be suffering from an anxiety state and opined that accused's excessive drinking was "symptomatic and related to the tension and vasomotor instability which he shows" (R. 30). Following this report accused was dispatched to the Psychiatric Center at Fletcher General Hospital where he was observed by a Board of Officers. On 27 June 1945, this Board reported its diagnosis of accused's condition as "Anxiety state, manifested by tenseness, apprehension, tremulousness and over-activity." The Board found accused to be sane and to have been sane during the period from 25 January 1945 to 14 June 1945, and recommended that he be "discharged from the hospital and returned to confinement for appropriate administrative action" (R. 31,32; Pros. Ex. 1).

5. Accused sought to alleviate the effects of his conduct by introducing evidence to prove that during the time he committed the offenses charged he was suffering from a nervous disorder. However, none of the evidence suggested that his condition was psychotic or that he was not legally sane. Indeed, the Board of Officers convened at Fletcher General Hospital specifically determined that accused was sane during the period he committed the offenses charged. Accordingly, accused must be held legally responsible for his conduct.

a. <u>Charge II, Specifications 1 to 3 inclusive</u>:

In each of these three Specifications accused is charged with making a false statement in a monthly Pay and Allowance Account in order

to obtain approval, allowance and payment of a claim against the United States. Executive Order No. 9195, July 7, 1942, par. 2, AR 35-1480, 10 October 1942, in general, provides that an individual is entitled to claim flying pay if he is required by competent authority to participate regularly and frequently in aerial flights and if during the month for which such pay is claimed he has flown a certain number of hours. Of this Executive Order, incorporated in the Army Regulations, the court properly took judicial notice (MCM, 1928, par. 125). The evidence shows that for the months of February, March and April, 1945, accused signed monthly pay vouchers each of which contained a claim for monthly flying pay in the amount of $87.50 and on the reverse side of each appeared a certificate stating in effect that accused had complied with the provisions of the above-mentioned Executive Order No. 9195. This certificate had not been signed by accused nor does it appear that he ever saw it or that he occasioned it to be placed upon the pay voucher. However, the representation that accused had complied with all necessary regulations to entitle him to flying pay is implicit in his claims for that type of pay. Executive Order No. 9195 contains the basic requirements, well known throughout the Air Corps, which must be met to entitle one to such pay. Thus, the statement on each pay voucher that accused was entitled to flying pay for the particular month covered by the voucher necessarily contains the representation that he has complied with the provisions of this Executive Order No. 9195.

The evidence conclusively demonstrates that not only had accused engaged in no aerial flights whatsoever during the months of February, March and April, 1945, but furthermore he had been suspended from flying status on 25 January 1945 and, accordingly was not even authorized to participate in any such flights. Thus, accused's statements that he was entitled to flying pay were both false and fraudulent. The evidence is ample to sustain the findings of guilty of these three Specifications.

b. Charge III, Specifications 1 to 6 inclusive:

In each of these six Specifications accused is charged with the nonfraudulent offense of wrongfully failing to maintain a sufficient bank balance to pay a check made and uttered by him. It is well established that, in the absence of a satisfactory excuse therefor, such conduct constitutes a violation of Article of War 96 (CM 250484, Hebb, 32 B.R. 397). Proof that the check was issued as a result of an honest mistake made by accused with respect to the sufficiency of his bank balance may excuse such conduct but proof that the check was carelessly issued affords accused no legal excuse for his act (CM 282335, McCarthy; CM 249232, Norren, 32 B.R. 95). In fact, negligence is the essence of this offense. Here the proof establishes that accused made and uttered six checks ranging in amount from $10 to $52 and aggregating a total of $162 without having more than $4.40 in his bank account when any one of the checks was issued and presented for payment. Accused offered no explanation for his acts. On the evidence presented the court was fully warranted in finding accused guilty of the offenses charged under these six Specifications.

6. Accused is 28 years of age. War Department records reveal that after graduation from high school he worked in various oil fields until he enlisted in the military service as an air cadet in October 1942. On 23 June 1943, he was commissioned a second lieutenant after graduating from the Two-Engine Advanced Flying Course, Pampa Army Air Field, Pampa, Texas. For meritorious achievement while serving as co-pilot of a B-17 type bomber on a total of thirty bomber missions over enemy occupied continental Europe, accused was awarded the Distinguished Flying Cross, the Air Medal and two Oak Leaf Clusters to the Air Medal. On 14 November 1944 he was promoted to first lieutenant. On 5 December 1944 he was given a reprimand and a forfeiture of $75 of his pay under Article of War 104 for absenting himself without leave from 2 November 1944 to 7 November 1944. According to the review of the Staff Judge Advocate, on 12 January 1945 he was again punished under that Article of War for failure to maintain a sufficient bank balance to pay certain checks and for noncompliance with standing orders.

7. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings 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 94 or Article of War 96.

Thomas H. Tapley, Judge Advocate

William H. Gambrell, Jr., Judge Advocate

Robert E. Truwithau, Judge Advocate

SPJGH-CM 284260 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 First Lieutenant J. C. Hayes (0-683692), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from 17 April 1945 to 30 April 1945, in violation of Article of War 61 (Chg I & Spec); guilty of making three false statements in order to obtain payment from the United States of three asserted claims for flying pay, in violation of Article of War 94 (Chg II, Specs 1-3); and guilty of making and uttering six checks in the total face amount of $162 without maintaining a sufficient bank balance to pay them, in violation of Article of War 96 (Chg III, Specs 1-6). He was sentenced to dismissal, total forfeitures and confinement for one year. The reviewing authority disapproved the findings of guilty of Charge I and its Specification (absence without leave), approved the sentence but remitted the forfeitures and 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. On his Pay and Allowance Accounts for the months of February, March and April 1945, accused stated he was entitled to, and made claim for, flying pay in the amount of $87.50 per month when in fact he was not entitled to any such pay, having been removed from flying status on 25 January 1945 and having accumulated no flying time whatsoever for any of these three months. Thus, he fraudulently obtained a total of $262.50 from the United States Government. As partial restoration of the money so obtained, on 30 April 1945 accused returned to the finance officer the sum of $176.60 which had been paid him for the month of April. During the period from 5 April 1945 to 16 April 1945, accused cashed six checks totaling $162 in amount and negligently failed to maintain a sufficient bank balance to pay them inasmuch as his balance from 5 April 1945 until his account was closed on 17 May 1945 never exceeded $4.40.

On 5 December 1944, accused was punished under the 104th Article of War for absenting himself without leave for five days and,

according to the review of the Staff Judge Advocate, on 12 January 1945 he was again punished under that Article of War for failure to maintain a sufficient bank balance to pay certain checks and for non-compliance with standing orders.

Accused served overseas in the European Theater of Operations as co-pilot aboard a B-17 type of bomber aircraft, participating in thirty bombing missions over enemy occupied continental Europe. For meritorious services performed on these missions he was awarded the Distinguished Flying Cross, the Air Medal and two, possibly three, Oak Leaf Clusters to the Air Medal. During May and June 1945, accused was subjected to three psychiatric examinations and the diagnosis following each such examination was that accused, although not psychotic, was suffering from an "anxiety state" manifested generally by tenseness, apprehension and instability.

In view of accused's excellent combat record and considering the psychiatric reports indicating the existence of a nervous disorder, I recommend that the sentence as approved by the reviewing authority be confirmed but commuted to a reprimand and a forfeiture of pay of $50 per month for six months and that the sentence as thus commuted be 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 but, cpmmuted to a reprimand and forfeitures. GCMO 444, 21 Sept 1945).

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

SPJGK - CM 284323

13 AUG 1945

UNITED STATES	INFANTRY REPLACEMENT TRAINING CENTER Camp Fannin, Texas
v.	Trial by G.C.M., convened at Camp Fannin, Texas, 23 July 1945. Dismissal.
Second Lieutenant GEORGE A. HALL (O-1058544), Infantry	

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

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

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

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

Specification: In that Second Lieutenant George A. Hall, Company "D", Eighty-third Training Battalion, Fifteenth Training Regiment, did, without proper leave, absent himself from his organization at Camp Fannin, Texas from about 0555 21 June 1945 to about 1515 21 June 1945.

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

Specification: In that Second Lieutenant George A. Hall, * * *, did, at Camp Fannin, Texas, on or about 22 June 1945, in an affidavit make under oath a statement in substance as follows: That on or about 20 June 1945 at about 2345 he went to his quarters to bed, at about 0520 21 June 1945 he went to Lieutenant Lambertson's quarters and talked until about 0630, he then went to Company "D", Eighty-fourth Training Battalion about 0700 where he and said Lieutenant Lambertson conversed until about 1000 when he accompanied said Lieutenant Lambertson to Headquarters, Eighty-fourth Training Battalion, which statements he did not then believe to be true.

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

3. Summary of evidence.

a. Charge I and Specification. On the dates referred to in the Charges and Specifications the accused was a second lieutenant, Army of the United States, a member of Company D, 83rd Training Battalion, 15th Training Regiment, and stationed at Camp Fannin, Texas (R. 6). The accused was not present for duty with his company from 0555 until 1515 on 21 June 1945 (R. 7,13,14,15). Between these hours a search was made for him by the Battalion adjutant, but accused was not located until 1515 when he was found at Dental Clinic 1-A (R. 14,15). No authority had been granted accused to be absent for the period alleged, and accused had not signed out in the Regimental V.O.C.O. register (R. 20).

b. Specification, Charge II. As a result of the absence of the accused referred to above the regimental commander by Special Orders No. 118, dated 22 June 1945, in confirmation of verbal orders of 21 June 1945, appointed Major John O. Cook, Jr., investigating officer to investigate the matter (R. 21, Ex. 4). Pursuant to this order Major Cook had an interview with the accused at the Headquarters of the 83rd Battalion about 10 o'clock on the morning of 22 June 1945. He asked accused if he was aware of his rights under Article of War 24 and accused replied that he was. Major Cook stated that he apprised accused that he could remain silent, "*** give a statement not sworn or a sworn statement, that he would not be required to answer or give any evidence which would incriminate himself" (R. 22). It appears from the testimony of Major Cook that on the occasion of this interview he did not have a stenographer and that the statement then made by the accused was transcribed by Major Cook in longhand. Shortly thereafter he (Major Cook) had a "draft copy typed," which was read and signed by accused at approximately 11 o'clock on the morning of 22 June 1945 (R. 22,27). This document is in the form of an affidavit, recites that it was made under oath and bears the jurat of the investigating officer. In the document the accused states in substance that on the night of 20 June 1945 he parted company with a Mrs. Bergeron on the post at about 2330 or 2345, after which he went to his quarters and retired; that at 0520 the next morning he arose, went to "Lieutenant Lamberson's" quarters and talked until about 0630. From there he went to Company D, 84th Battalion, where he and Lieutenant Lambertson arrived at 0720 and where they talked until 1000. From there they went to the 84th Battalion headquarters. Thereafter he went to the hospital, thence to the camp cafeteria for lunch, then to the bank, and finally, at 1500, he went to Dental Clinic 1-A (R. 22, Ex. 5). Major Cook stated that he turned this statement over to a typist for the preparation of five copies which were required for his investigation report, and that he then interviewed Lieutenant Lambertson (R. 22,23). After his conference with Lieutenant Lambertson, Major Cook received from the typist the required typewritten copies of accused's previous statement (Ex. 5). He stated that at about 1340 on the same day he recalled accused for the purpose of having him sign the additional copies. Major Cook stated that on this occasion

he called in "Lieutenant Dallas" as a witness; that he administered the oath and handed to the accused the additional statements for his signature. The accused started to sign and wrote the word "George" and "then stopped." After waiting about 15 minutes accused requested that he be permitted to submit another statement. Major Cook gave him a "deposition form and a pen and left the room." In a few minutes Major Cook returned and accused signed under oath and delivered to him a new statement concerning the matter under investigation (R. 22,25). In this document the accused stated that he left the post at 2255 20 June 1945 in company with a guest, that he returned to the post at 1045 21 June 1945, going to the station hospital, then to the camp cafeteria and to the bank and finally to Dental Clinic 1-A at 1515, when he called his company and advised the first sergeant of his whereabouts (R. 25, Ex. 6).

First Lieutenant Bruce L. Lambertson, 85th Training Battalion, 15th Training Regiment, testified that he did not see the accused or have any conversation with him on 21 June 1945 until about 2310 in the evening of that day (R. 28-29).

4. For the defense.

The accused, advised of his rights as a witness, elected to make an unsworn statement as follows:

> "The only thing I have to say is, Major Cook came to me and told me, in all proper form, he was the investigating officer in reference to my absence for the period of time involved, and as I have known Major Cook for a considerable length of time, I knew he would do a very thorough job. My absence from the Post, as I described in the second statement, which was the true and correct statement, involved a party of a non-military nature, and due to the fact I did not want an investigation so far as that particular party was concerned, I made up that story, which, of course, is not true, which represented the first statement that was made. I did not think about a Court-Martial. The only thing I had in my mind was the case of Major Cook being the investigating officer, and as such would do a very good job. However, when I began to think about it, I went over voluntarily the second time and spoke to Major Cook and told him as the investigating officer, I could save him a lot of time, and I told him what had happened. I had left the Post and I had failed to sign out, because there was a cab there available and they are hard to get at that time of night, and I told him for the purpose of the record that I had left the Post without signing out and returned the following morning at the hospital at approximately 10:30, and for the purpose of the record, I preferred not to mention what had happened, and why I had been late, and those are the exact conditions underwhich the true and correct statement were made. Realizing the seriousness of the first statement I went over voluntarily. It was only about an hour and a half later, and I told Major Cook I could

save him a lot of time in the investigation, if he would let me write out another statement, which he did, and the investigation ceased, and he asked, in view of the fact they were in a big hurry to get this, if I would sign the five copies in blank, and he would have them typed up. The second statement was merely blank sheets of paper, which I signed in expediting the matter, so they could get it to the Regimental Commander's desk. That's all I have to say." (R. 32-33)

5. It is unnecessary to recapitulate the evidence in this case. With reference to Charge I and its Specification, the evidence for the prosecution, and the unsworn statement of the accused, clearly show that accused was absent without leave from his organization for the period alleged in violation of Article of War 61. Concerning Charge II and its Specification charging that accused made certain false statements under oath, which statements he did not believe to be true, in violation of Article of War 96, the undisputed evidence shows (1) that the regimental commander of accused's organization appointed Major John O. Cook, Jr., as investigating officer to investigate the facts and circumstances of accused's unauthorized absence referred to in the Specification of Charge I. In the course of this investigation the accused, after being fully advised of his rights under Article of War 24, made a voluntary statement to the investigating officer, the substance of which was first taken down in the handwriting of the investigating officer and thereafter typed in the form of an affidavit. The affidavit was then submitted to the accused, who read, signed and returned it to the investigating officer. The affidavit is regular in form, contains recitals that it was made under oath, and bears the jurat of the investigating officer who was empowered to administer the oath. The statements of facts appearing in the affidavit are substantially the same as those alleged in Charge II and its Specification. (2) The falsity of the statements set forth in the affidavit is clearly shown by the testimony of Lieutenant Lambertson, by the subsequent affidavit of accused (Ex. 6) and by the unsworn statement of accused made at his trial. Obviously these undisputed facts support the findings of guilty of Charge II and its Specification. The fact that accused shortly after making the false statement (Ex. 5) recanted and made another statement to the investigating officer in which he told the truth may be a matter for the consideration of the reviewing or confirming authority, but it does not condone or purge the original offense (B.R. 18, pp. 197-214, II Bull. JAG 190).

6. War Department records show the accused is 30 years of age and is unmarried. He attended City College of New York two years but did not graduate. He enlisted in the military service 4 February 1942 and attained the grade of corporal. On 12 August 1943 he was graduated from the Anti-aircraft Artillery School, Camp Davis, North Carolina, and commissioned a second lieutenant, Army of the United States.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 Articles of War 61 and 96.

[illegible], Judge Advocate

Charles G. Luckie, Judge Advocate

(On Leave), Judge Advocate

[illegible], Judge Advocate

(334)

SPJGK - CM 284323 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 George A. Hall (O-1058544), Infantry.

2. Upon trial by general court-martial this officer was found guilty of being absent without leave from his organization from about 0555 21 June 1945 to about 1515 21 June 1945, in violation of Article of War 61, and of making a false statement under oath with respect to his unauthorized absence 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 undisputed evidence clearly shows that accused was absent without leave from his organization between the hours of 5:55 a.m. and 3:15 p.m. on 21 June 1945. Upon an official investigation of his unauthorized absence the accused on 22 June 1945 made a false statement to the investigating officer concerning his whereabouts, which statement was sworn to and signed by accused. Within less than two hours thereafter the accused voluntarily recanted and made another statement to the investigating officer in which he told the truth. The staff judge advocate in his review of the record of trial states that the accused has been the subject of disciplinary action under the provisions of Article of War 104 for abandoning his duty as officer of the day and remaining absent "for most of the following day."

War Department records show that accused voluntarily enlisted in the military service 4 February 1942 and that after attaining the grade of corporal he attended Officer Candidate School (Anti-Aircraft Artillery), Camp Davis, North Carolina, from which he was commissioned a second lieutenant, Army of the United States, 12 August 1943. Under all the circumstances in this case I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $50 pay per month for a period of 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 forfeitures, GCMO 423, 28 Aug 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGN-CM 284325

4 [illegible] 1945

UNITED STATES v. First Lieutenant ELMER H. KAMKE (O-823383), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Bryan, Texas, 19 July 1945. Dismissal and total forfeitures.

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

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

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

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

Specification 1: In that First Lieutenant Elmer H. Kamke, Air Corps, did, at Bryan Army Air Field, Bryan, Texas, on or about 5 April 1945, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to-wit:

"The FIRST NATIONAL BANK 88-230
Of Bryan

BRYAN, TEXAS, April 5 1945 No. 17

Pay to the
Order of Cash——— $ 40XX

Forty & XX Dollars

(Signed) J.S. Kennedy "

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

Specification 2: Same as Specification 1 except that check is in the amount of $30 and purports to be executed by "M. J. Granger,

Major AC. 0-623465."

Specification 3: Same as Specification 1 except the offense was committed on 9 May 1945 and check is made payable to Officers Mess, is in amount of $30, and purports to be signed by "Fred S. Kennedy, 1st Lt. 0-7938865."

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

Specification 1: In that First Lieutenant Elmer H. Kamke, Air Corps, did, at Bryan Army Air Field, Bryan, Texas, on or about 5 April 1945, wrongfully and with intent to defraud, willfully, unlawfully and feloniously utter as true and genuine a certain check in words and figures as follows:

"The FIRST NATIONAL BANK 88-230
Of Bryan

BRYAN, TEXAS, April 5 194 5 No. 17

Pay to the
Order of Cash ——— $ 40xx

Forty & xx Dollars

(Signed) J. S. Kennedy "

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said First Lieutenant Elmer H. Kamke then well knew, falsely made and forged.

Specification 2: Same as Specification 1 except that check is in the amount of $30 and purports to be executed by "M. J. Granger, Major AC. 0-623465."

Specification 3: Same as Specification 1 except the offense was committed on 9 May 1945 and check is made payable to Officers Mess, is in the amount of $30, and purports to be signed by "Fred S. Kennedy, 1st Lt. 0-793865."

The accused pleaded not guilty to, and was found guilty of, both Charges and 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 about 7:00 p.m. on the night of 5 April 1945 some fifteen men were engaged in a dice game in the Officers' Club at Bryan Field, Texas (R. 12, 15). The accused

and First Lieutenant John O. Gallagher, who were strangers, were among the participants and were placing "side-bets" with one another. For a time their transactions were conducted with cash, but, luck having apparently turned against accused, he introduced two checks into the play and lost both of them to his opponent. The first, in the sum of forty dollars, was drawn on The First National Bank of Bryan, Texas, and purported to be signed by "J. S.Kennedy." The other, drawn on the same bank, was for thirty dollars and bore the purported signature of "M. J. Granger, Major AC, 0-623465" (R. 13-14, 17-18; Pros. Exs. 2, 3). The drawee institution had no account in the name of either alleged maker and refused to accept the instruments for deposit (R. 14, 57; Pros. Ex.13). An examination of the rosters at Bryan Field by Lieutenant Gallagher and an inquiry directed by him to the local "Military Personnel" office revealed that "there were no such persons" as "M. J. Granger" or "J. S. Kennedy" at that field (R. 14, 18; Pros. Ex. 14). After several futile attempts to find the makers, Lieutenant Gallagher turned the checks over to Captain Arthur W. Jordan, the Provost Marshal on 9 April 1945 (R. 14, 19, 21, 39, 52).

Having completed his course of training in instrument flying,the accused departed from Bryan Field on 7 April 1945 to return to his home base at Marana Army Air Field, Marana, Arizona. Twenty days later he reported back to Bryan Field and was assigned to duty as an instructor (R. 23; Pros. Ex. 4). Between 6:00 and 7:00 p.m. on 8 May 1945 he was again a participant in a gambling game at the Officers' Club. The dice passed in order "around the table" from one player to another and ultimately came into the hands of Captain Harry L. Cole, who proceeded to use them with extraordinary success. After making about six consecutive "passes," he found himself in possession of a check in the sum of thirty dollars which had been wagered by the accused and which was surrendered by him after receiving either five or ten dollars in "change." This instrument was also drawn on The First National Bank of Bryan, Texas, was payable to the Officers' Mess, and signed by "Fred S. Kennedy, 1st Lt. 0-793865." Although not endorsed, it was accepted by Captain Cole because several in similar form, executed by other makers, had been cashed for him by the Officers' Mess (R. 28-29, 32-33). A telephone call the following day disclosed that "there was no person by [the] . . . name [of "Fred S. Kennedy"] with an account at the bank" (R. 24-27, 29-31, 33; Pros. Exs. 5, 13, 14). On 10 May 1945, the check, like its two predecessors, was delivered to the office of the Provost Marshal (R. 26, 30-32, 39). Shortly thereafter Captain Cole informed the Provost Marshal that the instrument had been obtained from the accused (R. 52).

Believing that he "didn't have enough . . . against the man to make the arrest," the Provost Marshal commenced an independent investigation in the hope of discovering additional evidence (R. 53). After observing the gambling on 11 and 13 May, the Provost Marshal noted, at the conclusion of a dice game during the noon hour of 14 May 1945, that, as the accused left the "card room" at the officers' club, he tore two checks

into numerous small pieces and deposited them in an ash receptacle in the lounge. The Provost Marshal, after having waited some ten or fifteen minutes, proceeded to retrieve the bits of paper. From this task he was momentarily diverted by the accused who "came over" and "just stood there for a moment." The Provost Marshal immediately inquired whether the two checks had belonged to the accused and whether he had written them. The answer in each instance was in the affirmative. Both checks had been signed by the accused in his true name (R. 39-42, 53-54; Pros. Exs. 8, 9).

Having collected all of the pieces, the Provost Marshal revealed his identity to the accused and requested his presence at "Headquarters." The accused offered no objections and, after complying, willingly submitted to further interrogation. The Provost Marshal began by pointing out that he had three checks in his possession "that were not good" and asked whether the accused had written any of them. The accused not only denied that he had written them but even that he had ever seen them before. At this point the Provost Marshal inquired whether the accused would "mind" giving a specimen of his handwriting "for the purpose of comparison with the handwriting on the checks . . . under investigation." The accused was agreeable and on three separate sheets prepared numerous samples of his penmanship, some in his normal "free-hand" script and some, at the Provost Marshal's specific direction, in "back-hand" (R. 43-50; Pros. Exs. 10, 11, 12). A fourth sheet containing several other specimens was prepared by him that same day at the request, and in the presence, of Captain Michael Gordon, the Post Legal Officer (R. 36-38; Pros. Ex. 7). All four pages were voluntarily written by the accused with full knowledge of their purpose (R. 37, 44, 50). Further investigation revealed another sample of his standard penmanship. This was a "Criticism Sheet" which he had previously addressed to the Deputy for Training and Operations at Bryan, Texas (R.35; Pros. Ex. 6).

The two torn checks deposited in the ash receptacle at the officers' club, the four pages of sample writing, and the "Criticism Sheet" were all submitted by the Provost Marshal to the Department of Public Safety of the State of Texas on 15 May 1945 for comparison with the three worthless checks received by Lieutenant Gallagher and Captain Cole (R. 50-51, 54-56, 60). In the opinion of Mr. Fred R. Rymer and Mr. E. N. Martin, handwriting experts employed by that Department, all of these documents were the work of the same person (R. 58, 61, 74, 77, 79). According to Mr. Martin, the:

> "* * * dissimilarities I noted were contributed [sic] to an attempt to disregard the person's habits of writing. Our opinion is based on natural, free-hand characteristics of writing. Any differences are due to this attempt to disguise or discard habits of writing or from his natural variation, no person can write twice exactly alike * * *" (R. 88, 92).

4. After being apprised of his rights as a witness, the accused elected to take the stand on his own behalf. Preliminary to his testimony

it was stipulated that he had opened an account with The First National Bank of Bryan, Texas, on 7 May 1945 with a deposit of $260.00, that his balance thereafter was never less than $200.00, and that he had $200.00 on deposit on the date of the trial (R. 95; Def. Ex. 1).

After serving as a cadet, the accused was commissioned as a pilot on 8 February 1944. In July of 1944 he was sent overseas to the European Theatre of Operations and, during the next three months, participated in thirty-three missions "from the Atlantic coast half-way across Russia." He was awarded two battle stars and the Air Medal with four Oak Leaf Clusters and was recommended for the Distinguished Flying Cross. At no time was he the subject of any disciplinary action (R. 96-98).

He categorically denied writing the three worthless checks in issue, and he did not recall ever having them in his possession (R. 99, 103-104, 117-118). In the dice games in which he had played a large proportion of the betting had been made with checks. These changed hands so frequently that he "couldn't say how many [he] had" (R. 102-103). If the three checks in issue were ever held by him, he obtained them "through a prior bet . . . off the table" (R. 103-104, 112).

He had not been in financial difficulties either in April or May of 1945. As a matter of fact, he had over $2000.00 on deposit in a bank in Milwaukee, Wisconsin, in addition to the $200.00 already mentioned as the balance of his account with the Bryan bank (R. 104, 114-115). Dice was a source of great pleasure to him, and he had participated in about fifty games while stationed at Bryan. He usually played "a conservative game" and, while he had occasionally been a "small loser," he was a net winner as of the day of trial to the extent of some $200.00 (R. 104, 106-7, 124). Prior to 14 May 1945 he had never written a check in a dice game. He explained that:

> "I played dice during the lunch hour, which is a limited time, and I would come in with ten or fifteen dollars and if I won it was OK, I went back and flew, and if I didn't it was OK and I went back and flew anyway" (R. 124).

The two checks which were rescued from the ash receptacle on this last date were written by him, because, in this instance, he "lost what [he] had." After placing them in the game, he had won enough to redeem them from a lieutenant into whose hands they had drifted (R. 107, 121).

The samples of handwriting given to the Provost Marshal were freely and voluntarily submitted, but they were not in the accused's natural hand; for he "had the impression that [he] was under arrest . . ." and consequently was "flustered" and "unduly nervous" (R. 99, 111, 115-116, 118). His penmanship was further debased by requests that he write "back-hand" and "bigger" and "faster" (R. 110). In his own words, "When I write free-hand I have a better-looking handwriting than that" (R. 111).

5. Specifications 1, 2, and 3 of Charge I allege that the accused did, on 5 April and 9 May 1945, "with intent to defraud, falsely make in [their] entirety" three checks, which were writings "of a private nature, which might operate to the prejudice of another." These acts were set forth as violations of Article of War 93. Specifications 1, 2, and 3 of Charge II allege that he did, on the same dates, "wrongfully and with intent to defraud, willfully, unlawfully and feloniously utter as true and genuine" the same checks, which he "then well knew" were "falsely made and forged." These offenses were laid under Article of War 96.

> "Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice" (MCM, 1928, par. 149j).

To constitute the additional separate and distinct offense of uttering a forged instrument "there must be a knowledge that the instrument is a forgery, and there must be an intent to defraud. The intent to defraud may be implied where knowledge of the falsity of the document is shown." (MCM, 1928, par. 152c).

The accused was positively identified by Lieutenant Gallagher and Captain Cole as the individual from whom they had received the three worthless checks in issue, and the accused himself admitted that it was "possible" that he had passed the instruments. The basic question presented by the record is accordingly whether the accused forged the signatures of the purported makers.

On this point the testimony of the handwriting experts introduced by the prosecution is unequivocal and convincing. In their opinion the hand which subscribed the names of "J. S. Kennedy,""M. J. Granger," and "Fred S. Kennedy" to the three checks was that of the accused and no other. Although he protested that the specimens of his handwriting obtained from him by the Provost Marshal were not in his normal freehand, the same objection cannot be leveled at the two torn checks recovered from the ash receptacle on 14 May 1945 or at the "Criticism Sheet" prepared by him for a purpose completely divorced from the issues here under consideration. These three samples of his handwriting were produced by him free from pressure and coercion and at a time when he had no reason to believe that he was under suspicion. They comprise an adequate and acceptable standard of comparison and were properly employed as such by the expert witnesses. But even the specimens procured by the Provost Marshal would have furnished a suitable basis of comparison; for, while the accused may have been "flustered," he conceded that his writing was voluntary.

Once the forgery is established the uttering, under the circumstances of this case, is also proved. Obviously no man can have more accurate knowledge of the forged character of an instrument than the

forger himself, and his passing of the instrument with that knowledge creates an irrefutable presumption of intent to defraud. All of the Specifications of Charges I and II have been sustained beyond a reasonable doubt.

6. The accused, who is married, is about 27 years of age. After being graduated from high school, he obtained employment from June, 1939, to April, 1941, as a stockman and from May, 1941, to January, 1943, as a general machine operator. He served as an enlisted man from 17 November 1942 to 7 February 1944, was commissioned as a second lieutenant on 8 February 1944, and was promoted to first lieutenant on 28 September 1944. While overseas he earned the Air Medal with four Oak Leaf Clusters and the European Theatre of Operation ribbon with two battle stars. In his testimony he asserted that he has been recommended for the Distinguished Flying Cross.

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 93 or Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Robert J. O'Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 284325 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 Elmer H. Kamke (0-823383), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of forging three checks, in violation of Article of War 93, and of unlawfully and feloniously uttering as true and genuine the same checks, 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 sentence and to warrant confirmation thereof.

While participating in a dice game with some fourteen other officers on the night of 5 April 1945, the accused paid several of his bets with two checks payable to the order of cash, one in the sum of $40 and the other in the sum of $30. The first purported to be signed by "J. S. Kennedy" and the second by "M. J. Granger Major AC. 0-623465". Approximately a month later, on 8 May 1945, while engaged in another dice game, the accused paid his losses by a check in the face amount of $30 purporting to be signed by "Fred S. Kennedy, 1st Lt. 0-7938865". The three instruments described were forgeries and, according to the expert testimony introduced, they were all in the handwriting of the accused. In view, however, of his meritorious overseas service, for which he was awarded the Air Medal with four Oak Leaf Clusters and the European Theater of Operations ribbon with two battle stars, he is deserving of some clemency. I accordingly recommend that the sentence be confirmed, but that the forfeitures be remitted, and that sentence as thus modified be suspended during good behavior.

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

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. GCMO 451, 21 Sept 1945).

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

SPJGQ - CM 284401

UNITED STATES v. Second Lieutenant JAMES A. BICKERS (0-564806), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Randolph Field, Texas, 30 July 1945. Dismissal and total forfeitures.

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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant James A. Bickers, Air Corps, did, at Randolph Field, Texas, on or about 12 June 1945, wrongfully and unlawfully make and utter to First Lieutenant Donald H. Marcus, Air Corps, a certain check in words and figures, as follows, to wit:

National Bank of Fort Sam — DATE 12 June 19 45
Name of Bank

Houston
City or Town — State

PAY TO THE ORDER OF Cash $ 89 00

Eighty-nine and no/100 - - - - - - - - - - - - - - - DOLLARS

For the purpose of obtaining payment of this check I hereby represent that the amount stated herein is on deposit in said Bank in my name subject to this check and is hereby assigned to the payee or holder thereof

/s/ James A. Bickers
2nd Lt A C

he the said Second Lieutenant James A. Bickers, 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 for the payment of said check.

Specification 2: In that Second Lieutenant James A. Bickers, Air Corps, did, at San Antonio, Texas, on or about 21 June 1945, with intent to defraud wrongfully and unlawfully make and utter to Grande Courts a check for $25.00, bearing date of 21 June 1945, drawn on the National Bank of Fort Sam Houston, Texas, and by means thereof did fraudulently obtain from Grande Courts $25.00 lawful money of the United States he the said Second Lieutenant James A. Bickers, 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 for the payment of said check and other outstanding checks.

Specifications 3, 4, 5, 6, 7, 8, 10 and 11 are identical with Specification 2 except as to dates, amounts and payees, which exceptions are, respectively, as follows:

Specification	Date	Amount	Payee
3	22 June 1945	$45.00	Grande Courts
4	22 June 1945	30.00	Grande Courts
5	23 June 1945	25.00	Joskes of Texas
6	23 June 1945	35.00	Grande Courts
7	24 June 1945	25.00	Grande Courts
8	25 June 1945	40.00	Grande Courts
10	26 June 1945	30.00	Joskes of Texas
11	27 June 1945	30.00	Joskes of Texas

Specification 9: In that Second Lieutenant James A. Bickers, Air Corps, did, at San Antonio, Texas, on or about 26 June 1945, with intent to defraud wrongfully and unlawfully make and utter to Grande Courts a check for $30.00, bearing date of 26 June 1945, drawn on the National Bank of Fort Sam Houston, Texas and by means thereof did fraudulently obtain from Grande Courts $20.00 lawful money of the United States, and a credit of $10.00 on his debt to Grande Courts, he the said Second Lieutenant James A Bickers, 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 for the payment of said check and other outstanding checks.

He pleaded guilty to the Specifications and the Charge. He was found guilty of Specifications 1, 2, 3, 4, 5, 6, 7, 10, and 11, of Specification 8 except the words "$40.00 lawful money of the United States", substituting therefor "$30.00 lawful money of the United States and a credit of $10.00 on debt to Grande Courts", of the excepted words, not guilty and of the substituted words, guilty, of Specification 9 except the words "$20.00 lawful money of the United States and a credit of $10.00 on his debt to Grande Courts", substituting therefor, respectively, the words "$30.00 lawful money of the United States," of the excepted words, not guilty and of the substituted words guilty, and of the Charge, guilty. 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 pay to the United States a fine of $1000.00 payable in installments of $100.00 per month. The reviewing authority approved only so much of the sentence as provided for dismissal and the forfeiture of all pay and allowances due or to become due and forwarded the record of trial for action under Article of War 48.

3. It was stipulated in writing by and between the trial judge advocate, the defense counsel and the accused that since being commissioned on 28 October 1942 the accused has continuously been a member of the armed forces of the United States and subject to military law (R. 8; Pros. Ex.1).

Specification 1

On 12 June 1945 the accused and First Lieutenant Marcus were participants in a poker game during which First Lieutenant Marcus won a "pot" containing a check drawn by the accused to "Cash" on the National Bank of Fort Sam Houston in the amount of $89 and dated 12 June 1945 (R. 9; Pros. Ex. 3). First Lieutenant Marcus deposited the check in his account in the Broadway National Bank, it was returned marked "insufficient funds" and he has never received payment for the check (R. 9; Pros. Ex. 3).

Specifications 5, 10 and 11

Mrs. Helen Gordon was employed at the reception desk at Joske Brothers, a department store in San Antonio, Texas, on 23 June 1945 when "the lieutenant" asked her if she would cash a personal check for him for $25 (R. 10). He told her "it was on the Fort Sam Bank" and she then told him "Well, if it will be covered, just step over to the desk and make out your check" (R. 10). He wrote out the check, which she identified (Pros. Ex. 7), and she "okayed it for him" by placing her initials "H.G." on the check (R. 10, 11). It was stipulated in writing by the trial judge advocate, defense counsel and accused that Mrs. Marowayne Copeland was employed as cashier by Joske's of Texas on 23 June 1945 and on that date cashed a check (Pros. Ex. 7) for the accused paying him "$25 in United States currency". (Pros. Ex. 1).

Mrs. Gladys Adam was employed in the credit department of Joske Brothers Department Store (R. 12). She "okayed" a check (Pros. Ex. 12).

"to be cashed for a lieutenant" on or about the date of the check (R. 13) and she "okayed" a check (Pros. Ex. 13) for the accused on or about 27 June 1945 (R. 13). In each case she put her "initials, which is my okay" on the checks (R. 13). She pointed out the accused in the court room (R. 13). It was stipulated in writing that on 26 June 1945 Mrs. Billie Johnston, a cashier of Joske's of Texas, cashed a check for the accused paying him $30 (Pros. Exs. 1, 12), and that Mrs. Betty Worthington, also employed as a cashier by Joske's of Texas, cashed a check for the accused on 27 June 1945 paying him $30 (Pros. Exs. 1, 13). These two checks (Pros. Exs. 12, 13) came back and have never been paid (R. 12, 13).

Specifications 2, 3, 4, 6, 7, 8 and 9

Seven checks (Pros. Exs. 4, 5, 6, 8, 9, 10 and 11) were cashed by the accused at Grande Courts, a motor court in San Antonio, Texas (R. 14, 17). The accused was a guest at Grande Courts from 16 March to 26 June 1945 (R. 14). Four or five of the checks were cashed by Mr. Ririe, the assistant manager (R. 15), and the other by Mr. Foster, the room clerk at the Grande Courts (R. 17). Mr. Ririe could not identify the checks that he personally handled but stated "all I did cash for him were for cash only" (R. 15). Mr. Foster cashed a check for the accused on 25 June 1945 in the amount of $40 (Pros. Ex. 10) when he was checking out (R. 17). In cashing this check he credited $10 to the account of the accused and gave him the balance of $30 in cash (R. 17). As to the other check Mr. Foster "cashed one or two for him. I couldn't say definitely which one" for which he gave the accused cash (R. 17). The seven checks were deposited by Mr. Ririe in the account of Grande Courts in the National Bank of Commerce in San Antonio and were returned marked "insufficiant funds"(R. 14) and have never been paid (R. 16). The accused was identified by both Mr. Ririe and Mr. Foster (R. 14, 17).

It was stipulated in writing by and between the trial judge advocate, the defense counsel and the accused that W. L. Bailey, assistant cashier of the National Bank of Fort Sam Houston would have testified, if called as a witness, that the accused had a checking account in that bank from 17 March 1945 to 11 July 1945 (Pros. Ex. 1). The ledger account of accused's account shows a balance of $1.62 on 11 June 1945 and an overdraft of $6.38 on 11 July 1945. At all times on and after 11 June 1945 the balance was never more than $1.62 and at all times on and after 21 June 1945 showed overdrafts (Pros. Ex. 2). The eleven checks (Pros. Exs. 3 to 13) were presented to the National Bank of Fort Sam Houston for payment by the San Antonio, Texas, Clearing House, between 13 June 1945 and 29 June 1945 and were returned unpaid with notation that there were insufficient funds in the account of the accused (Pros. Ex. 1).

4. The accused after being advised of his rights elected to remain silent (R. 18). No evidence was submitted on behalf of the accused.

5. The evidence and the accused's pleas of guilty amply sustain the findings that the accused, with the intent to defraud, wrongfully and

unlawfully made and uttered 11 checks as specified in the total amount of $404, drawn on the National Bank of Fort Sam Houston, and thereby fraudulently received cash or credit knowing that he did not have and not intending that he should have sufficient funds in the bank for the payment of the checks. Such conduct is violative of Article of War 96.

6. War Department records show that the accused is 26 years of age, married and has one child. He is a native of Oregon and a resident of Modoc Point, Oregon. He graduated from high school. In civilian life he was employed from May 1934 to August 1940 by the Lamm Lumber Company, Modoc Point, Oregon, as a box shook grader and participated on his own behalf in rodeo contests. He served in enlisted status from 23 August 1940 to 27 October 1942 and attained the grade of staff sergeant. He was appointed a second lieutenant, Army of the United States, on 28 October 1942 upon graduation from the Air Forces Officer Candidate School, Army Air Forces Technical Training Command, Miami Beach, Florida, and was ordered to active duty in the Air Corps.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, to support the sentence as approved by the reviewing authority, and to warrant confirmation thereof. Dismissal is authorized for a violation by an officer of Article of War 96.

_____, Judge Advocate

[illegible], Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ-CM 284401 1st Ind AUG 23 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 Second Lieutenant James A. Bickers (O-564806), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of wrongfully making and uttering eleven worthless checks, in the aggregate sum of $404, all with full knowledge that he did not have, and not intending that he should have, sufficient funds in the drawee bank for the payment thereof, and, in ten of the eleven instances (Specifications 2-11, inclusive, of the Charge) of fraudulently obtaining money or credit thereby, 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 pay to the United States a fine of $1000. The reviewing authority approved only so much of the sentence as provides for dismissal and total forfeitures, 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.

The accused officer made and uttered eleven worthless checks during the period from 12 June 1945 through 27 June 1945, in and about San Antonio, Texas, aggregating $404. One check, for $89, was given to another officer as a wager in a poker game on 12 June 1945 at Randolph Field, Texas. Seven checks were uttered to Grande Courts, a tourist hostelry, from 21 June 1945 through 26 June 1945, for a total of $220 cash and $10 hotel bill. Three checks, on 23, 26 and 27 June 1945, were given to Joske's of Texas, a department store, for a total of $85 cash. All the checks were drawn on the National Bank of Fort Sam Houston, Texas, where the accused had a nominal account, with a credit balance not in excess of $1.62 at any pertinent time. All the checks were dishonored on presentation. The accused acted throughout with full knowledge of the condition of his account.

Information accompanying the record indicates that the accused officer has fallen into financial discredit through gambling ventures resulting in losses of about $4000, unpaid and unredeemed, shortly before

the commission of the offenses here involved. Although he has expressed a desire to make restitution, hoping to obtain aid from a brother, it appears that his wanton indifference to financial obligation and his complete irresponsibility are incompatible with his status as an officer. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that the sentence as thus modified be 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
Major General
The Judge Advocate General

2 Incls
1 Rec of Trial
2 Form of Action

(Sentence confirmed but forfeitures remitted. GCMO 418, 28 Aug 1945).

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

SPJGH-CM 284447

24 AUG 1945

UNITED STATES v. First Lieutenant ARTHUR W. TURNER (0-796046), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Craig Field, Selma, Alabama, 7 and 23 July 1945. Dismissal.

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

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

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

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

Specification 1: In that First Lieutenant Arthur W. Turner, Air Corps, Army of the United States, Squadron B, 2138th AAF Base Unit, Army Air Forces Pilot School (Advanced - Single Engine), Craig Field, Selma, Alabama, did, at Montgomery, Alabama, on or about 2 June 1945, with intent to defraud, wrongfully and unlawfully make and utter to The Jefferson Davis Hotel, of Montgomery, Alabama, a certain check in words and figures as follows, to-wit:

Montgomery, Ala., June 2nd 1945

The First National BANK

Montgomery Alabama

Pay to the order of JEFFERSON DAVIS HOTEL $ 25.00

--------- Twenty five ---------- DOLLARS

I hereby claim that I have the amount in this bank and through this representation I have accepted the above amount from said Jefferson Davis Hotel.

/s/ Arthur W. Turner
0-796046 1st Lt.

and by means thereof did fraudulently obtain from the Jefferson Davis Hotel, of Montgomery, Alabama, the sum of twenty-five dollars ($25.00), he, the said First Lieutenant Arthur W. Turner, then well knowing that he did not have and not intending that he should have any account with the First National Bank, Montgomery, Alabama, for the payment of said check.

Specification 2: In that First Lieutenant Arthur W. Turner, * * *, did, at Montgomery, Alabama, on or about 2 June 1945, with intent to defraud, wrongfully and unlawfully make and utter to The Maxwell Field Officers' Club, Montgomery, Alabama, a certain check, in words and figures as follows, to-wit:

The Mattituck National Bank

Mattituck, Long Island N.Y.

June 2nd 1945

PAY TO THE
ORDER OF Maxwell Officers Club $ 25.00

---------- Twenty five ---------- DOLLARS

Value received With Exchange and Collection Charges

/s/ Arthur W. Turner
1st Lt. 0-796046
A.C.

and by means thereof did fraudulently obtain from The Maxwell Field Officers' Club, Montgomery, Alabama, the sum of twenty-five dollars ($25.00), he, the said First Lieutenant Arthur W. Turner, then well knowing that he did not have and not intending that he should have sufficient funds in The Mattituck National Bank, Mattituck, Long Island, New York, for the payment of said check.

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

Specification 1: In that First Lieutenant Arthur W. Turner, * * *, did, on or about 19 April 1945, wrongfully fail to maintain a sufficient bank balance in the Mattituck National Bank, Mattituck Long Island, New York, to pay a certain check in words and figures as follows:

Mattituck Long Island

April 19th 1945 No. ____

Mattituck National Bank

PAY TO THE ORDER OF Cash ----------$ 50.00

Fifty and no/100 ---------- DOLLARS

/s/ Arthur W. Turner
0-796046 1st Lt.

made and uttered by said First Lieutenant Arthur W. Turner.

Specification 2: Same allegations as Specification 1, except check dated 2 June 1945.

Specification 3: Same allegations as Specification 1, except check dated 2 June 1945 and payable to the order of Robert Later in the amount of $25.

Specification 4: Same allegations as Specification 1, except instrument was a draft on Mattituck National Bank, Mattituck, Long Island, dated 1 June 1945 and payable to the order of The Whitley in the amount of $25.

Specification 5: Same allegations as Specification 1, except instrument was a draft on Mattituck National Bank, Mattituck, Long Island, dated 2 June 1945 and payable to the order of The Whitley in the amount of $25.

Specification 6: Same allegations as Specification 1, except check dated 2 June 1945 and is in the amount of $25.

Specification 7: Same allegations as Specification 1, except check dated 1 June 1945 and is in the amount of $15.

Specification 8: Same allegations as Specification 1, except check dated 2 June 1945 and is in the amount of $25.

Specification 9: Same allegations as Specification 1, except check dated 31 May 1945 and is in the amount of $25.

Specification 10: Same allegations as Specification 1, except check dated 2 June 1945 and is in the amount of $25.

Specification 11: Same allegations as Specification 1, except check dated 2 June 1945 and is payable to Maxwell Field Exchange.

Specification 12: Same allegations as Specification 1, except check is undated and is payable to Maxwell Field Exchange.

Specification 13: Same allegations as Specification 1, except check dated 1 June 1945 and is in the amount of $25.

Specification 14: Same allegations as Specification 1, except check dated 25 May 1945 and is payable to Officers' Club, Maxwell Field in the amount of $25.

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

3. Evidence for the prosecution:

The two (2) checks described in Specifications 1 and 2, respectively, of Charge I and the fourteen (14) checks described in Specifications 1 to 14, respectively, of Charge II were identified by the investigating officer, Major Joseph C. Coleman, who testified that accused had admitted to him during the course of the investigation that he, the accused, had signed each of said checks. The checks were introduced in evidence, without objection, as Prosecution's Exhibits Nos. 1 to 16. Major Coleman also identified a voluntary pre-trial statement signed by accused, which was introduced, without objection, as Prosecution's Exhibit No. 17 (R. 14, 15).

Henry L. Fleet, Cashier of Mattituck National Bank & Trust Company, on which all of the above checks, except the check described in Specification 1 of Charge I, were drawn, testified, by deposition, that accused first opened an account in that bank on 13 April 1944. The only deposits made in this account during 1945 have been the following: 3 January, $100; 5 February, $100; 10 February, $8.33; 3 March, $100; 27 March, $50; 4 June, $100; 5 July, $100. All of the above deposits of $100 were for the purpose of making payments on account of loans which had been extended to accused by the bank. The balance in accused's checking account has stood at "zero" since March 1945. Prosecution's Exhibits 2 through 16 were presented through banking channels for payment, but were all returned to the Federal Reserve Bank of New York because of "insufficient funds" (R. 22, 23; Pros. Ex. 18).

In his voluntary pre-trial statement (Pros. Ex. 17) accused stated that in April 1944 he contracted a loan from the Mattituck bank. This loan, together with subsequent loans granted to him by the same bank, aggregated $1500. He made a Class E allotment to the bank of $100 per month and agreed with the bank that it should have the right to apply out of the allotted monies the amount due each month on his loans, which he stated was "within a few cents" of $100. He declared that "Up until the time I drew these checks I have not been making any additional deposits in addition to the $100.00 allotment." He signed and uttered all of the

checks and received the full amount of money shown on each. At various times "while drinking in various degrees" he had "over-stepped" his "financial limitations." His financial difficulties were "due to gambling during the months of March, April, and May either at Craig Field in the Officers' Club or at Shady Nook in Selma." His account in the Mattituck bank was not a joint account. No one else deposited or promised to deposit any money in that account for him. He became "desperate and frantic" and attempted by gambling "to raise enough money so that I could be completely out of debt. * * * I had at my disposal only one means of straightening out my difficulties and that was gambling." He had never previously failed to pay a debt when due "and the one driving force which caused me to finally write checks was finding some means of raising enough money so that I could cover the checks in my bank and clear my other indebtedness." With respect to the check drawn on The First National Bank, Montgomery, Alabama (Spec. 1 of Ch. I), he admitted that he had never had an account in that bank. He declared, however, that he never had any intent to draw a check on a bank in which he had no account and that all he can say about this check is that he was so "desperate and frantic" that he was confused and that his "probable intent" was to make the check out on the Mattituck bank.

4. Evidence for the defense:

The accused, after having his rights as a witness explained to him, elected to testify under oath. He has been a flying instructor since January 1943, having served at five (5) different fields in the Southeast Training Command during that period. When he arrived at Craig Field in February 1945 he was not "in a proper frame of mind so far as my outlook and my consideration for my job was concerned." He found his duties "very boring and very repetitious." As a result he resorted to "gambling quite a bit" and "drinking once in a while." He found himself "without realizing it, getting into debt. I made a couple or so loans in town here and before I knew it had lost the money which I had borrowed in town. I didn't sit down and reason with myself. I also had domestic problems on my mind and before I knew it I did owe quite a bit of money." When he received his pay at the end of May he took it and went to Montgomery for the "very foolish and naive purpose of gambling in Montgomery, and in the process of the first afternoon" lost all of it. He was drinking at the time and became very "frantic and desperate." The first thing he knew he had written the checks "not knowing what my bank balance was." He was so "mentally upset" and "in so deep" that he "couldn't think." He will make "full restitution" as soon as his father can raise the money by mortgaging some real estate, which he estimates will require two (2) or three (3) months. On cross-examination, he testified that during the past six (6) months he had not deposited any money in the Mattituck bank other than the allotment monies.

First Lieutenant Roscoe J. Breazeale, a witness for the defense, testified that he has been acquainted with accused since 15 April 1945 and that to the best of his knowledge and belief accused has always behaved himself as an officer and a gentleman (R. 21).

First Lieutenant Joseph F. Ross, a witness for the defense, testified that he has been acquainted with accused five (5) months and that in his opinion accused "has always conducted himself as an officer and a gentleman" (R. 22).

It was stipulated that if Henry L. Fleet were present in court he would testify that he is Cashier of Mattituck National Bank & Trust Company, Mattituck, Long Island, New York, that he has known accused and the latter's family during the past fifteen (15) years; that he has always had a high regard for accused personally and considered him a high type American boy; and that until recently his business transactions with accused have always been satisfactory.

5. Specifications 1 and 2 of Charge I allege the wrongful and unlawful making and uttering of checks with intent to defraud, in violation of Article of War 95. Accused admits that he made and uttered each of the two checks and that he received the money called for by each check. He also admits that he has never had an account in the bank described in Specification 1, but claims that his "probable intent" in drawing the check on this bank was to make the check out on Mattituck National Bank & Trust Company. Such attempted explanation is wholly unworthy of belief. The check itself (Pros. Ex. 1) shows that the name and address of the bank - "The First National Bank, Montgomery, Alabama" - were written on the check by the accused in longhand, except the word "Bank" which was printed. Accused's handwriting on the check is perfectly legible and his signature is not different in general appearance from his signature on the other checks in evidence. It is quite apparent that accused knew what he was doing when he wrote this check.

The check described in Specification 2 was drawn on "The Mattituck National Bank, Mattituck, Long Island, N.Y.", the name being written in by accused in longhand. It may be assumed from the fact that he had an account in The Mattituck National Bank & Trust Company, of the same city, that his failure to write the bank's corporate title correctly was inadvertent. The check was dated 2 June 1945. The evidence shows that accused's balance in his account in that bank has stood at zero since March 1945. He admits that he has made no deposits during 1945 other than his allotment to the bank of $100 per month and that under his agreement with the bank all of the allotment is currently applicable to the reduction of his loan, except "a few cents" each month. On the same date that accused issued this check he issued other checks on the same account in the total amount of at least $250, as shown by the evidence of record pertaining to various of the Specifications of Charge II. It is also shown by evidence introduced under Charge II that he drew still other checks on the same account within two days prior to 2 June 1945. There can be no doubt that at the time accused made and uttered the check here under consideration he had very strong reasons for believing that his account was insufficient to pay it. He admitted

as much in his pre-trial statement. The making and uttering of a check under such circumstances is fraudulent (CM 239092, Hickman, 25 B.R. 47; CM 243105, Smith, 27 B.R. 285).

The evidence is thus amply sufficient to support the findings of guilty of Specifications 1 and 2 of Charge I.

6. Each of the 14 Specifications of Charge II alleges the wrongful failure to maintain a sufficient bank balance in "the Mattituck National Bank" to pay a specified check made and uttered by the accused. Eight of these 14 checks were issued 2 June 1945; three were issued 1 June 1945, and the other three were issued on 19 April 1945; 25 May 1945 and 31 May 1945, respectively. Each was returned unpaid because of insufficient funds. The cashier of the bank testified, by deposition, that accused's balance in the bank stood at zero throughout April, May and June 1945. It has been held that proof that a check given for value by a member of the military establishment is returned because of insufficient funds imposes upon the drawer of the check, when charged with conduct to the discredit of the military service, the burden of showing that his action was the result of an honest mistake not caused by his own carelessness or neglect (CM 249232, Norren, 32 B.R. 95). The evidence of record clearly sustains the findings of guilty of these 14 Specifications.

7. The records of the War Department show that accused is 28 years of age and single. He is a high school graduate and has had one year of college training. From 1936 until 1942 accused sold advertising and wrote advertising copy. He entered the service as an aviation cadet on 11 April 1942 and was commissioned a second lieutenant on 13 January 1943 upon graduation from the Army Air Forces Advanced Single-Engine School. He was promoted to first lieutenant on 13 October 1943.

The Staff Judge Advocate's Review, attached to the record of trial, contains advice (page 4) that accused was punished under Article of War 104 at Stewart Field, New York, on 16 February 1945 for absence without leave from 3 February 1945 until 6 February 1945, the punishment awarded being forfeiture of $80 of his pay and reprimand.

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

Thomas N. Tappy, Judge Advocate

William H. Bambrell, Judge Advocate

Robert E. Trewitten, Judge Advocate

SPJGH-CM 284447 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 First Lieutenant Arthur W. Turner (0-796046), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully and unlawfully making and uttering two worthless checks aggregating $50, with intent to defraud, in violation of Article of War 95 (Specifications 1 and 2 of Charge I); and guilty of wrongfully failing to maintain a sufficient bank balance to pay fourteen worthless checks made and uttered by him in the aggregate amount of $440, in violation of Article of War 96 (Specifications 1 to 14 of Charge II). 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 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 2 June 1945 the accused made and uttered to a hotel a check for $25 on a bank in which he admits he has never had an account. It is clear from the evidence that this act was not due to any mistake or inadvertence; it was intentional. On the same day he made and uttered for their face value nine other checks on a bank in which his balance had stood at zero for more than two months. Each of the remaining six checks involved in the present case was likewise made and uttered by the accused for its face value at a time when accused had no balance in the bank on which the check was drawn. There appear to be no mitigating or extenuating circumstances. I recommend that the sentence be confirmed and carried into execution.

4. The Staff Judge Advocate's Review, attached to the record of trial, contains a statement (page 4) that the accused was punished under Article of War 104 at Stewart Field, New York, on 16 February 1945 for absence without leave from 3 February 1945 to 6 February 1945, the punishment awarded being forfeiture of $50 of his pay and reprimand.

5. 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, GCMO 437, 21 Sept 1945).

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

SPJGN-CM 284595

UNITED STATES	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	Trial by G.C.M., convened at Las Vegas Army Air Field, Las Vegas, Nevada, 27 July 1945. Dismissal, total forfeitures, and confinement for two (2) years.
Second Lieutenant PHILIP E. POWERS, JR. (0-2063195), Air Corps.	

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

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

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

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

Specification 1: In that Second Lieutenant Philip E. Powers, Junior, 3021st AAF Base Unit did, at Las Vegas Army Air Field, Las Vegas, Nevada, on or about 30 March 1945, present for payment a claim against the United States by presenting to the finance officer Lieutenant Colonel H. L. Haviland, an officer of the United States, duly authorized to pay such claims, in the amount of Eighty-nine Dollars and thirty-five cents ($89.35), for rail travel pay from Childress, Texas to Las Vegas,Nevada, which claim was false and fraudulent in that Second Lieutenant Philip E. Powers, Junior, traveled by United States Government aircraft from Birmingham, Alabama to Long Beach, California, and was then known by the said Second Lieutenant Philip E. Powers, Junior, to be false and fraudulent.

Specification 2: In that Second Lieutenant Philip E. Powers, Junior, 3021st AAF Base Unit, did, at Las Vegas Army Air Field, Las Vegas, Nevada, on or about 31 May 1945, present for payment a claim against the United States by presenting to Lieutenant Colonel H. L. Haviland, finance officer at Las Vegas Army Air Field, Las Vegas, Nevada, an officer of the United States duly authorized to pay such claims, in the amount of Seventy-five Dollars ($75.00), for flying pay from 1 May 1945 to 31 May 1945 which claim was false and fraudulent in that Second Lieutenant Philip E. Powers, Junior, did not from 1 May 1945 to 31 May 1945, participate in regular and frequent flights while on duty status sufficient to meet the requirements of Executive Order 9195, 7 July 1942 (Army Regulations 35-1480) and was then known by the said Second Lieutenant Philip E. Powers, Junior, to be false and fraudulent.

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

Specification 1: In that Second Lieutenant Philip E. Powers, Junior, 3021st AAF Base Unit, did, at Las Vegas, Nevada, on or about 4 June 1945, with intent to defraud wrongfully and unlawfully make and utter to M. G. Jones, a certain check, in words and figures as follows, to wit:

Nat'l Bank of Ft. Sam Houston
4 June 1945
San Antonio, Texas

Pay to the
order of
Cash $15.00
Fifteen and no/cents Dollars
Philip E. Powers, Jr. 0-2063195
2nd Lt. AC Sqd. K LVAAF

and by means thereof, did fraudulently obtain from M. G. Jones Fifteen Dollars ($15.00) cash in United States currency, he the said Second Lieutenant Philip E. Powers, Junior, 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.

Specification 2: Similar to Specification 1 except that check was made and uttered on 9 June 1945.

Specification 3: Similar to Specification 1 except that check was made and uttered on 26 May 1945, to James L. Young, and was in the amount of $10.

Specification 4: Similar to Specification 1 except that check was made and uttered on 1 April 1945, to John Hughes, and was in the sum of $20.

Specification 5: Similar to Specification 4.

The accused pleaded guilty to, and was found guilty of, both Charges and all Specifications thereunder. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for seven years. The reviewing authority approved the sentence, but reduced the period of confinement to two years, and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced no evidence but rested its case following accused's pleas of guilty (R. 8).

4. The defense likewise presented no evidence but accused, through counsel, made an unsworn statement in which he admitted his guilt of the offenses charged. He asserted that his previous character had been good and that he had never been subjected to any disciplinary action. He was a lifelong resident of Birmingham, Alabama, and, after being graduated from high school there, attended a local college for one year. Following his enlistment in the Army Air Corps in 1942 he completed training as an aviation cadet at Childress Army Air Field and finished fifth in the class. Because of his proficiency and his high standing in his courses he was retained as an instructor "in AT-11's". While stationed at Childress in that capacity, he married. In March, 1945, he was transferred to Las Vegas Army Air Field as a bombardier and student in the gunnery school. At Las Vegas he began to gamble and his losses resulted in heavy debts and caused him to write the checks involved in the present case (R. 9-10).

5. Specifications 1 and 2, Charge I, allege the presentation of two false claims against the United States, in violation of Article of War 94, and Specifications 1 to 5, Charge II, allege the making and uttering of five worthless checks, in violation of Article of War 95.

The accused pleaded guilty to the Charges and Specifications and, after an explanation by the law member of the effect of his pleas, asserted his desire that they stand. He also expressly admitted guilt in his unsworn statement. There is nothing in the record inconsistent with the pleas nor any indication that they were improvidently entered. Since the material allegations of the Specifications sufficiently allege the offenses sought to be charged and are admitted by the pleas of guilty, the record of trial is legally sufficient to support the findings and the sentence. CM 248032, Johnston, 31 BR 91.

6. The accused is about 20 years and 10 months of age having

been born 29 October 1924 in Birmingham, Alabama. War Department records indicate that he completed the 12th grade in school. He enrolled in the Army Air Corps Enlisted Reserve on 4 November 1942 and entered upon active duty as a private on 31 January 1943. The following June he commenced training as an aviation cadet and, upon completing the course in July, 1944, he received a commission as a temporary Second Lieutenant of the Army of the United States. Disciplinary action under Article of War 104 was taken against him on 16 October 1944 for violating local regulations by failing to sign the register when leaving the post and returning thereto, and for absenting himself from his place of duty for twelve hours. Correspondense in his 201 File indicates that he is estranged from his wife and, according to her allegations, has failed to support her.

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 Article of War 94 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Robert J. Connor, Judge Advocate.

Samuel J. Morgan, Judge Advocate.

SPJGN-CM 284595 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 Philip E. Powers, Jr. (O-2063195), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, presenting two false claims against the United States, in violation of Article of War 94; and of making and uttering five checks knowing he did not have and not intending to have sufficient funds in the drawee bank for payment and thereby fraudulently obtaining the sum of $90, in violation of Article of War 95. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for seven years. The reviewing authority approved the sentence, but reduced the confinement to two years, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof.

When accused was transferred from Childress, Texas, to Las Vegas, Nevada, about 30 March 1945, he traveled by government plane as far as Long Beach, California, and by rail the remainder of the way. Although entitled only to mileage of $26.08 for the distance traveled by rail he submitted a voucher for $89.35 asserting that he had made the whole trip by private conveyance. He defended his action when questioned on the ground that it was "common practice in the Army". Despite the fact that he had only two hours and twenty minutes flying time during May, 1945, he included in his voucher $75 for flying pay. A minimum of four hours was required for him to draw such pay. A few days after being paid he refunded, apparently on his own initiative, this money to the Finance Office.

While stationed at Las Vegas he did considerable gambling, lost heavily and wrote a number of checks on his account, principally to gambling houses, without having sufficient funds in the bank for payment. In April 1945 he received an administrative reprimand for writing two worthless checks and the present charges include five checks totaling

$90. He has also received punishment under the 104th Article of War on two occasions for absences without leave of a few hours.

I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and the confinement be reduced to one year, that the sentence as thus modified be ordered executed, and that a United States Disciplinary Barracks 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 and confinement reduced to one year. GCMO 439, 21 Sept 1945).

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

SPJGK - CM 284596

23 AUG 1945

UNITED STATES	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	)	
First Lieutenant CLYDE A. HUFF (O-698434), Air Corps.	)	Trial by G.C.M., convened at Victorville Army Air Field, Victorville, California, 28 July 1945. Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Clyde A. Huff, Air Corps, Squadron N, 3035th Army Air Forces Base Unit, did, without proper leave, absent himself from his command at Victorville Army Air Field, Victorville, California, from about 17 June 1945 to about 26 June 1945.

He pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence was introduced of one previous conviction by general court-martial for two prior absences without leave for periods of 4 days and 6 days, respectively, for which the sentence as adjudged on 18 May 1945 and subsequently approved, provided for a forfeiture of $100 per month for six months. In the instant case he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 18 months. The reviewing authority approved the sentence but remitted the confinement, and forwarded the record of trial for action under Article of War 48.

3. For the Prosecution.

The prosecution introduced into evidence without objection a duly authenticated extract copy of the morning report of Squadron N, 3035th Army Air Forces Base Unit, Victorville Army Air Field, Victorville, California,

containing entries showing accused as absent without leave from his station at Victorville Army Air Field, Victorville, California, from 2000 hours on 17 June 1945 to 1400 hours on 26 June 1945 (R. 6, Pros. Ex. 1).

4. For the Defense.

Captain George R. Crisler, Medical Corps, was called as a witness and testified in substance as follows:

He "has had experience in making psychiatric evaluations of Army Personnel" and was the officer in charge of Ward 1, "where flying personnel are treated, and where psychiatric evaluations are made" (R. 8). Accused became his patient upon entry into the hospital on 26 June 1945 for medical consultation, diagnosis and treatment (R. 8,9,12). On the basis of medical history elicited from accused, some of which has been confirmed and other which has not, his present and final diagnosis in the "light" of AAF Letter 110-11 dated 7 July 1945 is:

> "* * * operational fatigue manifested by dipsomania, restlessness, disillusionment, and fatalistic attitude. Predisposition, mild; stress, adequate, as represented by fifty B-24 missions, six and one-half months overseas in Italy, and a flack injury" (R. 10,11).

The history upon which the diagnosis was based was read to the court and is as follows:

> "Returned to the United States after six and a half months in the NATO. Finished fifty B-24 missions; one flak injury; other crew members received only minor injuries; returned to the United States end of September 1944; has been on this field since February 1945; came here from Ellington Field, where he had been previously stationed. He has repeatedly requested reassignment to combat duty. Disillusioned by apparent apathy of civilians and other Air Force personnel. He has drunk no more than other members of his outfit on combat duty. No military police record during combat, or previous. No civilian prison record. No sexual aberrations. Very satisfactory home environment. He completed high school and entered the army promptly. After return from overseas, began drinking excessively many times by himself. He wished to be alone a significant portion of the time. Has had some sleep disturbance; no frank nightmares. He does not believe he is particularly nervous, only 'restless and disillusioned.' He is bothered especially when he is not fully occupied."

> "Has knowledge of the contents of War Department Pamphlet 20-5 and solicited medical aid on Flight Surgeon Sick Call on 24 April 1945. He was simply advised at that time to 'stop drinking entirely and work the problem out for himself.' He lapsed into habitual

drinking to excess. The present episode occurred on June 16. He began drinking in a bar at Victorville with a friend. He became separated from his friend and became intoxicated so he does not recall many details. He has not a very good idea of what happened all the next week which he spent in hotels at San Bernardino and Riverside. On June 25 he stopped drinking entirely in preparation for returning to this base. He reported voluntarily to Squadron N's Commanding Officer at Squadron N headquarters. He was sent to consult with the Post Adjutant, who in turn sent him to the hospital. This history is to June 26, and subsequently was enlarged and elucidated on 20 July, which was necessary in an attempt to comply with AAF Letter 110-11, dated 7 July 1945."(R. 9-10).

Witness stated that the records show accused had previously solicited medical advice in regard to dipsomania but it was his (witness') opinion that he did not receive adequate treatment at that time (R. 10).

On cross-examination witness testified that he had made no recommendation of additional treatment or disposition because accused was still being treated and such recommendation at this time would be premature (R. 12). Legally, accused knows the difference between right and wrong and has the ability to adhere to the right (R. 12).

In reply to questions by the court witness stated that he was "adequately convinced in [his] own mind because of [accused's] previous record as given to [him] by [accused], that is as adequately as [he] had facilities to check it" that the condition he found accused suffering was a direct result of his overseas experience (R. 13). He would recommend at the present time that the same type of treatment accused has been having, "consisting of any measures which can be enlisted to decrease the liberating of nervous energy coupled with any measures which can be found which will be found to dissipate nervous energy," be continued (R. 13).

By stipulation a portion of accused's Form 66-2 was read into evidence showing: "... Duties: Nav. B-24. Dr, Pilotage, 50 miss. 290 combat hrs. 305 hrs. total time ..." and that he has received the following awards: "Purple Heart, EAME Th. Ribbon w/3 stars. Air Medal." (R. 7).

The accused, having been fully advised of his rights to testify, elected to remain silent (R. 14).

5. The entries contained in the extract copy of the morning report introduced into evidence by the prosecution, constituted prima facie evidence of accused's guilt of absence without leave for the period alleged in the Specification (par. 117, MCM 1928). The defense made no attempt to contradict the evidence for the prosecution but offered by way of explanation the psychiatric condition of accused, diagnosed as "operational fatigue". It

is clear from the evidence, however, that the accused knows the difference between right and wrong and has the ability to adhere to the right. The evidence of record establishes beyond a reasonable doubt the guilt of accused as alleged. Accused's combat record of fifty missions is patently no legal defense to his alleged misconduct.

6. War Department records disclose that this officer is 23 years of age, single, and is a high school graduate. He entered the service on 16 September 1940 when 18 years of age, attaining the grade of staff sergeant prior to appointment as an aviation cadet. On 13 November 1943 he was appointed a temporary second lieutenant in the Army of the United States and "having clearly demonstrated /his/ fitness for promotion by outstanding performance in actual combat" was promoted to first lieutenant on 23 July 1944. On 6 June 1944 he was awarded the Purple Heart for wounds received in action in France on 25 May 1944. On 24 June 1944 he was awarded the Air Medal and on 20 July 1944, 19 August 1944, and 29 August 1944 he was awarded Oak-Leaf Clusters. On 29 November 1944 he was reprimanded and a forfeiture of $40 was imposed on him under the provisions of Article of War 104 for absence without leave from 9 November 1944 to 12 November 1944. The Staff Judge Advocate in his review states that on 29 March 1945 he was punished under the provisions of Article of War 104 for absence without leave and sentenced to a forfeiture of $80.00 of his pay. Accused was convicted by a general court-martial on 18 May 1945 for absence without leave from 16 April to 20 April 1945 and from 3 May to 9 May 1945 in violation of Article of War 61, the sentence as approved providing for a forfeiture of $100 per month for six months.

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

[illegible], Judge Advocate

Charles A. [illegible], Judge Advocate

(On Leave), Judge Advocate

Charles L. Sykes, Judge Advocate

SPJGK - CM 284596 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 First Lieutenant Clyde A. Huff (0-698434), Air Corps.

2. Upon trial by general court-martial this officer pleaded not guilty to and was found guilty of absence without proper leave for nine days in violation of Article of War 61. Evidence was introduced of one previous conviction by general court-martial for two prior absences without leave for periods of four days and six days, respectively, for which the sentence as adjudged on 18 May 1945 and subsequently approved provided for a forfeiture of $100 per month for six months. In the instant case he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for eighteen months. The reviewing authority approved the sentence but remitted 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 that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence.

This officer is 23 years of age, single, and is a high school graduate. He entered the service on 16 September 1940 at the age of 18, attaining the grade of staff sergeant prior to appointment as an aviation cadet. On 13 November 1943 he was appointed a temporary second lieutenant in the Army of the United States and for outstanding performance in actual combat was promoted to first lieutenant on 23 July 1944. On 6 June 1944 he was awarded the Purple Heart for wounds received in action in France on 25 May 1944. On 24 June 1944 he was awarded the Air Medal, and on 20 July 1944, 19 August 1944, and 29 August 1944 he was awarded Oak Leaf Clusters. Having completed fifty B-24 missions overseas he was returned to the United States the latter part of September 1944. On 29 November 1944 he was reprimanded and a forfeiture of $50.00 was imposed on him under the provisions of Article of War 104 for absence without leave of three days. The Staff Judge Advocate in his review of the case now under consideration states that on 29 March 1945 he was again punished under the provisions of Article of War 104 for absence without leave by the imposition of a forfeiture of $80.00 of his pay. Accused was convicted by a general court-martial on 18 May 1945 for absence without leave on

two separate occasions of four and six days, respectively, in violation of Article of War 61. The approved sentence in that case involved a forfeiture of $100 of his pay per month for a period of six months. This office has been advised by teletype from the Office of the Commanding General, Army Air Forces, Western Flying Training Command, that accused, pending the review of the record of trial in the case now under consideration, again absented himself without leave from his station for one week, from 8 August until his voluntary return 15 August 1945. Despite the repeated and persistent misconduct of accused, in view of his excellent combat record and the diagnosis of his condition as shown by a psychiatric examination which is as follows:

> "*** operational fatigue manifested by dipsomania, restlessness, disillusionment, and fatalistic attitude. Predisposition, mild; stress, adequate, as represented by fifty B-24 missions, six and one-half months overseas in Italy, and a flack injury"

and the testimony of the psychiatrist that in his opinion accused's condition was a direct result of his overseas experience, I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that the sentence as thus modified be 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.

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 but forfeitures remitted. Sentence as modified suspended during good behavior. GCMO 455, 11 Oct 1945).

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

SPJGQ - CM 284599

3

UNITED STATES	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Victorville Army Air Field, Victorville, California, 25 July 1945. Dismissal and total forfeitures.
First Lieutenant ARTHUR R. KNUTSON (0-1552534), Ordnance.	)	

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 96th Article of War.

Specification 1: In that First Lieutenant Arthur R. Knutson, Ordnance Department, 3035th Army Air Forces Base Unit, did, at Victorville Army Air Field, Victorville, California, on or about 4 May 1945, wrongfully and unlawfully cause certain repairs, to-wit, the removal and installation of a clutch plate, to be made upon his privately owned 1940 Hudson Sedan automobile by the use of Government labor and Government tools.

Specification 2: In that First Lieutenant Arthur R. Knutson, Ordnance Department, 3035th Army Air Forces Base Unit, did, at Victorville Army Air Field, Victorville, California, on or about 25 June 1945, wrongfully and unlawfully cause a United States Army five passenger Plymouth Sedan automobile to be "red lined" and taken temporarily out of service for a period of approximately four (4) days by the removal therefrom of a wheel bearing for the personal use and convenience of him, the said First Lieutenant Arthur R. Knutson.

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

Specification 1: In that First Lieutenant Arthur R. Knutson, Ordnance

Department, 3035th Army Air Forces Base Unit, did, at Victorville Army Air Field, Victorville, California, on or about 25 June 1945, wrongfully, knowingly and wilfully apply to his own use and benefit one front wheel bearing cone, value about One ($1.00) Dollar, and one front wheel bearing cup, value about Forty ($.40) Cents, of the total value of about One Dollars and Forty ($1.40) cents, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that First Lieutenant Arthur R. Knutson, Ordnance Department, 3035th Army Air Forces Base Unit, did, at Victorville Army Air Field, Victorville, California, on or about 20 June 1945, wrongfully, knowingly and wilfully apply to his own use and benefit one gasoline engine type air compressor, value about Two Hundred Thirty Five ($235.00) Dollars, and one spray gun, value about Nine ($9.00) Dollars, of the total value of about Two Hundred Forty Four ($244.00) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 3: In that First Lieutenant Arthur R. Knutson, Ordnance Department, 3035th Army Air Forces Base Unit, did, at Victorville Army Air Field, Victorville, California, on or about 30 June 1945, wrongfully, knowingly and wilfully apply to his own use and benefit one (1) Lorraine driving light, Model 16, of the value of about Ten ($10.00) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 4: In that First Lieutenant Arthur R. Knutson, Ordnance Department, 3035th Army Air Forces Base Unit, did, at Victorville Army Air Field, Victorville, California, on or about 30 June 1945, wrongfully, knowingly and wilfully apply to his own use and benefit one front wheel bearing cone, value of about One ($1.00) Dollar, and one front wheel bearing cup, value about Forty ($.40) Cents, of the total value of about One Dollar and ($1.40) Forty Cents, property of the United States, furnished and intended for the military service thereof.

Specification 5: In that First Lieutenant Arthur R. Knutson, Ordnance Department, 3035th Army Air Forces Base Unit, did, at Victorville Army Air Field, Victorville, California, on or about 2 July 1945, wrongfully, knowingly and wilfully apply to his own use and benefit two Firestone, 6.50 x 16, 6 ply motor vehicle tires, value about Eighteen ($18.00) Dollars each, and two inner tubes, value about One ($1.00) Dollar each, of the total value of about Thirty Eight ($38.00) Dollars, property of the United States, furnished and intended for the military service thereof.

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

sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct, for eighteen (18) months. The reviewing authority approved the sentence, remitted the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. Specification 1, Charge I

It was stipulated in writing that if Technical Sergeant Keith were called as a witness he would testify that he was on duty as a mechanic at the Station Motor Pool, Victorville Army Air Field, and that the accused was the Motor Maintenance Officer. On or about 4 May 1945, at the direction of the accused, he removed an old clutch plate and installed a new one in a 1940 Hudson sedan owned by the accused. The work required ten hours labor and was performed at the Station Motor Pool during regular working hours. Government tools were used but the parts were furnished by the accused. Technical Sergeant Keith received no personal remuneration for this work for the accused (R. 7; Pros. Ex. 1).

Specification 2, Charge I; Specifications 1 and 4, Charge II

Technical Sergeant Kazlouski was the acting assistant shop foreman in the station garage (R. 13). During the latter part of June 1945, about 25 June 1945, he saw the accused at the Station Motor Pool taking the right front wheel off his Hudson two door sedan (R. 9, 13). He helped the accused and removed a worn out bearing from the wheel which he handed to the accused, who said "Let's get one" (R. 13, 14). "They didn't have any" in the parts room (R. 14). Private First Class Sherer was working at the Motor Pool on a Plymouth staff car in accordance with a work order for relining the brakes and installing a new horn (R.9). The accused said, "Let's see if the bearing will fit" (R. 14), and asked Private First Class Sherer to remove a wheel bearing from the right front wheel of the staff car (R. 9, 10). He removed the bearing and gave it to the accused (R. 10). Technical Sergeant Kazlouski put it in the brake drum of the wheel from accused's car (R. 14). It did not fit but at the accused's suggestion they got shim stock and installed the bearing (R. 14). After the bearing was installed the accused's car ran (R. 14). With the exception of the brakes the Plymouth staff car was in good order and about three hours were required to repair the brakes (R. 9). It had to be put on the "deadline" for two or three days (R. 15) or three or four days because it was "out of running order on account of the bearing" (R. 10). There was nothing else the matter with this car (R. 10).

On 26 June 1945 Major Maynard, the Property Maintenance Officer, called Corporal Wright, the "parts man" in the motor repair shop, about a property issue slip (R. 35, 41, 42). Corporal Wright asked the accused what he should order and the accused gave him the information (R. 41). He made out a property issue slip for "Cone, Front Wheel Bearing" and "Cup, Front Wheel Bearing" which was a complete bearing assembly (R. 41, 43, 44; Pros. Ex. 8). This was for a Plymouth staff car on the "PLM line" (R. 41). Corporal Wright wrote the accused's signature and his own initials on the

property issue slip and took it to Major Maynard, but the bearing was not delivered to him and he never saw it (R. 42, 43; Pros. Ex. 8). A few days later the accused handed Technical Sergeant Kazlouski a new bearing and said, "Here's a new bearing, will you put it in?" (R. 15). The Sergeant then had the old bearing removed from accused's car and the new one put in (R. 15, 16). He gave the old bearing to Private Deehl who replaced it in the staff car. The staff car then went out (R. 15). It was stipulated in writing that the market value of each front wheel bearing cone and cup in the vicinity of Victorville, California, on the dates involved was $1.40 (R. 52; Pros. Ex. 11).

Specification 2, Charge II

In the latter part of May 1945 the accused told Master Sergeant Jones, the shop foreman at the Motor Pool, that he would like to have him paint his car on a Sunday (R. 17, 18, 19). The accused mentioned that he would use an air compressor and paint gun from the garage and bring it back Monday (R. 19). Master Sergeant Jones painted the accused's car at his (Jones') place using a portable compressor and a regular paint spray gun which the accused brought in his car (R. 20). The air compressor was "O.D." color and one of the same type was issued to the Station Motor Pool (R. 20). Four or five of the same type of paint guns were also issued to the Motor Pool (R. 21). When Master Sergeant Jones finished the job he took the air Compressor and the paint gun to the accused's house (R. 22). On 10 July 1945 he, Staff Sergeant White, a criminal investigator, and a Mr. Boomer picked up the air compressor and paint gun at the accused's home in Colton, California (R. 22, 23, 24, 25; Pros. Ex. 2). He identified the paint gun because it still had blue paint on the outside (R. 22). The accused was responsible for this property which was charged to him on a Memorandum Receipt (R. 22, 23). It was stipulated in writing that on or about 20 June 1945, the gasoline engine type air compressor and the spray paint gun had market value of $235 and $9, respectively, in the vicinity of Victorville, California (R. 52; Pros. Ex. 11).

Specification 3, Charge II

On or about 30 June 1945 the accused brought an adjustable driving light of a type used on "regular ordnance vehicles" to Private First Class Gregg, a painter in the motor repair shop at the motor pool (R. 26, 28). The accused said "Take the paint off this light" and a sergeant said to paint the base blue (R. 28). The light was olive drab-color but when he removed the paint it was chromium plated (R. 26, 27). He then painted the base blue and left the light in the maintenance room (R. 27). Corporal Wright, the "parts man" in the motor repair shop, saw the accused and Master Sergeant Jones installing a spotlight on the accused's car on 30 June 1945 (R. 40). Previously he had seen Sergeant Gray working on the same or similar spotlight in the tool room (R. 40). In the early part of July Private First Class Gregg saw the light on the accused's car and identified it. The light, bearing the trademark "Lorraine" was introduced in evidence (R. 27, 28; Pros. Ex. 3).

It was stipulated in writing that on or about 30 June 1945 in the vicinity of Victorville, California, the Lorraine driving light had a market value of $10 (R. 52; Pros. Ex. 11).

Specification 5, Charge II

Corporal Espinosa's duty was to replace and repair tires in the tire repair shop (R. 29). Shortly before 30 June 1945 he obtained eight tires from the warehouse and mounted them on tug wheels (R. 29, 30). Immediately after he checked the tires out of the garage the accused designated two new tires and told him to take them to the parts room (R. 30). The tires were marked "Military" (R. 31, 34). This was on a Saturday in the latter part of June and he never saw the tires again (R. 31, 34). On or about 30 June 1945 Corporal Wright, who was in charge of the parts room, saw Corporal Espinosa bring two 6.50 x 16 heavy duty, six ply tires marked "Military" into the parts room (R. 35). Tires were not ordinarily stored in the parts room (R. 36). On or about 2 July the accused told Corporal Wright to put the tires in the accused's car (R. 36). He put the tires in the trunk of the accused's car, closed the trunk and never took them out (R. 36). He wrote the numbers of the tires on a piece of paper (R. 37, 38; Pros. Ex. 5), and identified the two tires by their serial number. They were introduced in evidence. (R. 38, 39; Pros. Exs. 6, 7).

On the same day that Corporal Espinosa put the tires in the parts room the accused asked him to get some inner tubes for him (R. 31). He got government inner tubes, size 6.50 x 16, at the tire shop, and put them in a box which he placed on the accused's desk (R. 31, 32). He did not know what became of the tubes and never saw them again (R. 32, 34). He identified the box and the tubes, which were introduced in evidence (R. 32; Pros. Ex. 4). The accused was the officer in charge of the safekeeping and distribution of the tires and tubes (R. 33).

It was stipulated in writing that if First Lieutenant Stone, the Police and Prison Officer and Assistant Provost Marshal, were called as witness he would testify that on 19 July 1945, while investigating discrepancies in the automotive repair department, he removed two new 6.50 x 16 Firestone motor vehicle tires and two used tire tubes from the trunk compartment of accused's car. The tires were marked "United States Army Air Corps" (R. 44; Pros. Ex. 9). It was stipulated in writing that on or about 2 July 1945 in the vicinity of Victorville, California each tire had a market value of $18 and each inner tube a market value of $1 (R. 52; Pros. Ex. 11).

On 10 July 1945 Captain Albright, claims officer and investigating officer, was investigating alleged discrepancies at the Station Motor Pool (R. 45). At this time the accused was not under charges (R. 46). Captain Albright warned the accused of his rights under Article of War 24 (R. 46). The accused made an oral statement which was taken down in shorthand by Sergeant Winkle and sworn to and signed by the accused on the same day (R. 45-49). The statement of the accused was received in

evidence (R. 51; Pros. Ex. 10). The accused was assigned as motor maintenance officer on 15 September 1944 and his specific duty was to supervise all maintenance of vehicles up to echelon 4 (Pros. Ex. 10, page 1). He owns a 1940 Hudson. The two tires found in it on 9 July 1945 are owned by the United States Government and had been there for approximately two weeks (Pros. Ex. 10, page 1). He requisitioned the tires from Ordnance supply on a property issue slip and while they were in the tire repair shop he ordered Corporal Wright to place them in his car (Pros. Ex. 10, page 2). He intended to use them for his own personal use but never did so because he "got cold feet" (Pros. Ex. 10, page 2). The two 6.50 x 16 tubes found in his car were owned by the United States Army and were obtained from the tire repair shop (Pros. Ex. 10, page 5). About 25 June he had trouble with the wheel bearing in his right front wheel and directed Private Sherer to remove the wheel bearing from a Plymouth staff car. The accused put the bearing in his wheel (Pros. Ex. 10, page 3). There was no other bearing in stock and the staff car was "redlined" (Pros. Ex. 10, page 4). Subsequently he requisitioned a wheel bearing for the staff car stating that it was necessary to place a "redlined" car back in service. The staff car was "redlined" two or three days. The new bearing was placed in the accused's car by Sergeant Kazlouski and the old one was replaced in the staff car. This work was done during regular working hours on Government time (Pros. Ex. 10, page 4). The Lorraine driving light on his car was removed from a Government vehicle. It had been painted "Army O.D." but on accused's order the paint had been removed by Gregg, a man in the paint shop. The accused knew the light was Government property and installed it on his car (Pros. Ex. 10, pages 4, 5). About 4 May he had trouble with the clutch on his car and ordered Sergeant Keith to remove the clutch and replace it. This was done on Government time during regular working hours (Pros. Ex. 10, pages 5, 6). He had an air compressor and paint gun, the property of the Government, in his home for about three weeks. They were signed out to him on a "memo receipt" from Ordnance but there is no receipt to show that the property is in his home (Pros. Ex. 10, pages 6, 7). He has never sold any parts or materials to anyone and has never received any financial benefits from misappropriation of Government materials (Pros. Ex. 10, page 5).

4. The accused after having his rights explained to him elected to make a sworn statement limited to his military record and family background (R. 53). He is 29 years old and has been in the Army for four and a half years and has served overseas (R. 54). He is married and has four children between the ages of seven months and six years (R. 54). He has no income except from the Army and his wife and her parents are not able to support his wife and children (R. 54). His parents died when he was three and a half years of age (R. 54). He lived with his grandmother until he was 14 and then lived at boarding houses (R. 54). He has supported himself since he was 14 years of age (R. 55). He received a commendation on 4 September 1944 from Colonel C. W. Pyle, Air Corps, Commanding Officer of Mather Field, Sacramento, California (R. 55; Def. Ex. A).

The WDAGO Form 66-2 of the accused showed two efficiency ratings of

"Superior" and six of "Excellent" (R. 56; Def. Ex. B). Major Maynard has been Automotive Equipment and Maintenance Officer since 22 December 1944 and the accused has served under him since that date (R. 57). The accused's efficiency rating is "Excellent" (R. 57). He rated the accused on his ability as a mechanic, as a leader of men and "the ability to get the job done" (R. 58). The morale of the men in the Ordnance Department is just as good as any other department that he has seen at Victorville (R. 59).

5. The evidence sustains the findings of guilty. The accused was convicted of wrongfully and unlawfully causing repairs to be made to his private automobile by the use of Government labor and tools, of causing a United States Army vehicle to be taken out of service for a period of approximately four days by removing from it a wheel bearing for his own personal use and convenience in violation of Article of War 96, and of five Specifications of wrongfully, knowingly and willfully applying to his own use and benefit the various items of property of the United States specified, all furnished and intended for the military service, in violation of Article of War 94. The accused was Motor Maintenance Officer at the Station Motor Pool, Victorville Army Air Field. On or about 4 May 1945 at his direction an enlisted man removed an old clutch plate from the accused's private car and installed a new one, furnished by the accused. The work was performed at the Station Motor Pool during regular working hours, required ten hours and was performed with Government tools. About 25 June the accused had a wheel bearing removed from a staff car and installed in his private car. He then requisitioned a new wheel bearing for the staff car but when it was delivered had it installed in his private car and had the old wheel bearing replaced in the staff car. As a result of the removal of the wheel bearing the staff car had to be taken out of service and "redlined" for three to four days. The accused took an air compressor and paint spray gun from the Motor Pool, which were used by an enlisted man to paint the accused's private car, by the accused's orders. He also took a Lorraine driving light from a Government vehicle, had the olive drab paint removed and installed it on his private car. He caused two new tires, the property of the Government, to be placed in the trunk of his car and secured two used inner tubes, also the property of the Government, from the tire shop. The tires and the tubes were found in the accused's car.

In a voluntary statement to an investigating officer the accused admitted all the acts with which he was charged but stated that he did not use the tires and tubes for his personal use because he "got cold feet". He testified only as to his military record and family background.

A motion was made by Defense Counsel for a finding of not guilty of Specification 5 of Charge II on the ground that there was no proof that the accused received any use or benefit from the two tires and tubes (R. 52, 53). It was argued that the accused was charged with the tires and tubes and that the proof showed they were put in, but not on, his car (R. 53). In CM 247303, Pruttsmith, 30 BR 315, 319, where the offense was charged as a violation of Article of War 96, under similar facts and the

proof, after a plea of guilty, showed that the tire had never been used, the Board of Review said, "All elements of the offense were proved beyond reasonable doubt". The misapplication of the tires and tubes for the use and benefit of the accused was complete when they were removed from their proper place of storage and placed in the accused's car. His custody of such property for military use did not authorize or entitle him to divert it to personal use nor to exercise over it an act of dominion consistent only with intended personal use. The motion for a finding of not guilty of Specification 5 of Charge II was properly denied.

The act of an officer in having work done on his private car by personnel under his command as such officer, on Government time and with Government tools, is conduct to the prejudice of good order and military discipline and constitutes a violation of Article of War 96 (CM 261505, Allen, 40 BR 267) as is the act of an officer causing a Government vehicle to be rendered unfit for service by removing a part therefrom for his own personal use.

6. War Department records show that the accused is 29 years of age and married. He has four children. He is a native of Iowa and a resident of Council Bluffs, Iowa. He is a graduate of high school. In civilian life he was employed in Council Bluffs, Iowa as a salesman of auto accessories from February 1940 to February 1941, as a salesman of household appliances from 1938 to 1940 and as service manager and mechanic in a garage from 1931 to 1938. He served in the Iowa National Guard from 8 August 1931 to 7 August 1934, and from 13 September 1937 to 12 September 1940. He enlisted in Iowa National Guard on 15 January 1941 and served on active duty in enlisted status from 10 February 1941 to 31 July 1942, attaining the grade of staff sergeant. On 1 August 1942 he was appointed a Warrant Officer, Junior Grade, with the classification "Administrative-Supply" and served as supply officer with Headquarters Company, 34th Infantry Division. On 2 January 1943 he was appointed a second lieutenant upon graduation from Ordnance Officer Candidate School, Ordnance School, Aberdeen Proving Ground, Maryland, and ordered to active duty in Ordnance. He was promoted to the grade of first lieutenant on 26 May 1944. He has served in commissioned status as Assistant Ordnance Officer, Motor Maintenance Officer and Motor Transportation Officer. He graduated from the Automotive Mechanic Course, Fort Crook, Nebraska. He served overseas in Northern Ireland from February to September 1942 as an enlisted man and warrant officer, junior grade.

7. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of accused were committed. 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 94 and Article of War 96.

On Leave
_____, Judge Advocate

_____, Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ-CM 284599 1st Ind.

Hq ASF, JAGO, Washington 25, D. C. AUG 27 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 Arthur R. Knutson (O-1552534), Ordnance.

2. Upon trial by general court-martial this officer was found guilty of using the time of enlisted personnel under his command and Government tools to effect repairs upon his private automobile (Specification 1, Charge I), and of causing an Army automobile to be unfitted for use by having a part removed therefrom and installed in his private automobile (Specification 2, Charge I), both in violation of the 96th Article of War (Charge I); also of five Specifications of wrongful misapplication to his own personal use of military property, consisting of two wheel bearing cones and cups each of the value of $1.40 (Specificatinns 1 and 4, Charge II), an air compressor of the value of $235 and a spray gun of the value of $9 (Specification 2, Charge II), an adjustable driving light of the value of $10 (Specification 3, Charge II), and two automobile tires of the value of $18 each and two inner tubes of the value of $1 each (Specification 5, Charge II), all of the aggregate value of $294.80, all in violation of the 94th Article of War (Charge II). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for eighteen months. The reviewing authority approved the sentence, remitted the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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.

The accused officer was an automotive maintenance officer at Victorville Army Air Field, Victorville, California. While so assigned, on 4 May 1945, he caused an enlisted mechanic under his orders to expend about ten hours time during regular duty hours, using Government tools, in the removal and installation of a clutch plate, furnished by the accused, upon the accused's private automobile. On 25 June 1945, he caused an enlisted mechanic under his orders to remove a wheel bearing from an Army staff car and install the bearing in the accused's private automobile, thus rendering the Army car unfit for service for three or four days while a new bearing was procured. Having requisitioned a new bearing for the staff car, the accused then, on 30 June 1945,

caused the new bearing to be installed in his own car and the old bearing returned to the staff car. On 20 June 1945, he caused a gasoline engine type air compressor and spray gun issued to him from Ordnance on memorandum receipt to be used by an enlisted man under his command to paint the accused's own car, this equipment being then taken to the accused's own residence, where it was found and recovered about 10 July 1945. About 30 June 1945, he caused an adjustable driving light to be removed from a Government vehicle, the olive drab paint removed therefrom and the base of the light painted blue to match his car, by an enlisted man under his orders, and the light installed on his private car. About 2 July 1945, accused caused two Firestone automobile tires and two inner tubes, military property, to be removed from the motor parts stores and placed in the trunk compartment of his own car by an enlisted man under his orders, with the intention of using them on his own car. This intention was not carried into effect, as the accused became apprehensive about actually putting the tires into use on his car, and they were found and recovered, unused, in the trunk compartment of his car. The aggregate values of the items misappropriated amounted to $294.80, detailed as mentioned in a foregoing paragraph hereof.

The case is one of continued petty pilferage of military property and services entrusted to the accused for military use, wherein he has exhibited no higher appreciation of his responsibilities nor greater fidelity to his trust than to abuse his position and authority for his personal advantage, subverting for that purpose, and distracting from their proper duties, enlisted personnel under his command. The Staff Judge Advocate recommended and the reviewing authority concurred in remitting the confinement on the basis of prior excellent military record of the accused and his civilian background. I recommend that the sentence as approved by the reviewing authority be confirmed, but that the forfeitures be remitted, and that the sentence as thus modified be 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 as approved by reviewing authority confirmed but forfeitures remitted. GCMO 443, 21 Sept 1945).

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

SPJGH-CM 284646

1 SEP 1945

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Dale Mabry Field, Tallahassee, Florida, 25 July 1945. Dismissal.
Second Lieutenant KENNETH V. MANN (O-820534), Air Corps.	)	

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

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

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

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

Specification 1: In that Second Lieutenant Kenneth V. Mann, Squadron R, 335th AAF Base Unit, Dale Mabry Field, Tallahassee, Florida, was at Tampa, Florida, on or about 17 June 1945, in a public place, to-wit, The Big Orange, a drive-in, drunk and disorderly while in uniform.

Specification 2: In that Second Lieutenant Kenneth V. Mann, * * *, did at Tampa, Florida, on or about 17 June 1945, in a public place, to-wit, The Big Orange, a drive-in, use violent, abusive and profane language toward Mrs. Doris Zimmerman, to-wit: "I would like for somebody to fuck her so bad she wouldn't be able to walk when she got up", and "I wish I could see you hung up to a tree raped so much that it would be drooling out of your mouth".

Specification 3: In that Second Lieutenant Kenneth V. Mann, * * *, did at Tampa, Florida, on or about 17 June 1945,

in a public place, to-wit The Big Orange, a drive-in, drink intoxicating liquors with an enlisted man, to-wit: Corporal Clovis Anderson.

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

Specification: In that Second Lieutenant Kenneth V. Mann, * * *, having been duly placed in arrest of quarters at Dale Mabry Field, Tallahassee, Florida, on or about 19 June 1945, did, at Dale Mabry Field, Tallahassee, Florida, on or about 7 July 1945 break his said arrest before he was set at liberty by proper authority.

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

3. Inasmuch as the first three offenses were committed during a continuous sequence of events, the evidence offered by the prosecution and pertaining thereto will be summarized together while that pertaining to the offense last alleged will be summarized under a separate heading.

a. Charge I, Specifications 1, 2, 3:

Around 1 or 1:30 p.m. on 17 June 1945, accused and an enlisted man, both of whom had been drinking, arrived at "The Big Orange", a drive-in stand in Tampa, Florida, where food and both soft and alcoholic drinks were served. Accused, who was dressed in officer's uniform and wore the insignia of his commissioned rank, and the enlisted man occupied adjoining stools, commenced conversing and purchased alcoholic drinks, accused being served some six or seven whiskeys and sodas over a period of time. Eventually accused approached an automobile parked near the stand and began to talk to a woman seated therein. Her husband was telephoning at the time and when he returned he asked accused to leave the automobile. Accused smelled of alcohol and appeared to be drunk to two customers seated at the stand. Accused informed one of the customers he had been drinking since 3 p.m. the previous day.

Mrs. Doris Zimmerman, a waitress at the stand, refused to serve the enlisted man any more drinks after he spilled one. He and the accused then commenced to vilify the waitresses, referring to them as "low down girls, hussies." Military police arrived about this time but departed when told that matters had quieted down. Finally Mrs. Zimmerman refused to serve accused any more to drink. Accused then sought to induce the other waitress to serve him but she refused and when accused commenced to argue with her she walked away. Accused then turned to Mrs. Zimmerman and began using vulgar and profane language as

he addressed her. When she again flatly refused to serve him a drink he made the following disgusting statement to her: "I wish I could see you hung up to a tree raped so much that it would be drooling out of your mouth." Mrs. Zimmerman then asked the other waitress to have the military police summoned. Thereafter referring to Mrs. Zimmerman, accused audibly made the filthy remark to the enlisted man with him that "I would like for somebody to fuck her so bad she wouldn't be able to walk when she got up." Two civilians who heard this detestable language arose and started toward accused but were requested by Mrs. Zimmerman to cause no disturbance inasmuch as the military police would soon be there to handle the situation. Shortly thereafter the military police arrived and escorted the accused and the enlisted man from the stand.

Accused's tie was loosened and his uniform untidy and disarranged. When accused was taken away by the military police he was highly intoxicated. He weaved and staggered as he walked, was hesitant in his speech and his eyes were "bleary" (R. 8; Pros. Exs. A, B, C).

b. Additional Charge, Specification:

It was stipulated by the prosecution, defense and the accused that if Major J. E. Berg, Jr., were present he would testify that he is Commanding Officer of III Fighter Command Ground Training Unit, Dale Mabry Field, that accused was a member of his organization and that at approximately 1000 hours, 19 June 1945, he placed accused in arrest in quarters (R. 8; Pros. Ex. D). Pursuant to the terms of the arrest, accused was restricted to his barracks but was permitted to leave three times daily, for one hour each time, in order to procure his meals (R. 9; Pros. Exs. E, E 1).

At 1900 hours on 7 July 1945 First Lieutenant Bartlett M. Frost saw accused at the Officers' Club apparently using the telephone. Accused later joined Lieutenant Frost's party of four which was gathered around a table in the Hawaiian Room and visited with them intermittently until about 2300 hours. He volunteered the information that he was in arrest of quarters and when asked by one of the party what he was doing at the Officers' Club, he replied in a joking way that he "was breaking arrest" (R. 9-11). Accused was in fact still in arrest at that time (R. 13).

4. After his rights had been explained to him accused elected to give sworn testimony in his own behalf. His testimony may be summarized as follows. Accused met an enlisted man, a Corporal Anderson, at The Big Orange about 0700 hours on 17 June 1945. After having a drink with Anderson and two civilians accused accompanied Anderson to the station hospital at MacDill Field where the latter had an appointment to receive treatment for his feet (R. 17). Thereafter they returned by bus to The Big Orange, arriving about 1230 hours. Seating themselves on adjoining stools they ordered drinks and engaged in small talk. Accused

had about three drinks of whiskey and ginger ale while Anderson had one, each paying for their own drinks (R. 16, 18, 19). Noticing an automobile with a flat tire parked at the stand, accused stepped over to offer his services in changing it but the husband of the woman occupying the automobile soon returned and refused the proferred aid inasmuch as he had already telephoned for assistance (R. 15). Later accused stepped to the rear of the stand and when he returned he found Corporal Anderson and Mrs. Zimmerman having an argument. Military police thereafter arrived, Corporal Anderson apologized to Mrs. Zimmerman and the police left, asking accused to look after Anderson and stating that they would return shortly and take the two to town in order to avoid any more trouble. Accused and Anderson had about two more drinks apiece but the waitress refused to serve Anderson any more after he spilled his second one. Although accused was served a third drink the waitress refused to serve him any more than that. Accused protested this lack of service in an admittedly unpleasant manner, complaining that she still saw fit to serve civilians. When the waitress replied that if he were a civilian she would probably serve him accused became angry and, as he expressed it, "At that point I told her that I was hoping to go overseas, that I hoped that people I was fighting for did not have that type of attitude. I could not see any reason at all for her attitude, that in Germany and Japan in the Concentration Camps people were hung up to trees, women were raped, people were murdered and that all kinds of things were going on" (R. 14). He denied that he was drunk or that he uttered the remarks alleged in Specification 2 of the Charge. Although he was thereafter taken to military police headquarters he was not given any sobriety test (R. 15, 18).

Corporal Clovis A. Anderson testified that he met accused at The Big Orange around 6 or 7 a.m. one morning some several weeks prior to trial of this case (R. 23). Later that morning accused accompanied Corporal Anderson to MacDill Field where the latter kept an appointment to receive treatment at the station hospital. Thereafter they returned together to The Big Orange where accused bought the corporal a bottle of beer (R. 24, 25, 27). Subsequently the corporal spilled a drink served to him and while accused was temporarily absent from the stand the corporal engaged in an argument with the waitress because she refused to serve him another. Thereafter the military police arrived, Corporal Anderson apologized to the waitress and the police left stating that they would return soon and requesting accused to take care of the corporal in the meanwhile. Later when the waitress refused to serve accused another drink, stating, however, that she would do so if accused were a civilian, accused became angry and "told her off a little." Corporal Anderson did not hear accused make the remarks alleged in Specification 2 of the Charge and he did not believe that accused was drunk at the time (R. 24).

Accused admitted in his sworn testimony that he was placed in arrest in quarters by Major Berg being permitted to leave three times

daily for meals (R. 15). Accused stated that on 6 July 1945 he received permission to make a telephone call from a Lieutenant Pill, the adjutant of his organization. No specific day was mentioned on which the call was to be made. On 7 July 1945 accused was at the Officers' Club making a call to Washington. He informed the Alert Officer of his whereabouts as he had been directed to do by Lieutenant Pill and he visited with Lieutenant Ford and his party while waiting for his call to come through. Accused did not remember making any remark about having broken his arrest. He admitted, however, that he had made a voluntary statement to Major Berg in which he admitted that between "1200" (sic) and 0130 hours on the early morning of 8 July 1945 he went for a walk with a young lady (R. 16, 20, 21).

5. To rebut certain evidence presented by the defense with respect to accused's alleged breach of arrest, the prosecution introduced testimony to show that around 1300 hours on 6 July 1945 accused told First Lieutenant Gerald P. Pill, adjutant of his organization, that he wished to make a telephone call to Washington for the purpose of securing defense counsel. Lieutenant Pill understood that the call was urgent and, accordingly, told accused that when he went to the Officers' Club for supper at 6 p.m. he could place his call and if it were not completed by 7 p.m. he could notify the Alert Officer and remain at the club until the call was concluded. Although Lieutenant Pill mentioned no date on which the call was to be made he understood that accused wished to telephone that evening, 6 July 1945, and he intended his permission to cover that evening only (R. 29-31). When later questioned by Major Berg about his activities on the night of 7 July 1945, accused was not offered any promises or subjected to any threats. In response to questions asked, accused stated he understood that he had "blanket permission" to make the telephone call and that it was proper for him to do so on 7 July 1945. He further stated that he was at the Officers' Club from 6 p.m. to about midnight and that thereafter until about 1:30 a.m., 8 July 1945, he was strolling about with a young lady (R. 30).

Second Lieutenant Roy A. Cann, the Alert Officer of accused's organization, testified that about 1900 hours, 7 July 1945, accused called Headquarters and left word for him that he had permission to make a telephone call from the Officers' Club (R. 33). Thereafter, Lieutenant Cann visited accused's quarters four times during the period from 2200 to 2400 hours but could not find accused. He also telephoned the Officers' Club and had accused paged but he did not respond (R. 32).

6. a. <u>Charge I, Specifications 1, 2, 3</u>:

Under Specifications 1, 2, 3 of Charge I accused is charged, respectively, with (a) being drunk and disorderly in uniform at a drive-in stand called The Big Orange, (b) using certain vile and filthy

language toward a waitress at the stand, and (c) drinking intoxicating liquor with an enlisted man while at this stand, all in violation of Article of War 96. The testimony of the waitress and of two customers at the stand as to accused's physical condition and as to their opinion of his sobriety was ample evidence to warrant the court's conclusion that he was drunk. In addition to the disgusting remarks alleged in Specification 2, the evidence indicated that accused uttered other profane and insulting remarks directed at the waitresses at the stand. His uniform was both disarranged and untidy. Accordingly, the record sustains the court's finding of guilty of Specification 1 of Charge I.

The proof also establishes that accused publicly used toward a waitress the vile and abusive language detailed in Specification 2 of Charge I. The use of such base and disgusting language toward a female is clearly conduct of a nature to bring discredit upon the miltary service and is violative of Article of War 96 (CM 234296, Pennington, 20 B.R. 325; CM 249220, Hart, 32 B.R. 61). The record sustains the finding of guilty of this Specification 2.

The evidence also amply demonstrates that accused was in the company of Corporal Anderson on the day in question and that together they visited The Big Orange where they occupied adjoining stools, publicly drinking and conversing one with the other. Under the circumstances here present accused's conduct in drinking publicly with an enlisted man constituted a violation of Article of War 96 (Dig. Op. JAG, 1912-40, sec. 453 (9); CM 234558, Field, 21 B.R. 41; 2 Bull. JAG 342). The record sustains the finding of guilty of this Specification 3.

b. Additional Charge and Specification:

The evidence establishes that on 19 June 1945 accused had been ordered into arrest in quarters by his commanding officer. That arrest must be held to have been legal inasmuch as an arrest is presumed to be legal (MCM, 1928, par. 139a) and there is no evidence in this record rebutting that presumption and indicating that accused's commanding officer lacked the authority to impose it. Accused's defense to this charge was that he understood the permission granted him on 6 July 1945 to make a telephone call was unrestricted as to time and was a "blanket permission" which entitled him to make the call on 7 July 1945. That contention is refuted, however, by accused's own admission, freely made to Lieutenant Frost during the evening of 7 July 1945, that he was breaking arrest by being at the Officers' Club during that evening. Even more conclusive of his guilt was accused's voluntary statement to Major Berg, reaffirmed by accused in his testimony given at the trial, that from around midnight, 7 July 1945, to about 1:30 a.m., 8 July 1945, he was out strolling with a young lady. The permission to make a telephone call did not include, either expressly or by inference,

permission to spend an hour and a half on the early morning of 8 July 1945 on such activities. That conduct was not authorized under the permission granted by Lieutenant Pill and constituted a breach of arrest in and of itself. Accordingly, the record sustains the finding of guilty of this Specification of the Additional Charge.

7. Accused is almost 22 years of age. War Department records reveal that he attended Antioch College for one year and then entered the military service as an Air Cadet on 4 April 1943. On 7 January 1944, after completing the course of instruction at Army Air Forces Pilot School, Spence Field, Moultrie, Georgia, he was commissioned a second lieutenant.

8. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 69 or Article of War 96.

Thomas H. Tappy, Judge Advocate

William H. Gamble, Judge Advocate

Robert E. Trevithick, Judge Advocate

SPJGH-CM 284646 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 10 SEP 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 Kenneth V. Mann (0-820534), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of (a) being drunk and disorderly in public (Chg I, Spec. 1); (b) publicly using certain vile and filthy language toward a waitress (Chg I, Spec. 2); and (c) publicly drinking intoxicating liquor with an enlisted man (Chg I, Spec. 3), all in violation of Article of War 96; and (d) breaking arrest (Add Chg, Spec), 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 may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. On the afternoon of 17 June 1945 accused, clothed in officer's uniform bearing his insignia of grade and accompanied by an enlisted man with whom he had been associating during the morning, visited "The Big Orange", a drive-in stand in Tampa, Florida. Accused and the enlisted man, both of whom had been drinking, proceeded to consume alcoholic drinks until they both became drunk. When one of the waitresses refused to serve the enlisted man any more liquor, he and accused then commenced to vilify and abuse both her and the other waitress, referring to them as "low down girls, hussies." Military police arrived at the stand but soon left when told that matters had quieted down. Thereafter, accused resumed his vilification of the waitresses eventually making to one of them the filthy and disgusting remarks set forth in Specification 2 of Charge I which aroused the wrath of other customers at the stand. In a short time the military police returned and escorted accused from the stand. Accused's tie was loosened, his uniform was untidy and disarranged, his eyes were glazed and he weaved and staggered as he walked off with the military police. After having been placed in arrest on 19 June 1945 and limited to his quarters except for three daily visits of one hour each for meals, on 6 July 1945 accused requested, and was granted, permission to remain after supper at the Officers' Club so long as might be necessary to enable him to complete a long distance telephone call.

The next evening, 7 July 1945, he was at the Officers' Club from 6 p.m. until midnight where he was busy with the telephone for at least a part of the time. During the evening he admitted to another officer that he had broken arrest. From midnight that night to 1:30 a.m. the next morning he was out strolling with a young lady, having been given no permission so to do.

Accused's vile and filthy language toward a female, coupled with his other offenses, conclusively demonstrates his unfitness to remain an officer. It also appears that on 14 December 1944 the accused received punishment under the 104th Article of War for violation of flying regulations and was fined $75 and reprimanded. I recommend that the sentence 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 confirmed. GCMO 436, 21 Sept 1945).

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

SPJGK - CM 284653

20 AUG 1945

UNITED STATES	SIXTH SERVICE COMMAND ARMY SERVICE FORCES
v.	Trial by G.C.M., convened at Fort Sheridan, Illinois, 24 July 1945. Dismissal and total forfeitures.
Captain JOHN P. JONES (0-404305), Medical Corps.	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Captain John P. Jones, Medical Corps, Attached Unassigned, 3612 Service Command Unit, Officer Patient Detachment, Gardiner General Hospital, Chicago, Illinois, did, without proper leave, absent himself from his station at Gardiner General Hospital, Chicago, Illinois, from about 0800 5 March 1945, to about 1500 6 March 1945.

Specification 2: In that Captain John P. Jones, Medical Corps, * * *, did, while enroute from Gardiner General Hospital to Fort Sheridan, Illinois, without proper leave, absent himself from his station at Fort Sheridan from about 7 May 1945, to about 6 June 1945.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service 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 the provisions of Article of War 48.

3. For the Prosecution:

a. As to Specification 1.

About 0800 hours on 5 March 1945, accused absented himself without leave from his station at Gardiner General Hospital, Chicago, Illinois (R. 6;

Pros. Ex. 1). The unauthorized absence was terminated by his return to his station about 1500 hours on the following day (R. 7; Pros. Ex. 2).

b. As to Specification 2.

By Special Orders No. 108, Gardiner General Hospital, 5 May 1945, accused was placed on temporary duty at "ASF Regional Hospital Fort Sheridan Illinois" and directed to proceed to such station on or about 7 May 1945, reporting upon arrival to the commanding officer for duty (R. 7; Pros. Ex. 3). On 7 May 1945, accused signed out at Gardiner General Hospital, at which time he stated to the Personnel Sergeant Major that he was "going to Fort Sheridan to the Station Hospital" (R. 9). Accused failed to report to the Fort Sheridan Hospital on 7 May 1945 or thereafter (R. 11). On 6 June 1945, he went to the home of a medical officer in Chicago, and was returned by the latter to the Gardiner General Hospital (R. 11,12). Upon being asked by the medical officer where he had been, accused stated "that he was not certain; that he had been in Milwaukee and St. Paul, Omaha, and Chicago, during the period of his absence" (R. 13).

4. For the defense.

On 20 June 1945, accused appeared before a sanity board at Gardiner General Hospital (R. 14; Def. Ex. 1). The Board found no evidence of insanity, but diagnosed accused's condition as "Reactive depression, moderately severe" and "alcoholism, acute, periodic" which condition did not exist prior to entering the military service (Def. Ex. 1). Attached to the findings of the Board is a "review of the evidence in the case" which is briefly summarized as follows:

Accused stated that during his unauthorized absence he met friends, drank to excess, and cared not for responsibilities until his system could tolerate no more liquor. Accused had been married in 1934 and lived with his wife and two daughters until his entry on active military duty on 10 February 1941. He went to England in February 1942 and later engaged in campaigns described hereinafter in the summary of accused's testimony. Upon return from overseas in 1944, he learned of his wife's infidelity and divorced her. His unfortunate marital difficulties apparently attributed to his exhibition of "bad judgment."

Accused, after his rights as a witness were explained to him, testified that he is 35 years of age, and that he attended Dakota Western University, University of South Dakota, and Northwestern University Medical School. He practiced medicine in Mitchell, South Dakota, for 2-1/2 years before he entered on active duty with the Army on 10 February 1941. He went overseas on 18 February 1942, and thereafter participated in combat "from Pichon to Kasserene Pass, Sidi Bou Zid, Kef El Ames Pass, Foundouk, Kairowan * * * Beja, Hill 609, Chou Gui Pass, Mateur Faerry" and ended the

campaign "outside of Tunis." Then he made the "Salerno landings on D-Day" and was in action at "Altavilla" and also in action from September 9th until December 9th through Cassino and "up the Italian boot." He was battalion surgeon during the operations and received the Purple Heart and Silver Star. Accused returned to the United States in June 1944 and went to Wichita, Kansas, where he found that his wife had been living with another man for some time. He then brought an action for divorce. Accused was drinking "very much more" than he should have but is now in control of himself and can effectively perform his medical duties (R. 20-27).

It was stipulated that if Herbert E. Hitchcock, former United States Senator from South Dakota, Mabel O. Woods, Superintendent of Methodist State Hospital, Mitchell, South Dakota, Dr. B. A. Bobb, surgeon of Mitchell, South Dakota, Dr. R. A. Weber, past president of State Medical Society of South Dakota, J. W. Bryant, vice-president of Commercial Trust and Savings Bank of Mitchell, South Dakota, and John C. Lindsey, Office of Superintendent of Mitchell Public School, Mitchell, South Dakota, were present they would testify as to accused's good character and reputation, his ability and integrity (R. 27-30).

5. Accused is charged with two offenses of absence without leave, one for 31 hours (Spec. 1) and another for 30 days (Spec. 2).

The evidence for the prosecution, consisting of extract copies of the morning reports of his organization and of direct testimony of witnesses, in no manner contradicted by the defense, amply supports the court's findings of guilty and the sentence. The evidence for the defense, relating to the accused's fine combat record, his marital difficulties which induced his seeking oblivion by excessive use of intoxicating liquor, and his excellent reputation in his home town, is directed toward the mitigation rather than defense of his offenses which were not contradicted, even though unadmitted.

6. War Department records show that accused is 35 years of age. He entered on active duty on 10 February 1941. Accused's 201 file in The Adjutant General's Office is incomplete. However, the Surgeon General's Office confirmed that accused had overseas service in the European Theater from March 1942 until June 1944, as he testified. According to the record of trial, accused was awarded the Purple Heart and Silver Star, the award of the latter being made by Major General Charles W. Ryder, Commanding General, 34th Infantry Division, for gallantry in action on 13 September 1943 near Altavilla, Italy, for directing the "evacuation and first-aid" of wounded men "despite the added hazard of an exploding ammunition dump nearby which had received a direct hit from enemy artillery" (Def. Ex.3). A statement of battles in Italy in which accused's unit participated shows the Battle of Salerno, 9 to 19 September 1943, crossing of Volturno, 26 September to 16 October 1943, Scapoli, 17 October to 9 December 1943, and Cassino, 1 January to 22 February 1944 (Def. Ex. 2).

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

Thomas G. Fox, Judge Advocate

Charles G. Luckie, Judge Advocate

(On Leave), Judge Advocate

Charles S. Sykes, Judge Advocate

SPJGK - CM 284653 1st Ind

Hq ASF, JAGO, Washington 25, D. C. AUG 28 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain John P. Jones (0-404305), Medical Corps.

2. Upon trial by general court-martial this officer was found guilty of two absences without leave, the first for one day from 0800 on 5 March 1945 to 1500 on 6 March 1945, and the second for one month from 7 May 1945 to 6 June 1945, in violation of Article of War 61. 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 sufficient to support the findings of guilty and the sentence.

The record of trial discloses that accused, a medical officer, entered on active duty on 10 February 1941 and went to England in February 1942. Thereafter he participated in the African campaign and in the Battles of Salerno, Volturno, Scapoli and Cassino. He was awarded the Purple Heart and Silver Star, the latter award having been made by Major General Charles W. Ryder, Commanding General, 34th Infantry Division, for gallantry in action on 13 September 1943 near Altaville, Italy, for directing the "evacuation and first-aid" of wounded men "despite the added hazard of an exploding ammunition dump nearby which had received a direct hit from enemy artillery." Accused was returned to the continental United States in June 1944. On reaching this country he learned of the infidelity of his wife during his absence and instituted divorce proceedings against her. The unauthorized absences of which he stands convicted appear to have been caused by his excessive drinking, caused by worry over his wife's unfaithfulness and its possible effect on their two young daughters. Accused testified that he now has control over himself and is able to perform efficiently his duties as medical officer. According to the stipulated testimony of several prominent citizens of accused's home state, the accused prior to his entry into the military service had the reputation of being a doctor of character and ability.

In view of the impressive combat record of accused, and since the offenses of which he has been convicted by general court-martial are of a strictly military character involving no moral turpitude, I recommend

that the sentence be confirmed but commuted to a reprimand and forfeiture of $50.00 of accused's pay per month for a period of six months.

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

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but commuted to a reprimand and forfeitures. GCMO 425, 28 Aug 1945).

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D. C.

SPJGN - CM 284666

UNITED STATES v. Private First Class CALVIN SMITH (34756365), Squadron F, 3022nd Army Air Forces Base Unit, Indian Springs, Army Air Field, Las Vegas, Nevada.	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Las Vegas, Nevada, 25-30 June 1945. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by 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 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 First Class Calvin Smith, 3022nd AAF Base Unit, did, at or near Las Vegas, Nevada, on or about 7 June 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Ruth Pearson.

The accused pleaded not guilty to, and was found guilty of, both the Charge and Specification thereunder. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence; designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement; and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that, on the night of 6 June and the early morning of 7 June 1945, Mrs. Ruth Adrienee Pearson, a twenty-nine year old mother of two children, was at the Silver Club in Las Vegas, Nevada, with her husband, Sergeant James O. Pearson (R. 20-21, 43, 53). At approximately 2:00 a.m. she suggested that they leave, but he was so engrossed in the course of events at one of the gambling tables that he evidenced no interest in her expressed wish other than to mutter, "Just a minute." Without any further attempt to divert him from his amusement she left him and set out for her home alone.

Since the busses were no longer operating because of the lateness of the hour and since she lacked sufficient money to hire a taxi, she proceeded on foot to Main Street. Walking down the "east side" of that highway, she headed in a northeasterly direction for almost a mile (R. 22, 29-30, 43-44, 53).

Some distance beyond the Rocky Mountain Produce Company she heard "footsteps on the gravel" behind her. She did not look around, but, after halting for a moment to listen, she "moved to the middle of the highway" which at this point traversed a dark and unpopulated section of the countryside. Before she could complete her maneuver, someone seized her left arm and began to pull her toward the west side of the pavement. She resisted and attempted "to get a grip with [her] feet," but her assailant was too strong. She was dragged "across an embankment and * * * a barbed wire fence" and thrown down on a "clump of bushes" (R. 32-33, 38; Pros. Ex. 22). In passing through the fence one of her slippers "caught" on the wire and was torn (R. 24-25, 33, 44, 50; Pros. Ex. 13).

Both of her assailant's thumbs were pressing hard on her windpipe so that she found it difficult to breathe. She heard a man's voice, which she identified as that of a Negro, saying, "I will kill you." As she lay helpless under him on the ground, he informed her that "he was going to get [her] with child" and commented that he had previously been out with her and had intercourse with her. She pleaded with him to "let me go" and that,

> "there were lots of others, why couldn't he find someone like that, that I was married and had two children, and to go find somebody else."

His only reply, repeated some three or four times, was "I done told you what I would do to you if you don't shut up." As a final argument she attempted to convince him that he was mistaken in assuming that he had ever seen her or had relations with her before. He hesitated momentarily, struck a match, and scrutinized her face in the light. In that instant his features, now well illuminated, were vividly impressed upon her mind. His large, unusually thick, protruding lips and his nose were etched with particular clarity upon her memory (R. 33-35, 45, 49).

After glancing at her briefly, her assailant tossed aside the match, inserted his private parts into hers, and commenced the act of intercourse. She continued to plead, but, soon realizing the futility of her arguments, she began to recite "the Lord's Prayer out loud." He again warned her that, "I done told you what I would do to you if you don't shut up." Fearing for her life, she lapsed into silence. Not satisfied with the mere cessation of her protestations he demanded that she "kick it up to him or he would keep [her] there all night." Seizing her legs just above the knees, he forced them over her head until she screamed with pain. Her outcry induced him to release her limbs.

Having completely subdued her by his violence and threats, he continued to ravish her. A passing car momentarily distracted him and caused him to put his hand across her mouth. There were no further interruptions for a little while. At long last, as the sound of two voices was carried to them on the clear night air, he released her "and ran" (R. 35-36).

She rose to her feet and headed for the highway. As she walked along she felt "something dripping down [her] leg" and she "knew then what he had done." After covering only a short distance, she met two soldiers to whom she immediately complained about the outrage to which she had been subjected. One of them went to the nearest house, awakened the owner, Mr. Maxwell R. Krauss, and had him summon the police. Upon meeting Mr. Krauss, Mrs. Pearson also complained to him. The police received the call at 3:04 a.m., and a patrol car responded by 3:10 a.m. To Officer Keith F. Waldrop Mrs. Pearson repeated her complaint for the third time. After observing that her "clothing was torn" and that "she was very nervous, sobbing, her hair dishevelled," he conveyed her to the Clark County Hospital. On the way she described her assailant and, among other things, stated that he was between five feet six and five feet eight inches tall (R. 37-39, 54-64, 67).

At the hospital she was examined by Miss Norma Fay Wilson, a registered nurse. Miss Wilson found that Mrs. Pearson's "thighs were scratched; her dress was separated from the waistline several inches; and on one leg there was a scratch several inches long, probably six or eight inches, that was bleeding" (R. 39, 67, 69). A more thorough examination several hours later by Dr. Jack C. Cherry was summarized by him as follows:

> "* * * I found the patient to be very nervous and that was approximately seven-thirty, somewhere between seven-thirty and eight o'clock the same morning. I had the nurse put the patient on a cart and bring her to the examining room. I made an examination of her. I found numerous scratches and abrasions over her body and also found considerable irritation on the entrance to the vagina. I found approximately one c.c. and a half of semen in the vagina and it was posterior to the cervix. I recognized it as such at first and was not going to make a slide, but out of curiosity, just to be sure, I made a slide—ordered my lab technician to. About quarter to nine in the morning I went back and put it under the microscope myself and examined it. I found semen; they were not alive. I found some abrasions on her neck and also on the left side of the face was several abrasions, over the right hip extending from the crest of the ilium down to the buttocks, and the entire lower leg, that was the right leg, down to the ankle. Then we had some scratches that were more than abrasions, a little deeper, over the left angle. There

were abrasions over both buttocks and on the inside of both legs, that would be the upper third of the leg between the knee and the hip" (R. 70-72).

In the meantime the military police had been instructed "to round up all G.I.'S on the west side" of Las Vegas. At the Cotton Club, eight men, including the accused, were arrested "about quarter of four" (R. 85, 101). Near the crotch of his khaki pants there were "a couple of spots of blood." His shirt had "one small tear in it and a couple of snags; his shoes were very dirty and dusty," and they contained "desert rubble or grass" (R. 90-91, 102, 104, 121, 247, 260). The blood was that of a human being, but there was not enough of it to be typed (R. 261-263). All of the accused's wearing apparel, with the exception of his shoes, were removed and in exchange he was given a suit of fatigues. His "personal belongings," including ten red tokens, were transferred to the pockets of his new outfit (R. 18-19, 102, 121, 139, 141; Pros. Exs. 2, 3, 4, 5, 6, 7, 8, 19). Laboratory examination of the shorts taken from him revealed the presence of semen (R. 263, 270, 272-273, 284).

Sergeant Charles W. Hersey, a military policeman, who had been in the patrol car which conveyed Mrs. Pearson to the hospital, returned to the scene of the rape at approximately 5:00 a.m. Hanging from the adjacent barbed wire fence was a piece of cloth which had been ripped from her dress (R. 28, 64-65; Pros. Ex. 9, 20). A little over two hours later at approximately 7:15 a.m., Corporal Jimmy L. Parchmon, in returning to Las Vegas Army Air Field from the city, crossed a little footpath some 1850 yards west of the clump of bushes in which Mrs. Pearson had been violated (R. 105-106, 152, 162; Pros. Ex. 1). About five feet to the right of the path he saw a lady's purse. He picked it up, opened it, and found inside five ration books which had been issued to Ruth Medsick Pearson, Mary Martha Pearson, Mrs. Ruth Pearson, Don Lee Medsick Pearson, and James O. Pearson. After placing these in his pocket, Parchmon dropped the purse "right back" where he had first observed it and continued on his way. After walking some distance, he re-examined the books and discovered two sticks of lipstick among them. These sticks he forthwith dropped "at the side of the path." The books themselves, together with a mirror which had previously escaped his notice, were voluntarily surrendered by him at the air field upon his being informed that a rape had been committed (R. 106-110, 118, 133-138; Pros. Exs. 11, 15, 16, 18A, 18B, 18C, 18D, 18E). The purse was the one which had been carried by Mrs. Pearson when attacked (R. 23-24, 106).

The spot in which this item of evidence reposed was visited by Captain Cassius M. Inman, the local Provost Marshal, at 8:00 a.m. He was accompanied by Parchmon and was soon joined by Harry E. Miller, the Chief of Police of Las Vegas (R. 120, 142, 144, 219-220). The combined efforts of the two officers disclosed a "line of tracks" leading from that vicinity in an easterly direction * * *" (R. 221). The results of further investigation had been succinctly described by Chief Miller as follows:

"* * * following [the tracks] a short distance we first came upon [three pieces of] Kleenex with apparently fresh lipstick on it, that was probably, oh, eighteen inches of one of the footsteps; a little farther on we found a handkerchief, a white handkerchief with pink or red dots on it; the tracks then led on towards the fence on the westerly lane of the railroad right of way; we lost them for a while and picked them up again on the easterly side of the railroad right of way and tracked them, followed them back through the brush and partly on the trails to within approximately 100 feet of the scene of the crime. From there it was very difficult to distinguish any tracks from the others that had been made there" (R. 27, 154-155, 222; Pros. Exs. 17, 26).

The following day, 8 June 1945, the search was continued in the area in which the trail had been lost. On this second occasion "one of the men in the party found an apron, a red and white checked apron, that was on the wire fence perhaps 40 yards north of where we had anticipated the [railroad] tracks had been crossed." From this new orientation point it was possible to see footprints both east and west of the railroad right of way. These provided a connecting link for the two segments of the trail discovered the day before (R. 24, 160, 225, 233; Pros. Ex. 12). Although the trail led to within one hundred feet of the scene of the rape, the nearest clear footprint to that spot was two hundred yards away (R. 235). The three pieces of soiled Kleenex, the handkerchief, and the apron had been in Mrs. Pearson's purse on the morning on which she was attacked (R. 24, 26-27; Pros. Exs. 12, 17, 26). At that time the purse had also contained several red tokens similar to those found in the accused's possession (R. 28, 254). Most of the footprints were "clearly discernible," and several of them were positively identified as impressions made by the shoes which the accused had worn when arrested. In arriving at this conclusion both plaster casts and photographs of the tracks were used (R. 18, 171, 177-178, 180, 184, 193, 196, 205, 225-226, 235-236, 274-283; Pros. Exs. 3A, 3B, 30, 31, 32, 33, 34, 35, 37, 38, 39A, 39B).

In addition to the various evidentiary items enumerated above, a used paper match and two buttons from Mrs. Pearson's dress were found near the scene of the offense. The terrain in the vicinity of the buttons bore signs of "quite a struggle. There were marks of something having been dragged there on the face of the embankment" (R. 29, 213, 216, 238; Pros. Exs. 21, 23, 36).

Between 2:30 and 3:00 p.m., on 8 June 1945, the accused and five other colored soldiers of approximately the same height, weight, and appearance were brought to the office of the Provost Marshal and viewed by Mrs. Pearson through a slot in a canvas curtain suspended over a glass pane in a door. She promptly and positively identified the accused.

She was removed from the door and the men reshuffled so that a different perspective of their features would be presented to her. Upon returning to the slot she again indicated the accused. A third reshuffling and a third glance through the canvas curtain again produced the same result (R. 41, 185-186, 248-250).

Mrs. Pearson and the six colored soldiers were then conveyed to the Intelligence Headquarters for a voice test. While she sat in the inner office, they were taken into the outer office and each was asked to repeat three or four times the words, "I done told you what I would do to you if you don't shut up." Although the door between the two rooms was slightly ajar, she was so placed that she could not see any of the suspects. After listening to them all, she identified the voice of the accused (R. 41, 186-188, 197-200, 250-252).

On 20 June 1945 similar visual and auditory tests were conducted by defense counsel. As the first of several groups of colored soldiers were paraded before Mrs. Pearson, she stated that her assailant was not among those presented. A second group was brought into the room, and on this occasion she indicated Private Willie Tramble as the one who had attacked her. A third line-up was then held which included the accused for the first time. Upon seeing him she declared that she had been mistaken in her identification of Tramble and that the accused was the man. The repetition of the auditory test did not produce as certain a result. After listening to several colored men under the same conditions as on 7 June 1945, she selected two voices one of which was that of the accused. At this stage she suffered a "relapse" and could not distinguish between them (R. 41-43, 46-49, 51-52, 252-259).

4. The accused, after being apprized of his rights as a witness, elected to take the stand on his own behalf. His testimony was directed to the establishment of an alibi. On the night of 6 June 1945 he had come to town with Privates First Class Albert L. Tally and Washington Butler, Jr. After Butler purchases a pint of whiskey at a store, they stopped for a little while at the Oklahoma Cafe and then proceeded to the Dew Drop Inn. Here Butler and Tally stayed until closing time which was midnight, but the accused temporarily wandered off three or four times to visit the Cotton Club and on one occasion the El Morocco (R. 302-311). When the Dew Drop Inn finally shut its doors for the night, the accused parted from his friends and went to the Green Lantern. While seated at the bar in this last establishment, his nose began to bleed and several drops spattered onto the fly of his trousers (R. 294-295, 314, 339-340). Although he had testified at a pre-trial examination that he did not remember how the blood spots had gotten on his trousers, his memory had been refreshed after he had signed a statement. (R. 313-320). About 12:30 a.m. on 7 June 1945, he went to the Cotton Club. After talking to the girls "in the drinking side" for a few minutes, he entered the gambling side and participated in the dice game. He was still

engrossed in this sport when arrested by the military police "around three o'clock" (R. 295-296).

He had never had intercourse with Mrs. Pearson and he had never been on the desert (R. 297, 324-325, 333, 340). The semen on his shorts had been deposited during intercourse on 31 May 1945. Although he had then removed all of his other clothes, he had retained his shorts because he "seen no reason to take them off." During the following weeks he had continued to wear them without bothering to launder them. He could not remember the name of the girl with whom he had had sexual relations (R. 297-298, 333-335, 340).

The tear in his shirt was first noticed by him after a bicycle had "throwed" him (R. 320). He did not remember having any red points in his pocket immediately prior to his arrest and could not account for their presence (R. 326-328, 331). His pre-trial statement that he had obtained a number of tokens from a girl whose name he could not recall referred to tokens other than those found in his possession (R. 327-331, 340-342). He could not remember having asked one Bertha Anton on the early morning of 7 June 1945 for permission to use her living room floor as a rendezvous with a woman with whom he proposed to have sexual relations. His memory failed him on this score because Bertha "ain't got no right to tell stories about me being there" (R. 338-339).

Several witnesses were presented by the defense to corroborate his various assertions. Annie B. Mitchell Williams, a bartender at the Green Lantern, remembered his nosebleed between 12:00 and 1:00 a.m. on 7 June 1945 and, in particular, his statement that, "I will be all right, only I have a few soiled spots on my pants, but that is all right" (R. 348-360). Arthur Smith, a dealer at the Cotton Club, was certain that the accused was at the dice table from 2:30 a.m. until arrested. The occasion was vividly impressed upon Smith's mind because he had had an argument with the accused over one of the bets. The accused had remarked, among other things, that, "You ought to be praying instead of running a crap table." As a result of the controversy he was barred from betting against the house but was nevertheless given permission to make side wagers with other participants in the game (R. 367-370, 377). The arrest, according to Smith, occurred between 2:00 and 3:00 a.m. (R. 379). It was "quite a while" after the dispute (R. 380). When shown a picture of the accused before the trial, Arthur Smith had stated that he was unable to "recognize" the man from his photograph but might be able to identify him if confronted with him (R. 371-376; Pros. Exs. 40A, 40B, 40C).

Marjorie Blackwell had also seen the accused at dice tables between approximately 2:15 and 3:15 a.m. At the beginning of that period he had lent her husband some money. She had no watch and told time by "guess" (R. 381-386).

The argument between the accused and Arthur Smith had been witnessed by David Crowthers. The accused had been present in the Cotton

Club from "two to about three-thirty." In the heat of his dispute with Smith he had exclaimed, "You old hunchback son of a bitch, you should be somewhere praying" (R. 386-390).

The last witness for the defense, Private First Class Ettori Sherlotti, was attached to the local dispensary. He had measured the accused and had found him to be seventy-two inches tall (R. 390-391).

5. On rebuttal the prosecution offered the testimony of Bertha Anton, First Lieutenant Seymour Kempner, Privates First Class Albert Tally and Washington Butler, Jr. The last two had parted from the accused about 9:00 or 9:30 p.m. on 6 June 1945 and had not again seen him that night. Although they had shared a bottle of whiskey with him on that occasion, they had, in their pre-trial statements, denied doing so because they "didn't know whether we was supposed to be drinking" (R. 394, 396-398, 400, 405-409, 412). Bertha Anton had been awakened by the accused sometime before midnight on 6 June 1945 and had been asked by him whether he might spend the night on the floor of her room with "a girl" (R. 415-420). As Assistant Trial Judge Advocate, Lieutenant Kempner had interviewed Arthur Smith prior to trial. Upon being shown several pictures of the accused, Smith had declared that "he couldn't place the night." He had seen the person photographed "coming into the Cotton Club on various occasions, when and how long he had stayed on any occasion he could not say because he has seen so many people coming in and out." He "remembered the M.P.'s coming in and picking up some soldiers; who they were and how long they had been there he could not state" (R. 420-421). Lieutenant Kempner had also been present at a pre-trial examination of the accused. In reply to several questions concerning the red tokens in his fatigue pocket the accused explained that:

> "* * * he had been over to a girl's home several days before the 7th; that he wished to be invited for dinner at that girl's house and the girl was willing to have him stay for dinner but she did not have enough meat to go around and the accused offered to go out and buy some meat. The girl at whose house this was supposed to have occurred did not have sufficient ration points and Smith [the accused] offered to go out and procure ration points and meat and he said he had enough money to pay for the meat. He then said he met some unknown girl who gave him some ration points; that he used some of the ration points to buy meat for that particular dinner, and the points which he had in his possession at the time he was picked up were the balance of the points" (R. 424-425).

6. John Hampton, known as "Hooten," was called as a witness by the court. As an employee of the Cotton Club, he had heard the controversy between the accused and Arthur Smith. He "really" didn't know "what time it was * * *" (R. 426, 431, 437-438). His best estimate

was ten or fifteen minutes after Arthur Smith went on duty as dealer or approximately 2:30 a.m. (R. 427, 447). This was a variance from his written pre-trial statement in which he had asserted that the argument had occurred about "five or ten minutes before the accused was arrested by the military police (R. 441; Pros. Ex. 41). In accounting for this discrepancy, Hampton charged that he had been directed by the Trial Judge Advocate to make the statement "just like Derby's," that is like Arthur Smith's (R. 448, 467; Def. Ex. F, p. 6). At this point Defense Counsel moved for a mistrial on the ground that the Trial Judge Advocate had "engaged in improper conduct" (R. 450).

7. In support of their motion the defense submitted the testimony of Andrew J. Harris, a police officer employed by the City of Las Vegas. He had heard the Trial Judge Advocate say to Hampton, "That is about the same answer we got from Derby" (R.453). In a statement made out of court to defense counsel, however, Harris had also asserted that during Hampton's interrogation the Trial Judge Advocate "said that Derby said that it was 15 minutes after he had the argument with Georgia Boy that the MP's picked them up" (R. 454, 467; Def. Ex. E). After initially reaffirming this testimony at the trial, Harris later retracted, declaring that:

> "I don't remember that statement. I remember fifteen minutes was from the bank room to the tables; I remember that statement. Fifteen minutes from the office to the crap table while they were getting their bank roll.
>
> "The fifteen minutes was used. I am not very sure whether they used it at that particular time from the bank room to the crap table or going out the door with the MPs. I know it was used" (R. 463, 465-466).

When signing the statement, Hampton said that it was true (R. 460).

8. The Trial Judge Advocate and the Assistant Trial Judge Advocate both emphatically denied any misconduct in their pre-trial investigations. According to Lieutenant Kempner, the Trial Judge Advocate had twice used the phrase "That is about what Derby said," but in each instance only after Hampton had already given his answers (R. 470, 475-476).

No further evidence on the question of a mistrial was adduced. The motion of the defense was denied (R. 478).

9. Immediately after this ruling the prosecution asked permission to present another witness. Over the objection of the defense, this request was granted, and Private First Class James S. Buckner was called to the stand. It developed that he had suffered a complete lapse of memory concerning the events of the early morning of 7 June 1945 (R. 478, 480-485, 489-494). The testimony of Major Dow L. Bonnell, Jr., adduced to impeach Buckner, was not admitted for any other purpose (R. 486-488, 495-502).

10. The Specification of the Charge alleges that the accused did, "on or about 7 June 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Ruth Pearson." This offense was laid under Article of War 92.

As Mrs. Pearson was walking home on a dark, country highway, she was suddenly seized by a strange colored soldier, dragged into a nearby clump of bushes, thrown to the ground, and compelled by force and intimidation to submit to sexual intercourse. Although she resisted to the best of her ability, her strength was no match for that of her assailant. Lacking the requisite physical force to repel him, she resorted to pleas and protestations. While these did not cause him to desist from his foul purpose, they did temporarily throw him off his guard and cause him to strike a match. This was his downfall, for in the flickering light his features were clearly revealed and indelibly engraved upon his victims' memory. He had undoubtedly committed a vicious and brutal rape, but, without his convenient provision of this key to the mystery of his identity, he might never have been brought to justice.

The face with which she had become familiar under such circumstances of terror was not forgotten by Mrs. Pearson. At a line-up held on 8 June 1945 she positively and unreservedly pointed out the accused as her ravisher. To avoid the possibility of error her visual identification was checked by an auditory test. After listening to several colored soldiers, who were concealed from her, repeat the same sentence, she unhesitatingly picked the voice of the accused. Although she lapsed into temporary error some twelve days later at another line-up conducted by defense counsel, she quickly corrected herself and reaffirmed her previous visual identification. On this occasion she was unable to select any one voice as that of her assailant, but, of the two which she finally chose, one was his.

Although adequate, her identification need not be relied upon alone. As is apparent from Bertha Anton's testimony, the accused came to Las Vegas on the night of 6 June 1945 with fornication on his mind. The footprints precisely fitting his shoes, his unexplained possession of red tokens, the semen on his shorts, the blood on the fly of his trousers, the tear in his shirt, and the desert grass in his shoes, all clearly indicate that he mercilessly fulfilled his purpose. Of significance, too, is the fact that the trail leading from the scene of the rape to Mrs. Pearson's pocketbook terminated at a point only three-tenths of a mile from the Cotton Club (R. 163).

The defense has dexterously sought to avoid the evidentiary items by attempting to prove an alibi. But neither the accused nor any of the witnesses presented on his behalf was convincing or consistent. The accused testified that he did not finally separate from Tally and Butler until midnight. They fix the time at 9:00 or 9:30. Although before the trial he could not account for the blood on his trousers, he conveniently remembered at the trial itself that he had suffered a nosebleed on the night of 6 June 1945. Again, he had a pat explanation before trial for his possession of the ten red tokens, but, while on the stand, he could not explain their presence in his pocket.

And so it was with the other defense witnesses with the exception of Miss Annie B. Mitchell Williams. She recalled the nosebleed and the accused's comment that, "I will be all right, only I have a few soiled spots on my pants * * *." This testimony, standing by itself is credible but curiously enough, as already observed, the accused, who was the principal party concerned, did not even mention a nosebleed until on trial for his life despite repeated interrogation about the origin of the spots on his trousers.

To cite another flagrant example, Arthur Smith fixed the time of his controversy with the accused at approximately 2:30 a.m. Upon examination by the court, however, Smith expressed the opinion that the accused was arrested between 2:00 and 3:00 a.m. Since the correct time was about 3:45 a.m., Smith's contribution to the record must be regarded as worthless.

It would be useless to reiterate all of the other discrepancies and shortcomings in the evidence for the defense. Suffice it to say, that the defense has failed to shake or undermine the powerful case adduced by the prosecution, and that the Specification of the Charge and the Charge have been proved beyond a reasonable doubt.

11. The record shows that the accused is about 21 years of age; that he was inducted on 16 July 1943 at Fort Benning, Georgia; and that he had no prior service.

12. 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 sustain the findings and the sentence and to warrant confirmation thereof. A sentence of death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

Abner E. Lifsrom, Judge Advocate.

Robert J. Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

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

SPJGN-CM 284729

U N I T E D S T A T E S v. Private LUIGI PESCHIERA, 7347 Quartermaster Service Company (Italian), Corporal FIORAVANTE MARCUZZI, Company A, 7096 Engineer Battalion (Italian-Separate), Sergeant GIORGIO De NONI, Company A, 7096 Engineer Battalion (Italian-Separate) and Private SALVATORE AVINO, 7388 Quartermaster Service Company (Italian), all Italian Prisoners of War.	)	NORTH AFRICAN SERVICE COMMAND Trial by G.C.M., convened at Casablanca, French Morocco, 12 July 1945. Each: Confinement for seven (7) years. Disciplinary Barracks, Greenhaven, New York.

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

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1. The record of trial in the case of the prisoners of war named above has been examined in the office of The Judge Advocate General and there found legally sufficient to sustain the sentence as to the accused Peschiera and Marcuzzi, but legally insufficient to sustain the findings and sentence as to the accused De Noni and Avino. The record has now been examined by the Board of Review solely as to the accused De Noni and Avino, and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused were tried upon the following Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Luigi Peschiera, 7347 Quartermaster Service Company (Italian), Corporal Fioravante Marcuzzi, Company "A", 7096 Engineer Battalion (Italian - Separate), Sergeant Giorgio De Noni, Company "A", 7096 Engineer Battalion (Italian - Separate) and Private Salvatore Avino,

7388 Quartermaster Service Company (Italian), all Italian Prisoners of War, in the custody of the United States Army, acting jointly, and in pursuance of a common intent, did, at Cazes Air Base, French Morocco, on or about 15 February 1945, unlawfully enter a stock room of the 1252 Army Exchange, with intent to commit a criminal offense, to wit, larceny therein.

Specification 2: In that Private Luigi Peschiera, 7347 Quartermaster Service Company (Italian), Corporal Fioravante Marcuzzi, Company "A", 7096 Engineer Battalion (Italian - Separate), Sergeant Giorgio De Noni, Company "A", 7096 Engineer Battalion (Italian - Separate), and Private Salvatore Avino, 7388 Quartermaster Service Company (Italian), all Italian Prisoners of War, in the custody of the United States Army, acting jointly, and in pursuance of a common intent, did, at Cazes Air Base, French Morocco, on or about 15 February 1945, feloniously take, steal, and carry away 36 olive drab woolen sweaters with sleeves, of the value of about $143.28, the property of the 1252 Army Exchange.

The accused De Noni and Avino pleaded not guilty to, and were found guilty of, the Charge and the Specifications thereunder. They were sentenced to be confined at hard labor at such place as the reviewing authority might direct for ten years. The reviewing authority approved the sentence as to each accused, but reduced the period of confinement to seven years and designated the United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement. The result of their trial was published in General Court-Martial Order No. 12, Headquarters North African Service Command, APO 600, U. S. Army, 4 August 1945.

3. The legal sufficiency of the record to sustain the court's findings of guilty as to the accused De Noni and Avino is dependent upon the statements in their written confessions. The correctness, therefore, of the court's action in receiving their confessions in evidence presents the only question requiring discussion.

The admission of each confession was opposed by the defense counsel upon the ground that they were induced by a promise of leniency (R. 17, 20, 23, 25). The interpreter, who had served the investigating agent in securing the confessions from each of the Italian Prisoners of War, testified upon cross-examination that he had been instructed as follows:

"I was told to tell these boys that if they would make the confession, if they would tell everything they knew

about the case, why things would be much easier for them" (R. 18).

The interpreter further stated that he had advised the accused in accord with this instruction but that no other promise was made to the accused and that no force or threat was directed against them (R. 18). Sergeant Giorgio De Noni, one of the accused, testified that, "They gave me a couple of slaps and they threatened that if I didn't confess why something would happen to me" (R. 51).

In discussing the general principles governing the admissibility of confessions the Manual for Courts-Martial provides:

> "A confession not voluntarily made must be rejected; * * *
>
> * * *
>
> "Facts indicating that a confession was induced by hope of benefit or fear of punishment or injury inspired by a person competent (or believed by the party confessing to be competent) to effectuate the hope or fear is, subject to the following observations, evidence that the confession was involuntary. Much depends on the nature of the benefit or of the punishment or injury, on the words used, and on the personality of the accused, and on the relations of the parties involved. Thus, a benefit, punishment, or injury of trivial importance to the accused need not be accepted as having induced a confession, especially where the confession involves a serious offense; casual remarks or indefinite expressions need not be regarded as having inspired hope or fear; and an intelligent, experienced, strongminded soldier might not be influenced by words and circumstances which might influence an ignorant, dull-minded recruit" (MCM, 1928, par. 114a).

In accord with the principles above expressed, it was held in CM 183917 that a confession of a private was inadmissible in evidence because induced upon the promise of a sergeant to the effect that, if the accused would produce certain articles alleged to have been stolen, he would receive immunity. In CM 152444, a confession obtained by a sergeant from a private by telling him that he was under suspicion and that it would be best for him to tell the truth and "come clean" since otherwise his offense would be found out sooner or later and the penalty would probably be more severe, was similarly held to be inadmissible. Dig. Op. JAG, 1912-40, 395 (10). Also in CM 230377, Wilson, 17 BR 361, a case in which a private made a confession upon being told by a sergeant that "* * * if you have taken money from anyone else you might as well admit it. The penalty won't be anymore severe", the confession as to the other thefts was held to be improperly admitted.

These precedents, as well as the principles set forth in the Manual, clearly reveal that it is the purpose of military justice to safeguard both the court and the accused from the consequences of a finding of guilty based upon a confession induced by promise of favor. In the present case the position of authority and of power held by the investigating official was in marked contrast to the subservient position occupied by the two Italian Prisoners of War. Under Article 63 of the Geneva Convention of 27 July 1929 they were entitled to be tried by "* * * the same court and according to the same procedure as in the case of persons belonging" to our own Army. They had the same right, therefore, as our own soldiers, to expect that they would be dealt with truthfully and that their trust and confidence in the word of an American official would not be abused. Since the confessions of each accused were clearly induced by a promise of leniency, they were legally inadmissible.

4. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence as to the accused De Noni and Avino.

Abner E. Lipscomb, Judge Advocate.

Robert J. Lanner, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 284729 1st Ind.
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Luigi Peschiera, 7347 Quartermaster Service Company (Italian), Corporal Fioravante Marcuzzi, Company A, 7096 Engineer Battalion (Italian-Separate), Sergeant Giorgio De Noni, Company A, 7096 Engineer Battalion (Italian-Separate) and Private Salvatore Avino, 7388 Quartermaster Service Company (Italian), all Italian Prisoners of War, together with the foregoing opinion of the Board of Review.

2. I concur in the said opinion of the Board of Review and recommend that the findings of guilty and the sentence as to the accused De Noni and Avino be vacated; and that all rights, privileges and property of which each accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed herewith is a form of action designed to carry into effect the recommendation hereinabove made 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

(As to accused Pescheira findings and sentence confirmed. GCMO 467, 20 Oct 45)
(As to accused Marcuzzi findings and sentence confirmed. GCMO 467, 20 Oct 1945)
(As to accused De Noni sentence vacated. GCMO 467, 20 Oct 1945).
((As to accused Avino sentence vacated. GCMO 467, 20 Oct 1945)

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TITLE

DATE	BORROWER'S NAME	EXT.