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

SPJGN-CM 288607

U N I T E D S T A T E S	)	AIR TRANSPORT COMMAND
	)	
v.	)	Trial by G.C.M., convened at
	)	Hamilton Field, California,
First Lieutenant CHARLES E.	)	3 September 1945. Dismissal,
CRUNCLETON, JR. (0-2042754),	)	total forfeitures, and con-
Air Corps.	)	finement for one (1) year.
	)	Disciplinary Barracks.

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 First Lieutenant Charles E. Cruncleton, Jr., Squadron G, 1503d Army Air Forces Base Unit, West Coast Wing, Pacific Division, Air Transport Command, having been restricted to the limits of Hamilton Field, California, did, at Hamilton Field, California, on or about 30 July 1945, break said restriction by going to Lillian's, near Novato, California.

Specification 2: In that First Lieutenant Charles E. Cruncleton, Jr., * * *, having been alerted and briefed as a pilot for a scheduled aircraft flight, did, at Hamilton Field, California, on or about 30 July 1945, render himself unfit for important duties by excessive indulgence in intoxicating liquors.

The accused pleaded guilty to Specification 1 and not guilty to Specification 2 and the Charge and was found guilty of Specifications 1 and 2 and the Charge. Evidence was introduced of one previous conviction by a general court-martial for exceeding the speed limit in the operation of a motor vehicle and wrongfully failing to stop and give information at the scene of an accident in which he was involved. 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 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 Captain Al Tudyman, Assistant Navigation and Briefing Officer of the 1503d Army Air Forces Base Unit at Hamilton Field, California, briefed the accused, at 0945, on 30 July 1945, as first pilot, for an anticipated flight from Hamilton Field to Hickam Field, Hawaii (R. 7, 9). Tentative departure time for the flight was set at 0415, 31 July 1945 (Pros. Exs. 3, 4). The accused was present at the briefing and answered roll call both before and after the briefing (R. 7, 8; Pros. Ex. 4). Officers living off the post who were members of the crew were told to stay at BOQ 467 and the accused was assigned Bed No. 31 in that barrack (R. 10; Pros. Exs. 3, 4). At the briefing the accused received a copy of a bulletin entitled "Flight Crew Member Policy", which stated, in part, as follows:

> "Everyone on the alert must remain on the field until the alert is cancelled and they are notified of the cancellation by the crew supervisor on duty", and "Crews are on the alert from the time they report for briefing at 0945 until noon (1200) the following day and they are required to be on the Field and ready for immediate departure. There will be no exceptions to this rule" (R. 8-10; Pros. Ex. 2).

Accused was in "Lillian's", a bar, about half a mile from Novato, California, on 30 July 1945 (R. 11-12). He came in some time after one o'clock and departed about half past five (R. 12-13).

The Charge of Quarters at Bachelor Officers' Quarters 467, Private First Class Samuel H. Bennett, was notified by Captain Ralph Bradley, crew supervisor assigned to the Crew Assignment Office, 1503d Army Air Forces Base Unit, about 0200 on 31 July 1945, to awaken the accused for a flight and to call him to the telephone (R. 13-14; Pros. Ex. 3). Private Bennett was unsuccessful in his attempt to awaken the accused. Bennett shook the accused for about four or five minutes, but accused did not even open his eyes (R. 14-15). Bennett did not turn on the lights but used a flashlight (R. 17). He noticed a smell of whiskey

or "something like that" around the accused. Later, when accused was leaving in the ambulance, his gait and eyes were normal, and he did not appear to Bennett to be drunk (R. 15, 16). Captain Bradley proceeded to accused's quarters at about 0230 and unsuccessfully tried to awaken him. Captain Bradley noticed that the accused "smelled of alcohol" and that "it appeared that alcohol fumes surrounded the vicinity of the bed" (Pros. Ex. 3).

Another crew was alerted to take the trip in place of accused and his crew, who were told to stand by for a possible future assignment (Pros. Exs. 3, 4). Captain Bradley then went to see Major George K. Spearman, Air Transport Command Flight Surgeon and Medical Officer of the day, and Major Spearman accompanied Captain Bradley to accused's quarters at some time between 0315 and 0345 (R. 19; Pros. Ex. 3). Major Spearman succeeded in waking accused after four or five minutes (R. 19; Pros. Ex. 3). Captain Bradley thought accused was "under the influence of alcohol" (Pros. Ex. 3). Major Spearman, at the time of awakening accused, noticed a strong alcoholic odor on his breath (R. 20). He gave accused a superficial examination over a period of fifteen minutes and, in his opinion, accused was "definitely under the influence of intoxicating liquor" and "absolutely not able to fly a plane at that time" (R. 20). Accused was taken in an ambulance to the Base Hospital, where a sobriety test was performed (R. 15, 16; Pros. Ex. 3). His blood was found to contain 2.14 milligrams of alcohol per 1 cc of blood (R. 30). This test was conducted by Lieutenant Erickson, a biochemist whose qualifications as an expert were agreed to by the defense. His opinion was that a person having that degree of alcohol in his blood "would be under the influence of alcohol" (R. 31).

Captain Joseph B. Miller, Commanding Officer of Squadron G, of which accused was a member, interrogated him at about 1500 on 31 July 1945, after having advised him of his rights under the 24th Article of War (R. 22). The accused told Captain Miller that he had gone to a place known as "Lillian's" on the afternoon of 30 July 1945 to get his cigarette lighter which he had previously left there and that, while he was in the establishment, he met some friends who were having a farewell party before being shipped overseas and they asked him to join them. He accepted and had a "few beers" (R. 22). He returned to Hamilton Field around 1930 or between 1930 and 2000 hours.

4. The accused elected to make an unsworn statement and no evidence was presented for the defense. This chiefly concerned itself with his past military record and future hopes for a career in the Army (R. 32). His only remarks pertinent to the offenses charged were as follows: "* * * this is the first time I ever failed to appear for a flight * * * this is the first time I made a mistake of that kind. I admit it is a dumb mistake * * *" (R. 32).

5. Specification 1 alleges that the accused "having been restricted to the limits of Hamilton Field, California, did, at Hamilton Field, California, on or about 30 July 1945, break said restriction by going to Lillian's, near Novato, California."

Since the accused pleaded guilty to this Specification, no evidence was legally required to be introduced by the prosecution. The evidence in the record, however, shows beyond a reasonable doubt that the accused was restricted to Hamilton Field, California, by competent authority, from 0945 hours, 30 July 1945, and that, while under such restriction, he wrongfully left Hamilton Field on 30 July 1945 and proceeded to a place known as "Lillian's" about half a mile from Novato, California. The Specification alleges conduct to the prejudice of good order and military discipline violative of Article of War 96. Although the accused inconsistently pleaded not guilty to the Charge and guilty to the Specification, the evidence amply supports the findings of guilty of both the Charge and the Specification.

6. Specification 2 alleges that accused, "having been alerted and briefed as a pilot for a scheduled aircraft flight, did, at Hamilton Field, California, on or about 30 July 1945, render himself unfit for important duties by excessive indulgence in intoxicating liquors".

> "Rendering himself unfit for duty by excessive use of spirituous liquors" is a "neglect" and disorder "to the prejudice of good order and military discipline in the case of an officer" (Winthrop's Military Law & Precedents, p. 727, 2nd Ed.).

The evidence clearly shows that the accused, first pilot of a plane, after being briefed at 0945 hours, 30 July 1945, for an anticipated flight from Hamilton Field, California, to Hickam Field, Hawaii, imbibed of alcoholic beverages to such an extent that he was unfit to perform his duties when awakened on the early morning of 31 July 1945. In his unsworn statement to the court he said "this is the first time I ever failed to appear for a flight * * * this is the first time I made a mistake of that kind. I admit it is a dumb mistake * * *". The evidence in the record shows beyond a reasonable doubt that accused by excessive indulgence in intoxicating liquors unfitted himself for duty at the time and place charged in the Specification, in violation of the 96th Article of War.

7. The records of the War Department show that the accused is about 26½ years of age and married. He is a high school graduate and attended college for one year. Prior to entry into the service, he was the proprietor of a bowling alley and soda fountain, from which he derived a monthly income of about $200.00. He has been in the military service about five years, about half the time as an enlisted man and the remaining half as an officer.

8. The court was legally constituted and had jurisdiction of the person and 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.

Abner E. Lifecourt, Judge Advocate.

Robert J. Clamon, Judge Advocate.

Samuel Morgan, Judge Advocate.

NOV 1 1945

SPJGN-CM 288607 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 Charles E. Cruncleton, Jr. (O-2042754), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of leaving his post in violation of a restriction which had been placed upon him, and of rendering himself unfit for important duties by excessive indulgence in intoxicating liquors, both in violation of Article of War 96. After evidence of a previous conviction by general court-martial had been considered by the court, 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 record shows that the accused, after he had been briefed to fly a plane from Hamilton Field, California, to Hawaii, left Hamilton Field in violation of a restriction and became so intoxicated as to render himself unfit to perform his duties as first pilot of the scheduled flight. Prior to his present offenses the accused was convicted, on 19 July 1945, by a general court-martial for wrongfully operating a motor vehicle at a speed in excess of 35 miles per hour, and of wrongfully failing to stop at the scene of an accident in which he had been involved, and of failing to notify the owner of the damaged vehicle with which his car had collided of his name, address, and the registration number of his car, in violation of Article of War 96. For these offenses he was sentenced to forfeit $100 of his pay per month for ten months. Prior thereto, on 2 December 1944, he had been reprimanded under the 104th Article of War by Brigadier General Robert E. Nowland, for absenting himself without leave, and for failure to comply with an order. Following his present trial the accused was placed in arrest and restricted to the limits of Hamilton Field. The Staff Judge Advocate of the accused's command states that information has been received that the accused has recently broken this restriction by going to a bar two miles from his post where he engaged in drinking.

In view of the accused's repeated offenses he appears to be altogether unworthy of being retained in the service. I recommend that the sentence be confirmed, but that the confinement and forfeitures be remitted, and that the sentence as thus modified be ordered executed.

4. 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

2 Incls
Record of trial
Form of action

(Sentence confirmed but forfeitures and confinement remitted. GCMO 476, W.D. 15 Nov 1945).

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

SPJGQ - CM 288730

UNITED STATES v. First Lieutenant RALPH E. HARLING (0-676786), Air Corps.	ARMY AIR FORCES CENTER Orlando, Florida Trial by G.C.M., convened at Orlando Army Air Base, Orlando, Florida, 10 and 27 August 1945. Dismissal, total forfeitures and confinement at hard labor for three (3) years.

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OPINION of the BOARD OF REVIEW
PARTLOW, 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: Violation of the 93rd Article of War.

Specification 1: In that First Lieutenant Ralph E. Harling, Air Corps, Squadron F (Fighter Twin Engine), 621st Army Air Forces Base Unit (PAAF), then Squadron F-Fighter (TE), 904th Army Air Forces Base Unit (KAAF), did, at Orlando Army Air Base, Orlando, Florida, on or about 11 February 1945, feloniously take, steal, and carry away one DeMolay Legion of Honor ring, value about $104.00, and one Bulova wrist watch, value about $40.00, of a total value of about $144.00, the property of Captain Bertram S. Sherman, Air Corps.

Specification 2: In that First Lieutenant Ralph E. Harling, Air Corps, Squadron F (Fighter Twin Engine), 621st Army Air Forces Base Unit (PAAF), then Squadron F-Fighter (TE), 904th Army Air Forces Base Unit (KAAF), did, at Kissimmee Army Air Field, Kissimmee, Florida, on or about 6 April 1945, feloniously take, steal, and carry away about ten Office of Price Administration mileage ration gas coupons, value about 10¢, one short snorter bill, value about $5.00, and about

$100.00, lawful money of the United States, of a total value of about $105.10, the property of First Lieutenant Charles G. Eser, Air Corps.

Specification 3: In that First Lieutenant Ralph E. Harling, Air Corps, Squadron F (Fighter Twin Engine), 621st Army Air Forces Base Unit (PAAF), then Squadron F-Fighter (TE), 904th Army Air Forces Base Unit (KAAF), did, at Kissimmee Army Air Field, Kissimmee, Florida, on or about 23 April 1945, feloniously take, steal, and carry away one Parker fountain pen, value about $5.00, one Bulova wrist watch, value about $60.00, one leather camera case, value about $5.00, and one Argus 35 millimeter camera, value about $30.00, of a total value of about $100.00, the property of Captain Leon A. Van De Veire, Air Corps.

Specification 4: In that First Lieutenant Ralph E. Harling, Air Corps, Squadron F (Fighter Twin Engine), 621st Army Air Forces Base Unit (PAAF), then Squadron F-Fighter (TE), 904th Army Air Forces Base Unit (KAAF), did, at Kissimmee Army Air Field, Kissimmee, Florida, on or about 6 May 1945, feloniously take, steal, and carry away one check, dated 26 April 1945, in the sum of $54.90, payable to the order of Captain Henry J. Pashco, Air Corps, drawn upon the Treasurer of the United States, signed by G. McMillan, Finance Officer, USA, and about $110.00, lawful money of the United States, of a total value of about $164.90, the property of Captain Henry J. Pashco, Air Corps.

Specification 5: In that First Lieutenant Ralph E. Harling, Air Corps, Squadron F (Fighter Twin Engine), 621st Army Air Forces Base Unit (PAAF), then Squadron F-Fighter (TE), 904th Army Air Forces Base Unit (KAAF), did, at Orlando Army Air Base, Florida, from about 15 October 1944 to about 28 June 1945, feloniously take, steal, and carry away about twenty-five Syrettes containing morphine tartrate solution, value about $2.50, the property of the United States.

Accused originally pleaded guilty to all Specifications and to the Charge but thereafter such pleas were withdrawn and pleas of not guilty were entered as to all Specifications and the Charge (R. 11, 12). He was found guilty of Specification 1, guilty of Specification 2, except the figures "$5.00" and "$105.10", and substituting therefor the

figures "$1.00" and "$101.10", respectively, of the excepted figures not guilty, of the substituted figures, guilty; guilty of Specification 3, except the words and figures "one Bulova wrist watch, value about $60.00", and except the figures "$100.00", and substituting therefor the figures "$40.00", of the excepted words and figures, not guilty, of the substituted figures, guilty; guilty of Specification 4, guilty of Specification 5, and guilty of the Charge. 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 a period of three years. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. The evidence for the prosecution is as follows:

It was stipulated that the accused was in the military service at the time of trial and that he had been continuously in such service since 4 April 1942 (R. 87).

Specification 1 of the Charge

Captain Sherman left his DeMolay Legion of Honor ring and Bulova watch on the table in his room in the Bachelor Officers' Quarters (Orlando Army Air Base) about 1200 hours on 11 February 1945 (R. 12, 13, 14, 15). He returned to his room about 1415 hours (R. 16) and later, about 1445 hours the same day, when he looked for his ring and watch, they were missing (R. 16, 17).

On 28 June 1945, the accused, while under arrest, authorized in writing representatives of the Provost Marshal's office, Orlando Army Air Base, to search his home at 1122 DeWitt Drive, Orlando, Florida (R. 61, 62; Pros. Ex. 11). Two searches were made, the written instrument being secured on the occasion of the second search (R. 69). Captain Sherman's watch was found in a fishing box in a clothes closet in the accused's home (R. 17, 63; Pros. Ex. 2). The value of the watch, as of 11 February 1945, was stipulated to be "about $40.00" (R. 87). The DeMolay ring was found in the pilot's locker assigned to the accused at Kissimmee (Florida) Air Base by First Lieutenant Gregg (date not shown) (R. 79; Pros. Ex. 1) and was stipulated to have value of $104.00 on 11 February 1945 (R. 87).

Captain Sherman testified that he had known the accused since April 1943 (R. 18), that he noticed a difference in the accused's conduct beginning "last fall" (1944) (R. 18, 19), that accused "became, more or less, listless and spent a great deal of time lying around sleeping and just reading comic books where before he had been reading intelligence reports" (R. 21). The accused's speech became more hesitant (R. 22), his remarks were not coherent at all times (R. 23),

and in October or November 1944 the accused had a boil on his left leg lanced and it caused him considerable trouble (R. 24, 25). The accused was taken off flying status on account of his legs "about the middle of October and November, December and January" (R. 26, 27).

Specification 2 of the Charge

On 6 April 1945, First Lieutenant Eser was stationed at Kissimmee Army Air Field, Florida (R. 27, 28). On that date he changed clothes for flying, leaving his trousers in a room in which there were pilots' lockers (R. 31, 32). The accused had a locker in the same room on that date (R. 31). First Lieutenant Eser left his purse or wallet containing $100.00 in money, ten "A" basic OPA mileage coupons, and a "shortsnorter" bill, consisting of the currency of many countries and containing the names of many persons, in his trousers' pocket in the morning (R. 29, 30, 31, 32). When he returned "about 4:30 or 4:45" that day, his wallet and its contents were missing (R. 32, 33). He searched for the missing money and articles but was unable to find them and reported the loss to the Provost Marshal (R. 33). He later identified the gas coupons and the shortsnorter bill at the Provost Marshal's office in Orlando (R. 33, 34). First Lieutenant Eser testified that he had known the accused since the latter part of February or March (1945), that he thought the accused was a good flyer and was not considered to be erratic (R. 34, 35).

It was stipulated that if First Lieutenant Gortz were present in court he would testify that some time shortly prior to 28 April 1945 he saw Prosecution's Exhibits 3 (the gas coupons) and 4 (the shortsnorter bill) in the dresser drawer of the accused's home in Orlando, Florida (R. 82, 83; Pros. Ex. 3, 4). It was stipulated that the gas coupons (Pros. Ex. 3) had a value of "about 10¢" and that the shortsnorter bill (Pros. Ex. 4, described as "one silver certificate, United States of America, value $1.00 and 9 bills foreign currency") had a value of "about $5.00", which latter stipulated value was rejected by the court and a value of $1.00 fixed for such exhibit (R. 87, 88; Pros. Exs. 3, 4).

Specification 3 of the Charge:

The stipulated testimony of Captain Van de Veire disclosed that on 23 April 1945 he was unable to find his Parker green fountain pen which he usually kept in his "B-4" bag in "BOQ No. 236" Kissimmee Army Air Field, Florida, and that he searched his room and looked for it at the Officers' Club but was unable to find it (R. 35, 36). On the following day, Captain Van de Veire was unable to find his "Argus A2, 35 MM, Candid Type" camera and its leather carrying case which he

kept in his "B-4" bag also (R. 36). He saw and identified his pen, camera and camera case at the office of the Provost Marshal on 30 June 1945 (R. 36, 37; Pros. Exs. 5, 6, 7).

The pen was found in a fishing box in a clothes closet in the accused's home "on DeWitt Drive in Orlando" on 28 June 1945 (R. 61, 63, 64; Pros. Ex. 5) and it was stipulated that it had a value of $5.00 (R. 87). The camera and camera case were found in the dresser drawer in the accused's bedroom at the same time (R. 65, 66; Pros. Exs. 6, 7). It was stipulated that the camera had a value of "about $30.00" and the camera case a value of "about $5.00" (R. 87).

Specification 4 of the Charge

On 6 May 1945, Captain Pascho left his wallet containing an unindorsed Government check payable to his order in the sum of $54.90 and approximately $110.00 in cash in his trousers' pocket in his individual locker at the Kissimmee Air Field, prior to going out on his flight (R. 38, 39, 40, 46). The accused had a locker in the same locker room at that time (R. 38). Approximately an hour and three-quarters later, when he returned to his locker, his wallet, money and check were gone (R. 40). He never saw the money again but on 29 June 1945 at the Provost Marshal's office in Orlando he saw 21 pieces of a check which he fitted together and which proved to be the check for $54.90 which was missing (R. 40, 41, 42; Pros. Ex. 8). A finance officer identified the pieces of paper as a Treasury check, issued by the local disbursing officer on 26 April, in the sum of $54.90, payable to Henry J. Pascho (R. 44, 45).

The 21 pieces of this check were removed from an oil circulating heater in the accused's living room in his home (R. 66, 67; Pros. Ex. 8). It was stipulated that the check on 6 May 1945 had a value of "about $54.90" (R. 88).

Specification 5 of the Charge

Civilian employees of the Orlando Army Air Base Maintenance department testified that in April 1945, the first aid kit was missing from a life raft on an airplane at the base, the raft having been cut (R. 47, 48, 54). According to the storage tag, such kit contained six morphine tartrate syrettes (R. 48, 49, 54). Another life raft with a first aid kit containing six morphine tartrate syrettes was installed on the same plane (R. 55) but on 25 May 1945 it was discovered that this life raft "had been cut in the same manner as the previous one" and the first aid kit containing the morphine syrettes removed (R. 54, 55). Between 5 and 10 May 1945, it was discovered that two rafts on each of two B-17 airplanes at this field were out of place

and, on inspection, it was found that the first aid kits were missing from both rafts on each plane (R. 49, 50, 55, 56). The "tickets" indicated that the rafts had first aid kits containing six morphine tartrate syrettes each (R. 53, 56). The seals had been broken to get at the first aid kits (R. 56). Airplanes when on "the flight line" are not guarded (R. 52, 58, 59). If an airplane is carrying confidential equipment it will be guarded but otherwise not (R. 52).

Six morphine tartrate syrettes were taken from the accused's person on 28 June 1945, the date of his arrest. Six syrettes, of the same type and character, were introduced in evidence (R. 67; Pros. Ex. 9), and identified as the type of morphine syrettes furnished and owned by the United States Army and used in the first aid kits (R. 57, 58). Nineteen empty morphine tartrate syrettes, of similar character, were removed from the heater in the living room of the accused's home on 28 June 1945 (R. 58, 68; Pros. Ex. 10). These morphine syrettes were kept together in a paper sack by the Provost Marshal's office (R. 70, 71; Pros. Ex. 12). It was stipulated "that the 25 syrettes mentioned in Specification No. 5 were on 15 October 1945 of a value of $2.50" (R. 88).

Statements of the accused

After being fully advised as to his rights under Article of War 24 on each of three occasions, the accused executed three pre-trial written statements which were introduced in evidence (R. 72, 73, 74, 75, 76, 77, 81, 83, 84, 85; Pros. Exs. 13, 15, 16). The substance of these statements is as follows: About the middle of October the accused began using morphine to alleviate pain caused by a very severe ulcer on his leg. Twelve syrettes were furnished for him and thereafter he was on his "own". After he acquired the habit, he tried to quit but failed to do so. Some time later, he began picking up things, for no reason. He had no need of them and he didn't attempt to dispose of them. On a few occasions, he picked up money which he spent. When engaged in conversation he would sometimes forget what he was talking about. He hoped to quit on his own accord but on different occasions planned to see a civilian doctor but did not do so. He was "picked up by the Provost Marshal at Kissimmee and brought to Orlando for questioning" on 28 June 1945. On the same date his "house was searched and listed articles found" (Pros. Ex. 13). He took morphine from first aid kits on planes on the transient line at Orlando Air Base and on a few occasions at the Kissimmee Base on A-26 line (Pros. Ex. 15). He was admitted to the Station Hospital, Orlando, Florida, on 28 June 1945. If he was given any narcotics between the time of such admission and 1500 hours, 29 June 1945, when he had an interview with Major Wise, "it was a minimum amount". Prior to such interview the accused was in severe physical discomfort. The accused thought that if he said that he "had taken much more than" he really had, he would be given some relief. Although the ulcer was caused by a bruise sustained while in flight doing acrobatics, the accused finally stated that the ulcer

was caused by self administered narcotic injection, hoping to end the interview and get some relief. The accused is not claiming insanity, nor complete amnesia. He thinks he is sane and normally does not have amnesia. The accused can remember most incidents that happened while he was under the drug but the time, place and other particulars are "either quite hazy or I guess some particulars are entirely lacking" (Pros. Ex. 16).

4. The evidence for the defense is as follows:

Evidence as to the accused's honesty, integrity and general good character was introduced by the testimony of fellow officers (R. 93, 94, 101, 106), and the stipulated testimony of several residents of Inman, South Carolina (apparently the permanent residence of the accused) (R. 107, 108, 109). The accused was a good pilot (R. 92, 102) but in October 1944 he was "grounded" because of a boil or boils which he had and which became infected (R. 92, 95, 100, 101). The accused was returned to flying status in January 1945 (R. 95) but was changed, appeared sleepy at times, was "irresponsible" about the home, would leave home and be gone a couple of hours at a time, sometimes he appeared to be drunk, and his flying deteriorated and was not up to what it used to be (R. 91, 92, 96, 97, 103). Report of the accused's condition was made to the Flight Surgeon but he was not removed from flying status (R. 98). Captain Edwin A. Harling, Infantry, testified that the accused was his brother, that the accused had never been in trouble, had never taken anything and had not been intemperate in the use of drugs or liquor (R. 110). Evidence was elicited showing that Captain Harling had been thrice wounded in action in the European Theater of Operations in 1944, that his company was cited in War Department General Orders for outstanding performance of duty in action, and that he was awarded the Silver Star (R. 112, 113, 114; Def. Ex. 1).

Major Robert A. Wise, Medical Corps, testified that, beginning 28 June 1945, he had the accused under observation for a period of approximately three weeks and was a member of a "Sanity Board" that examined the accused (R. 115, 118, 121, 122, 123). The accused was treated as a drug addict (R. 117). The Board was of the opinion that the accused was legally sane, that the accused was not suffering from any psychosis or mental condition, was able to differentiate between right and wrong, and was able to choose the right, and recommended that he be placed in an institution which would enforce his abstinence from narcotic drugs (R. 118, 122, 123). The accused at first claimed to be taking around 14 to 16 morphine syrettes daily but in the opinion of Major Wise this was untrue as an average person could not take 14 syrettes in one day and survive (R. 116). Later the accused admitted taking 5 or 6 morphine syrettes a day and his response to treatments given indicated that such statement was correct (R. 121). No patient could get morphine in the hospital because it is kept under lock and key at all times (R. 119, 120, 121).

The accused testified that in September or October (1944), while engaged in aerial acrobatics, his "leg was banged up against" a gauge several times and later the same day it became so sore and painful that he "could hardly walk on it" (R. 135, 136). Thereafter a flight surgeon lanced the affected area of his leg and said it was a boil or an infection (R. 136). The edges around the incision turned black and about a week later the doctor cut out an area in his leg about an inch in diameter and a quarter inch deep (R. 136, 137). The dark flesh kept spreading until penicillin washings were used on his leg (R. 138). He suffered a great deal of pain and finally used twelve morphine syrettes to deaden it (R. 138). These syrettes were given to him by another pilot, since deceased, who suggested their use (R. 138, 139). Thereafter the accused took morphine syrettes from unguarded planes, "first aid kits and various places" (R. 139, 142, 143). He never procured morphine from any source other than an Army reservation (R. 141, 142). His leg was sore for about 3 to 3½ months (R. 139). After he started using narcotics he "did several things" he "had never done before", and he was never completely out from under the influence of the drug, in his opinion (R. 140, 141). He intended to stop using the drug of his own accord and return everything he had taken, but he was never strong enough to do it (R. 141). He had never been in trouble before he came into the Army, had never taken morphine, and knew nothing about it (R. 139, 140, 144).

On cross-examination the accused admitted he stole "this camera" (R. 144, 145), that he stole "this ring" from Captain Sherman, that he got $100.00 from First Lieutenant Eser's wallet (R. 145), that if he took $100.00 from Captain Pascho, he spent it (R. 146). Accused testified that if he had received his pay he would have paid back the money he took (R. 146), and that he had attempted to convert his $900.00 worth of war bonds for such purpose (R. 146, 147) but had not done so (R. 148).

The wife of the accused testified that she noticed a change in him during the first part of 1945 (R. 125, 130). "He slept most of the time", he became listless and secretive and made unreliable statements (R. 125, 131). Once the accused came home very late, acted very peculiarly, could not eat, and "gave all the signs of someone really intoxicated and yet he wasn't". She could not smell "anything" on his breath (R. 126, 127). He had many boils and an infection on his leg over a period of time which were very painful (R. 125, 130, 131). For six months he had a hole in the muscle of his leg which was aggravated by walking and she told the doctor the accused should be in the hospital (R. 125, 126). He was not normal although she did not suspect him of using morphine (R. 131). She never saw the camera, ring and other articles which were found in their home (R. 131, 132), although after they were discovered, she found additional articles which she voluntarily took to the Provost Marshal (R. 132).

5. The evidence in this case, although largely circumstantial, establishes beyond a reasonable doubt that at various times between about 15 October 1944 and 28 June 1945, the accused committed several acts of larceny at Orlando Army Air Base and Kissimmee Army Air Field, both in Florida. He was convicted of the theft of about 25 syrettes containing morphine tartrate solution, value about $2.50, property of the United States, and of a ring, a watch, ten OPA gas coupons, a "shortsnorter" bill, a fountain pen, a camera and case, all of an aggregate value of about $185.10, and of a Treasury check in the sum of $54.90, and about $210.00 in cash, all from various other officers.

Proof of the guilt of the accused rests upon his possession of the subject matter of the several larcenies and upon his admissions while testifying during the course of the trial.

Evidence that a person was in possession of recently stolen property, if not satisfactorily explained, may raise a presumption that such person stole it (MCM 1928, par. 112a). The presumption or inference is one of fact, not one of law, and the probative value of such evidence depends upon the character of the possession, the time that has elapsed between the theft and the discovery of the stolen goods in the possession of the accused and other attendant circumstances (CM 230928 Lanyon, 18 BR 115, 122, 123).

The evidence shows that two searches were made of the accused's home in Orlando, Florida, by representatives of the Provost Marshal's office, that oral authority for the first search was given by the accused and that written permission was granted by the accused on 28 June 1945 for another search. While it is not wholly clear from the record, it appears that most, if not all, of the items recovered from the accused's home were discovered on 28 June 1945. These included the watch, the fountain pen, the camera and case, the Treasury check torn in 21 pieces and 19 empty morphine tartrate syrettes. On the same date, six syrettes were taken from the accused's person. The ring was found in the accused's locker upon an undisclosed date and the OPA gas coupons and "shortsnorter" bill were seen in the accused's dresser drawer in his bedroom shortly before 28 April 1945, approximately three weeks following their loss. All of the articles were shown to have been missing, under circumstances indicating their theft, within five months prior to 28 June 1945. The lack of knowledge upon the part of the accused's wife that these articles were in their home tended to establish the accused's personal and exclusive possession of them.

Despite any uncertainty concerning the exact dates upon which some of these articles were found, the admissions made by the accused connect him with their unlawful taking and such admissions dissipate any reasonable doubt as to his guilt. He specifically testified that he stole Captain Sherman's ring, that he got $100.00 from First

Lieutenant Eser's wallet, and that he stole "this camera", the obvious reference being to Captain Van de Veire's camera as it was the only one mentioned in the record. He was not interrogated as to many of the items but his admitted possession of a part of each group of the stolen property warrants the inference that he stole all of it (Dig. Op. JAG, 1912-30, sec. 1575 (5); 36 Corpus Juris 870).

Although there was no direct evidence that the morphine syrettes were the property of the United States, there was abundant circumstantial evidence that the syrettes taken from his person and the unused syrettes found in his home were of the type, kind and character furnished and intended for use in the military service which evidence, together with the accused's admissions that he took morphine from unguarded planes and never procured it from any source other than an Army reservation, was ample to warrant the court in inferring and finding that the morphine was military property of the United States (MCM 1928, par. 150i, p. 185).

The accused attributed his wrongful conduct to his addiction to the use of drugs. Voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition, but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense (MCM 1928, par. 126a, p. 136). The evidence fails to show that the accused was so far under the influence of drugs as to be incapable of entertaining the specific intent requisite to the commission of larceny. After the accused had been under observation in a hospital for three weeks, a medical board concluded that he was legally sane, that he had not suffered and was not suffering from any psychosis or mental condition, that he was able to differentiate between right and wrong, and was able to adhere to the right. The accused's own testimony tends to corroborate the board's findings as he stated he knew that he was doing a lot of things he had never done before, that he intended to return everything he had taken and stop using drugs but was not strong enough to do so. His demonstrated ability to perpetrate a series of thefts, secrete the proceeds and avoid detection over a period of several months further tends to show that his was not a mind so far deranged or drugged as to be incapable of harboring the intent permanently to deprive the owners of their property.

6. War Department records show that the accused is 27 years of age. He is a high school graduate and attended Clemson College for three years but did not graduate. In civil life he was employed for about one year by a "ten-cent" store chain, working in the stockroom, and thereafter and until his entry into the military service he managed a farm at Inman, South Carolina. He entered upon active duty in the Army on 4 April 1942, as an aviation cadet. On 22 April 1943, he was

commissioned a second lieutenant, Army of the United States, and ordered to active duty with the Air Corps. He was promoted to first lieutenant on 5 January 1945.

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 sentence and to warrant confirmation thereof. Dismissal is authorized under Article of War 93.

W. H. Paxton, Jr., Judge Advocate

[illegible], Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 288730 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 Ralph E. Harling (0-676786), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of having committed several acts of larceny, all in violation of Article of War 93. He was convicted of the theft of a ring and a watch (Specification 1 of the Charge), ten Office of Price Administration mileage ration gas coupons, a shortsnorter bill and $100 in money (Specification 2 of the Charge), a fountain pen and a camera and case (Specification 3 of the Charge), a Treasury check in the sum of $54.90 and about $110 in money (Specification 4 of the Charge), and about 25 syrettes containing morphine tartrate solution (Specification 5 of the Charge), all such property having an aggregate value of about $452.50. 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 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. 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 thereof. I concur in that opinion.

At various times between about 15 October 1944 and 28 June 1945, the accused committed the several larcenies at Orlando Army Air Base and Kissimmee Army Air Field, Florida. The morphine syrettes were taken from first aid kits upon life rafts in unguarded airplanes at these installations. All of the other property belonged to brother officers of the accused and was taken from their respective quarters and from their lockers. Many of the stolen items were found in the home of the accused, although he spent the money and personally used most of the morphine taken. The accused injured his leg in the fall of 1944 while engaged in aerial acrobatics and thereafter, following surgery upon the limb, it became infected and very painful. The accused then used morphine given him by another pilot and continued to use it until apprehended in June 1945, obtaining it by the thefts described. The accused attributed his wrongful conduct to his addiction to the use of this drug.

The extent to which the accused's misconduct may be attributed to his use of morphine is problematical. That it did influence his actions to some degree appears certain, although it clearly provided no legal excuse therefor. The evidence reveals the accused not so much as a confirmed thief but as one whose criminal tendencies were developed contemporaneously with his use of drugs, and directly following physical injuries sustained in line of duty. According to a written statement of his counsel, which is among the allied papers attached to the record of trial, the accused has made full restitution covering all of the money and property wrongfully taken by him. In view of all the circumstances, I recommend that the sentence be confirmed but that the forfeitures and confinement imposed be remitted and that the sentence, as thus modified, be carried into execution.

4. Consideration has been given to a letter from the mother of the accused, dated 9 October 1945, addressed to the Honorable James F. Byrnes, Secretary of State, and transmitted to the Secretary of War under date of 24 October 1945. Consideration has also been given to a letter from the mother of the accused, dated 14 September 1945, to the Honorable Olin D. Johnston, United States Senator from South Carolina, and to matters in extenuation contained in a letter from Colonel James E. Matthews, individual counsel for the accused, dated 2 November 1945, addressed to the Board of Review, both of which letters also urge 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.

THOMAS H. GREEN
Brigadier General, U. S. Army
Acting The Judge Advocate General

5 Incls
1 - Record of trial
2 - Form of action
3 - Ltr fr Mrs. R. E. Harling to Sec. of State, 9 Oct. 45
4 - Ltr fr Mrs. R. E. Harling to Sen. Johnston, 14 Sep. 45
5 - Ltr fr Col. Matthews, 2 Nov. 45

(Sentence confirmed but forfeitures and confinement remitted. GCMO 505, W.D. 5 Dec 1945).

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

SPJGQ - CM 288951

1 NOV 1945

UNITED STATES	)	SOUTHWEST PACIFIC WING
	)	PACIFIC DIVISION
v.	)	AIR TRANSPORT COMMAND
	)	
Second Lieutenant JACK W. BURTON (O-710562), 1559th AAFBU, SWPW, PD, ATC, APO 72.	)	Trial by G.C.M., convened at 1559th AAF Base Unit, APO 72, 13 and 14 September 1945. Dismissal.

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

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

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

CHARGE: Violation of the 95th Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification: In that Second Lieutenant Jack W. Burton, 1559th Army Air Forces Base Unit, Southwest Pacific Wing, Pacific Division, Air Transport Command, APO 72, did, at or near APO 72, on or about the 5th day of September, 1945, threaten Captain Robert G. Crowder, Second Lieutenant George G. Doyle, and Warrant Officer Charles D. Loyd, all of the 1559th Army Air Forces Base Unit, APO 72, by using the following language: "If you go into town, I'll see that one of my boys gets you and you won't come back", or words to that effect.

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

3. The evidence concerning the original Charge and Specification, upon which findings of not guilty were made, will be considered only insofar as necessary to a clear understanding of the evidence adduced with respect to the Additional Charge and Specification. The evidence for the prosecution is as follows:

During the night of 28 August 1945, several officers and men from the air base at which the accused was stationed raided and searched a native hut in the nearby town of Tacloban, Phillippine Islands (R. 7, 17, 23, 36). The search was made for the purpose of finding Government property and guns. No such property was found (R. 20, 21). The officers who made the raid were Major Kelley, Captain Crowder, commanding officer of the base and of the accused (R. 87), Second Lieutenant Doyle, Provost Marshal (R. 7), and Warrant Officer Loyd, base legal officer (R. 7, 36). The accused, a married man, was discovered in a semi-clad condition in the hut with a young Filipino woman, Miss Fredesvinda R. Bana-ag, a nurse in the Phillippine Army, and there were some 12 or 14 Filipinos in the dwelling, which consisted of two or three rooms (R. 7, 8, 11, 15, 19, 20, 24, 29, 33, 36, 37, 76). As a result of these events, the accused was taken into custody, restricted to his base (R. 9, 10), and subsequently charged with wrongfully occupying a bedroom with a female not his wife (Specification and original Charge), of which Charge he was acquitted in this trial.

Sometime after 28 August 1945, the accused made a statement to First Lieutenant Culver, who occupied a tent with him, that "the men who raided Freddie's house on one particular night had better not appear in Tacloban alone" (R. 33, 34). About a week following the raid and during an investigation, Warrant Officer Loyd sent for the accused and asked him why he had not reported to the investigating officer that afternoon, as he had been instructed to do. The accused said he thought the investigation was over and wanted to know what the investigating officer wanted. Mr. Loyd told him that the investigating officer was going into town with him and interview several witnesses. The accused then said: "Aren't you afraid for me to go into town?" Mr. Loyd asked "Why?" Accused replied: "With my connections I might not come back, and if you and Lieutenant Doyle get in, you might not either" (R. 9, 12, 13). As the accused spoke these words to Mr. Loyd, he (the accused) assumed an unfriendly and hostile attitude, raising his voice and scowling (R. 12, 13).

Second Lieutenant Doyle, the Provost Marshal, testified that on or about 2 September 1945, he went to the accused's tent "to change his status of restriction to arrest, by order of the C.O." (R. 37). The accused was sitting close to the entrance of his tent, along with Second Lieutenant Yeates and "the houseboy" (R. 37, 41). The accused had a bolo or long knife shaving a cocoanut which he laid at his feet but continued "fooling" with the cocoanut. The witness described the ensuing scene in these words: "I approached him and I said, 'Burton (the accused), I'm here to inform you that the Commanding Officer has changed your restriction to arrest'. He said nothing, and I said,

'If you'd care to read the Court-Martial Manual under it, why I have it here', and he said, 'No, that's unnecessary, I know what's going to be done'. I said, 'The Commanding Officer wishes that you do not go to any other places except the mess hall, the latrine, and your quarters. You're to speak to no one, have no visitors and make no telephone calls'. He replied that he had a former date arranged with Miss Bana-ag to come out to her, and I told him that he could have one of the other lieutenants call up and cancel the date. Then he made the statement, 'You boys seem to be out to get me'. I made some statement to the effect that I didn't see how he concluded that. During this time he was still playing with the cocoanut, and Lieutenant Yeates was sitting there, and the three of us were close together, and I was looking at all of them during the conversation, and then he said to me, 'You'll never get this on a statement, but if Major Kelley, Captain Crowder, Mr. Loyd, or yourself ever go into the city of Tacloban at night, I'll see that you have one of these bolos shoved through your gut'. Then he made some statement in words I don't remember, and they were pretty sharp" (R. 37, 38). On another occasion, while the accused was under arrest or restriction and was in Second Lieutenant Doyle's office he told Doyle that "if the deal ever came through", it wouldn't be wise for Doyle to go into town (R. 40).

4. The evidence for the defense is as follows:

Second Lieutenant Yeates testified that on or about 5 September 1945, he was present in the tent with the accused and their houseboy when Second Lieutenant Doyle came over and told the accused that he was under arrest. The accused acknowledged that he was under arrest and asked if he could see anyone and was told "no" (R. 92). The witness did not remember hearing the accused say anything else and did not hear him say that "You won't get this in a statement, but if you, * * * * go into town, I'll see that one of my boys gets one of these through you" (R. 92, 93). On cross-examination, Second Lieutenant Yeates testified that while he was close enough to hear and thinks he heard everything that was said, the matter was none of his business, he paid no attention, and it was possible that something was said which he did not hear (R. 93). The same witness, later called as a witness by the court, testified that the accused and Second Lieutenant Doyle "said a few other words" but he "heard only sketches of it, and I don't know if that's correct or not" (R. 104, 105). He also testified that afterwards he told Second Lieutenant Doyle that he (Yeates) was from another field, didn't know anything about it, and didn't like to get mixed up in it (R. 104), which statement was confirmed in substance by Second Lieutenant Doyle, called as a rebuttal witness by the prosecution (R. 102, 103).

Epifanio Cayanong, the houseboy, testified through an interpreter that he remembered the occasion when the Provost Marshal came to the tent and talked to the accused (R. 68, 69). He remembers only

one thing, the Provost Marshal saying "under arrest". He heard the accused say only one word to the Provost Marshal who "did not wait any longer, he just went away." The accused was not angry, he was in a good mood (R. 69).

The accused, having been advised of his rights as a witness, testified that he was restricted "to the area" on the day following his apprehension at Miss Bana-ag's home and that on the occasion he was placed in arrest of quarters he did not tell Second Lieutenant Doyle that if he and other officers went into town, he (the accused) would see that they would not come back, or words to that effect (R. 51, 52). He does not remember whether he was using the bolo knife at the time; it was handy, however, and it is quite possible he could have been using it. He categorically denied having made any sort of threat to or against Captain Crowder, Second Lieutenant Doyle, or Warrant Officer Loyd (R. 52, 64). He did ask Warrant Officer Loyd "if he wasn't afraid if I went into town * * * * I might not come back. I also told him if Lieutenant Rocheleau (the investigating officer) was going to talk to the people at the house it would be best if he brought in an interpreter because they didn't speak English" (R. 64). But he did not make a statement to the effect that something might happen to the three parties if they went into town (R. 64).

The accused further testified that he was divorced from his first wife, by whom he had one child, had remarried and had one child by his second and present wife (R. 48, 55), that he sends $50.00 a month to support his first child and $250.00 a month to his second wife (R. 48, 55), and that his pay card shows his total monthly pay and allowances to be $417.01 (R. 66). He entered the Regular Army as a private on 7 February 1937, and served with the 35th Infantry and 11th Tank Company at Scofield Barracks, Hawaii, for about two and one-half years, attaining the grade of private first class (R. 46). He re-enlisted in 1939 and served as Sergeant and Staff Sergeant with the 144th Field Artillery for approximately a year and a half when he was transferred to the Air Corps (R. 46, 47). He became an aviation cadet and on 7 February 1944 was commissioned a Second Lieutenant with aeronautical rating of pilot (R. 47). He came overseas on 5 June 1944 and has been with the Air Transport Command ever since (R. 47, 48). He has never had company punishment nor been tried by court-martial since he entered the military service (R. 48). He has had no trouble with officers at his station and no one has complained about the performance of his duties (R. 53).

Captain Crowder, the accuser, testified that on 2 September 1945, when he preferred the original charges against the accused, the charge sheet did not contain any allegations or charges as to the accused threatening certain officers and that he (Captain Crowder) was never asked to swear to or sign the Additional Charge set out in the charge sheet (R. 87, 88, 89; Sp. and Add. Chg.).

5. The accused was convicted of a violation of Article of War 95 in that he did threaten his commanding officer, the base Provost Marshal, and the base legal officer, on or about the 5th day of September 1945, by using the following language: "If you go into town, I'll see that one of my boys gets you and you won't come back", or words to that effect. The evidence fully supports the findings of guilty.

On the night of 28 August 1945, the accused was discovered in a native Filipino hut in the town of Tacloban, Phillippine Islands, in the company of one Miss Bana-ag, a nurse in the Phillippine Army, and in the presence of some twelve or fourteen Filipinos who lived in the two or three room hut. The accused was thereafter restricted to his base and charged with wrongfully occupying a bedroom with a female not his wife, of which charge he was duly acquitted.

It was during an investigation of the original Charge that the accused committed the offense of which he now stands convicted. The evidence discloses a calculated attempt upon the part of the accused to intimidate Captain Crowder, his commanding officer, Second Lieutenant Doyle, the Provost Marshal, and Warrant Officer Loyd, base legal officer, into abandoning their efforts to complete investigation of the original Charge. These two officers and the warrant officer participated in the raid in which the accused was apprehended. Thereafter the accused told his tent-mate that they "better not appear in Tacloban alone" and followed this up by telling Mr. Loyd, in substance, that if he and Lieutenant Doyle went into town, they might not come back. When the Provost Marshal appeared at the quarters of the accused and advised him that his status had been changed from restriction to arrest, the accused told that officer, in the presence of Second Lieutenant Yeates, that if he or the others ever went into town, he (the accused) would see that a bolo knife was "shoved through your gut."

The conclusion is inescapable that the accused hoped by these statements and suggestions to instill such apprehension or fear in the minds of these officers that they would terminate their activities directed toward the investigation of his alleged misconduct. The statements disclose a willful attempt to obstruct the orderly process of military justice. Whether the accused would have been able to effectuate his stated purpose to bring physical harm to these officers is immaterial. His conduct was patently dishonorable and disgraceful and unbecoming an officer and a gentleman.

The fact that Captain Crowder was not physically present when the statements were made does not affect the character of the wrong. The term "threaten" as employed in the Specification not only means "to inspire with apprehension", "to promise punishment, reprisal or

the like, to", but is also defined as meaning "to utter threats against" (See Yarberry v. Commonwealth, 272 SW 24, 26, 209 Ky. 15; Webster's New International Dictionary (1934)). The accused uttered the threat, specifically naming Captain Crowder, to the Provost Marshal while the latter was engaged in the exercise of his official duty in advising the accused that he had been placed in arrest of quarters. The statement was made in the presence of other military personnel and while an official investigation was in progress. Under such circumstances, a direct and discreditable effect upon the military service to the prejudice of good order and discipline was fully accomplished, irrespective of the absence of one of the persons against whom the statement was directed. While there is a slight variance between the language attributed to the accused by the prosecution's witnesses and the allegations of the Specification, there is no material difference and the proof is sufficiently similar to the allegations to uphold the findings of guilty as made.

The evidence and the charge sheet disclose that the accuser signed and swore to the original Charge and Specification on 2 September 1945 and that thereafter the Additional Charge and Specification, alleging commission of an offense "on or about" 5 September 1945, were attached to the charge sheet below the original Charge. The charge sheet was not resubmitted to the accuser to obtain his oath thereto. The accused was acquitted of the original Charge and Specification and convicted of the Additional Charge and Specification. It is apparent that the accused was convicted of a charge and its specification which were neither signed by an accuser nor sworn to by him at any time. However, both the original and additional Charge were duly referred for trial under date of 10 September 1945, the accused was arraigned upon both Charges, and entered upon trial without voicing any objection thereto. The defense raised its objection on the second day of trial after all of the evidence for the prosecution had been presented and near the close of the evidence for the defense.

The failure to comply with that portion of Article of War 70 providing that charges and specifications must be signed under oath by a person subject to military law was a procedural error only and did not affect the jurisdiction of the court (CM 172002, Nickerson; CM 220625 Gentry; CM 229477, Floyd, 17 BR 149). Although counsel for the accused stated that he interposed objection based upon this error as soon as he and the accused had an opportunity to examine the original charge sheet and talk with the accuser (R. 91), nevertheless the objection was not timely made. The charges were served upon the accused on 10 September 1945. Three days later the trial began and upon arraignment the accused entered pleas to the general issue without questioning the propriety of any pre-trial procedure. Clearly the accused was not surprised when confronted by the Additional Charge. He knew exactly what he was charged with and he made a vigorous defense thereto. Belatedly he learned of the failure of the accuser to sign and swear to the Additional Charge and its Specification and undertook to take advantage thereof. Under all the circumstances, the error

complained of did not injuriously affect the substantial rights of the accused within the meaning of Article of War 37.

6. War Department records show that the accused is 25 years of age and married. He completed eleven grades but did not graduate from high school. He served in enlisted status in the Regular Army from 13 February 1937 to 8 September 1939 and from 17 August 1940 to 7 February 1944, upon 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, Air Corps.

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 thereof. Dismissal is mandatory under Article of War 95.

W. B. Pardow Jr., Judge Advocate.

A. B. Gieser, Judge Advocate.

Donald D. Hickman, Judge Advocate.

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

SPJGH-CM 288952

31 OCT 1945

UNITED STATES v. Second Lieutenant ALBERT L. ANDERSON (0-781756) and Second Lieutenant RICHARD BARTHOLOMEW, JR. (0-762212), both Air Corps.	AIR TRANSPORT COMMAND WEST COAST WING, PACIFIC DIVISION Trial by G.C.M., convened at Hamilton Field, California, 12 September 1945. Dismissal, 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 officers named above and submits this, its opinion, to The Judge Advocate General.

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

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

Specification 1: In that Second Lieutenant Albert L. Anderson, Transient, Port of Aerial Embarkation, 1503d Army Air Forces Base Unit, West Coast Wing, Pacific Division, Air Transport Command, and Second Lieutenant Richard Bartholomew, Jr., Transient, Port of Aerial Embarkation, 1503d Army Air Forces Base Unit, West Coast Wing, Pacific Division, Air Transport Command, acting jointly and in pursuance of a common intent, did, at San Rafael, California, on or about 18 August 1945, unlawfully enter the store of Salvatore A. Orru, with intent to commit a criminal offense, to wit, larceny therein.

Specification 2: In that Second Lieutenant Albert L. Anderson * * *, and Second Lieutenant Richard Bartholomew, Jr., * * *, acting jointly and in pursuance of a common intent, did, at San Rafael, California, on or about 18 August 1945, feloniously take, steal, and carry 3 bottles of Three Feathers whiskey, value of about $4.05 each, of a total value of about $12.15, the property of Salvatore A. Orru.

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

Specification: In that Second Lieutenant Albert L. Anderson, * * *, and Second Lieutenant Richard Bartholomew, Jr., * * *, acting jointly and in pursuance of a common intent, did, at San Rafael, California, on or about 18 August 1945, willfully, wrongfully, and unlawfully destroy a window, value about $29.90, property of Salvatore A. Orru.

Each accused pleaded guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced as to either accused. Each accused was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentences and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to show that Salvatore A. Orru operated a wholesale liquor store at 710 Fourth Street, San Rafael, California, over a period of time including 18 August 1945. Mr. Orru had living quarters in the rear of his store which he occupied. About 1:30 a.m. on 18 August 1945, Mr. Orru heard the sound of glass shattering and arising he discovered that the show window in the front of his store was broken and that three bottles of Three Feathers liquor which had been on a shelf in the showwindow were missing. These bottles could have been removed by merely reaching through the shattered window glass. Each bottle held a fifth of a gallon of liquor and sold for $4.05 (R. 8, 9, 12). Mr. Orru had given no one permission to break the window or to take these bottles of liquor (R. 11).

Gerald L. Reinhardt, a taxicab driver, was in front of a cab stand at 826 Fourth Street about 1:30 a.m. on 18 August 1945 and hearing a window break he looked down the street and saw two men in khaki trousers who were running. The window he heard break was the one in Orru's Liquor Store (R. 13, 14).

Soon thereafter, City Police Officer Charles J. Chiesa and Private John D. Outzen, a military policeman, who were on radio car patrol received a call and drove to Orru's store where they found the front show window broken (R. 15, 17, 18). Cruising for suspects they came upon the two accused walking south on U.S. Highway 101. Accused Anderson had two bottles of Three Feathers liquor in his possession while accused Bartholomew had one. Although they at first insisted they had purchased the liquor, soon thereafter one of the accused admitted that they had broken the window and taken it. The other accused heard this statement made and did not deny it (R. 15, 16, 19-22). Both accused were cooperative with the authorities (R. 24). Although they had the odor of alcohol about them, Chiesa and Outzen did not believe either of them was drunk because their gaits were steady and their eyes and voices were clear and normal (R. 16, 22).

The accused paid for the repair of the show window and also paid Mr. Orru an additional $25 in settlement of all other damages (R. 9, 10; Pros. Ex. 1). This proved satisfactory to Mr. Orru who entertained no desire to prosecute the accused criminally (R. 11).

4. Understanding their rights as witnesses each of the accused elected to make an unsworn statement. Accused Anderson made the following statement:

"I was exuberant over the peace with Japan and we were laying around here for quite a while. Our orders were cancelled once and we didn't know if we were going overseas, or what was going on. When we heard what had happened we went out and had a party and committed some rather foolish acts and I'm ready to accept punishment.

"My civilian record is clean and my Army record is clean except for one 104 which is not in our records.

"It was a silly thing to do and I know it."

Accused Bartholomew's statement was as follows:

"In effect my statement is approximately the same as Lieutenant Anderson's. We were both exuberant over the fact the war was over and we were going to ship, so it was our idea to have a party. It would probably be the last party here, so we went to town and got drunk and did a very stupid, foolish thing while under the influence of liquor. I realize that and I want to take my punishment for it.

"My record in the Army has all been good. I've been in the Army quite a while and I feel that I know the duties of a soldier and the obligations, especially of an officer."

5. Attached to the record of trial is a letter dated September 12, 1945, from the District Attorney of Marin County, San Rafael, California, which contains the following observations relative to the accused and their offenses, viz:

"At the time this matter was called to our attention, we had no choice but to prefer charges of burglary against them in this county. Upon further consideration of the case, we believe that we are justified in recommending consideration of their cases to the end that these men will not be given dishonorable discharges from the service. We do not condone acts of this kind but recognize the fact that the offenses were committed when our civilian population was guilty of even worse depredations and we feel

that the conduct of these two men might have been prompted by a good deal of misguided civilian psychology. It is therefore our recommendation that every possible leniency be granted to these men so that they can enter civilian life with a less severe penalty. We have discussed this matter with the Chief of Police of San Rafael and he has authorized us to make this statement.

6. Housebreaking is unlawfully entering another's building with intent to commit a criminal offense therein (MCM, 1928, par. 149e). The entry of any part of the body, even a finger, is sufficient to constitute an "entering" (MCM, 1928, par. 149d). Accuseds' pleas of guilty plus the evidence offered by the prosecution abundantly sustains the court's findings of guilty of Specification 1 of Charge I.

The court's findings of guilty of Specification 2 of Charge I are also sustained by the prosecution's evidence and the accuseds' pleas of guilty. The larceny charged in this specification was the "criminal offense" accused were charged with intending under Specification 1 of Charge I. Since the evidence fully established commission of the larceny it was appropriate to allege it in a separate specification as an offense separate and distinct from the housebreaking (MCM, 1928, par. 149d).

Prosecution's evidence also establishes commission of the wrongful destruction of the show window in Orru's liquor store as alleged in the Specification of Charge II. Such intentional destruction of private property is clearly conduct discreditable to the military service and violative of Article of War 96. Since a breaking is not an essential element of the offense of housebreaking it did not constitute any multiplication of charges to allege this offense of destroying the store window in addition to the offense of housebreaking.

7. Accused Anderson is 24 years of age. War Department records indicate that he is married and a high school graduate. From November 1940 to March 1943 he worked as a helper machinist and apprentice machinist at the Mare Island Navy Yard. On 25 March 1943 he entered military service. He served as an air cadet from 3 September 1943 to 27 June 1944 when he was commissioned a second lieutenant with the rating of pilot.

Accused Bartholomew is 23 years of age. War Department records indicate that he is a high school graduate. He entered military service as an air cadet on 22 April 1943 and on 5 December 1943 he was commissioned a second lieutenant with the rating of pilot.

8. The court was legally constituted and had jurisdiction of both 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 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 93 or Article of War 96.

Thomas N. Jaffy, Judge Advocate

William H. Bamberger, Judge Advocate

Robert E. Newham, Judge Advocate

SPJGH - CM 288952 1st Ind

Hq ASF, JAGO, Washington 25, D. C. NOV 21 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 Albert L. Anderson (0-781756), and Second Lieutenant Richard Bartholomew, Jr. (0-762212), both Air Corps.

2. Upon joint trial by general court-martial each accused pleaded guilty to, and was found guilty of, (a) housebreaking in violation of Article of War 93; (b) larceny of three bottles of Three Feathers whiskey of a total value of $12.15 in violation of Article of War 93; and (c) willfully and unlawfully destroying a window valued at $29.90 in violation of Article of War 96. Each accused was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentences and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. About 1:30 a.m., 18 August 1945, soon after victory over Japan had been achieved, the accused, who had been drinking but were not drunk, broke the glass of the front show window of a liquor store located in San Rafael, California, and extracted three bottles of Three Feathers liquor from the show window. They were apprehended soon after walking along a highway with the bottles in their possession. Payment has been made for all damages occasioned by their conduct. It appears from a letter of the District Attorney for Marin County, San Rafael, California, that accuseds' acts were committed at a time when the civilian population of that county were guilty of even worse depredations committed during the hysteria of excitement produced by our victory over Japan. It is quite apparent that the general atmosphere of unrestrained celebration contributed substantially to induce the accused to commit these offenses. The District Attorney for Marin County and the Chief of Police of San Rafael both recommend that leniency be accorded the accused to reduce their penalty to something less than dismissal.

In view of the foregoing, I recommend that the sentence, as to each accused, be confirmed but commuted to a reprimand and forfeiture of pay of $50 per month for three months, and that the sentence as thus commuted be carried into execution.

4. Consideration has been given to a letter from Mr. and Mrs. Richard Bartholomew, dated 7 October 1945, urging clemency in behalf of accused Bartholomew.

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
Brigadier General, U.S.A.
Acting The Judge Advocate General

3 Incls
1. Record of trial
2. Form of action
3. Cpy of ltr fr Mr. & Mrs. R. Bartholomew dated 10-7-45

(Sentence as to each accused, confirmed but commuted to a reprimand and forfeiture of $ 50. pay per month for three months. GCMO 497, 5 Dec 1945).

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

SPJGK - CM 290025

18 OCT 1945

UNITED STATES	THIRD AIR FORCES
v.	Trial by G.C.M., convened at Gulfport Army Air Field, Gulfport, Mississippi, 21 September 1945. Dismissal.
Second Lieutenant MERVIN J. BURBANK (O-2078431), Air Corps.	

OPINION of the BOARD OF REVIEW
LUCKIE, MOYSE and WINGO, 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 Mervin J. Burbank, Squadron S, 328th AAF Base Unit (CCTS (VHB)), did, without proper leave absent himself from his organization at Gulfport Army Air Field, Gulfport, Mississippi, from about 27 August 1945 to about 30 August 1945.

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

Specification 1: In that Second Lieutenant Mervin J. Burbank, * * *, did, at Gulfport Army Air Field, Gulfport, Mississippi, on or about 31 July 1945, borrow the sum of One Hundred Dollars ($100.00) from an enlisted man, to-wit: Sergeant Otto E. Sackman, to the prejudice of good order and military discipline.

Specification 2: In that Second Lieutenant Mervin J. Burbank, * * *, did, at Gulfport Army Air Field, Gulfport, Mississippi, on or about 31 July 1945, borrow the sum of Twenty Dollars ($20.00) from an enlisted man, to-wit: Sergeant Harry E. Richardson, to the prejudice of good order and military discipline.

Specification 3: In that Second Lieutenant Mervin J. Burbank,

* * *, did, at Gulfport Army Air Field, Gulfport, Mississippi, on or about 5 August 1945, borrow the sum of Twenty Dollars ($20.00) from an enlisted man, to-wit: Sergeant Lee S. Loveland, then Corporal, to the prejudice of good order and military discipline.

Specification 4: In that Second Lieutenant Mervin J. Burbank, * * *, did, at Gulfport, Mississippi, on or about 21 August 1945, with intent to defraud, wrongfully and unlawfully make and utter to Jones Brothers Drug Co., Inc., a certain check in words and figures as follows:

No._____

Gulfport, Miss., 21 August 1945

PAY TO THE
ORDER OF _____CASH_____ $20.00
XX
Twenty & No/100 ---------- DOLLARS

/s/ Mervin J. Burbank

To HANCOCK BANK
GULFPORT, MISS.

and by means thereof did fraudulently obtain from the said Jones Brothers Drug Company, Gulfport, Mississippi, the sum of $20.00, he the said Second Lieutenant Mervin J. Burbank then well knowing that he did not have and not intending that he should have any account with the Hancock Bank of Gulfport, Mississippi, for the payment of said check.

NOTE: Specifications 5 to 11 inclusive are identical in form with Specification 4 except as to date, amount, organization defrauded and bank on which drawn, which variations are as follows:

Spec.	Date	Amount	Organization Defrauded	Bank on which drawn
5	24 Aug 1945	$20.00	Artcraft Studios	Hancock Bank
6	27 Aug 1945	5.00	Artcraft Studios	Hancock Bank
7	26 Jul 1945	50.00	Hancock Bank Facility	Livestock National Bank
8	21 Aug 1945	20.00	Sea View, Inc.	Hancock Bank
9	22 Aug 1945	30.00	Sea View, Inc.	Hancock Bank
10	22 Aug 1945	20.00	Sea View, Inc.	Hancock Bank
11	24 Aug 1945	20.00	H. G. Hill Store	Hancock Bank

He pleaded guilty to Specification 1, Charge I, except the word "27"

substituting therefor "29", and pleaded guilty to Charge I and to Charge II and all of its specifications; and was found guilty of Specification 1, Charge I, except the word "27", substituting therefor "29", and guilty of Charge I, and of Charge II and all of its specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For the prosecution.

A duly authenticated extract copy of the morning report of Squadron S, 328th Army Air Forces Base Unit (CCTS (VHB)),containing entries showing accused as absent without leave from his organization from 0700 hours on 27 August 1945 to 1515 hours on 30 August 1945, was introduced into evidence without objection (R. 13, Pros. Ex. 1).

On 31 July 1945 accused borrowed $100 from Sergeant Otto E. Sackman (R. 14). On the same date he borrowed $20 from Sergeant, then Corporal, Harry E. Richardson (R. 15). On 5 August 1945 accused borrowed $20 from Sergeant, then Corporal, Lee S. Loveland (R. 16). All the loans were made at the request of accused and were subsequently repaid (R. 14, 15,16). Each of the three enlisted men, as well as accused, was a member of Crew 130 (R. 14,15,16).

On or about 21 August 1945 a clerk at Jones Brothers Drug Company, Gulfport, Mississippi, cashed a check in the amount of $20 for accused (R. 17, Pros. Ex. 23). On 25 August and again on 27 August 1945 the manager of Artcraft Studio, Gulfport, Mississippi, cashed checks in the sum of $20 and $5 respectively, for accused (R. 17,18, Pros. Exs. 4,5,6). On 26 July 1945 the Hancock Bank Facility, Gulfport, Mississippi, cashed a draft in the sum of $50 for accused (R. 18, Pros. Exs. 7,8). On 21 August 1945 the Sea View, Inc., Biloxi, Mississippi, cashed a check in the sum of $20, and on 22 August 1945 cashed two additional checks in the amounts of $30 and $20, respectively, for accused (R. 19, Pros. Exs. 9,10,11,12). On 24 August 1945 the manager of H. G. Hill Stores, Gulfport, Mississippi, "okayed" and one of the "girls" cashed a check in the amount of $20 for accused (R. 19,20, Pros. Exs. 13,14). Each of the checks in question was signed by accused and each was drawn on the Hancock Bank, Gulfport, Mississippi (Pros. Exs. 4,9,13). The draft was signed by accused and was drawn on the Livestock National Bank, Sioux City, Iowa (Pros. Ex. 7). In each instance he received in cash the amount for which the instrument was drawn. All the checks and the draft were placed in proper channels for collection and were returned unpaid (Pros. Exs. 2,4,7,9,13). It was stipulated that if the vice-president of the

Hancock Bank were present he would testify there was no account in the Hancock Bank in the name of accused (R. 20, Pros. Ex. 15). It was stipulated that if the cashier of the Livestock National Bank were present he would testify that the account "held by" Mervin J. Burbank had been closed prior to the receipt of the draft in question (R. 20, Pros. Ex. 16). Restitution in full for each check and draft was made on 12 September 1945 by payment in cash (Pros. Exs. 2,4,7,9,13).

A voluntary written statement made by accused to the investigating officer on 5 September 1945 was admitted in evidence without objection. This statement may be summarized as follows: While in Sioux City he became indebted in the amount of $250 through gambling at the Officers' Club. In an effort to raise this money he continued gambling and upon arriving at Gulfport Army Air Field he became more involved. In order to take care of some gambling obligations incurred at Gulfport Army Air Field he borrowed money from the three enlisted men named in Specifications 1, 2 and 3 of Charge II. He continued to become more involved financially and as a result wrote the checks described in Specifications 4 through 11 of Charge II. At the time he wrote the checks he did not have an account in the Hancock Bank, but he intended to get the checks "straightened out the first of the month." He attended classes on 27 August 1945, had the day off on 28 August 1945, and was absent from the field only on 29 August 1945 (R. 21,22, Pros. Ex. 17).

4. For the defense.

Staff Sergeant John H. Curtis testified that he was chief schedule clerk and was the noncommissioned officer in charge of student records. According to the attendance records and the training schedule accused was present for his assigned duties on 27 August 1945 and had the day off on 28 August 1945, having no scheduled duties to perform on the latter day (R. 23-26, Def. Exs. A,B,C).

Accused, after being apprised of his rights as a witness, elected to testify under oath (R. 27). He reiterated in substance the statement made by him to the investigating officer. In addition he stated he was 25 years of age, married, and has one child. On the night of 27 August 1945 he left Gulfport Army Air Field and went to New Orleans for the purpose of endeavoring to raise funds to cover his indebtedness. It was his intention to return on 28 August 1945, but, owing to the necessity of having to visit a bank the next morning, he "figured it would be worth (his) while to take (his) chances on that extra day to see if (he) could not raise the money" (R. 29,30). He had previously attempted to borrow $500 from the Hunter National Bank in Texas to take care of his indebtedness, but had been advised 16 August 1945 of its refusal to make the loan owing to a a change in its policy. All the checks he wrote were a direct result of his gambling and have all been paid off. He had no intention to defraud the parties who cashed his checks and intended to make these checks "good"

by the first of the month (R. 28-33).

First Lieutenant Frank S. Yancey, Commander of Crew 130, testified that accused was the navigator of Crew 130; that accused performed his duties "very good"; that he got along with the other members of the crew and worked "harmoniously" as a member of the crew (R. 34).

5. Accused's plea of guilty of absence without leave from 29 August to 30 August 1945, coupled with the morning report entries and his testimony of record, conclusively shows his guilt of absence without leave for this period as found by the court.

Specifications 1, 2 and 3 of Charge II allege that on three occasions accused borrowed money from enlisted men "to the prejudice of good order and military discipline" in violation of Article of War 96. His pleas of guilty, together with the evidence presented by the prosecution, establish beyond doubt his guilt of the commission of the offenses as alleged. Each of the loans was made at the request of accused and was made from an enlisted man who was a member of the same crew as accused. It is prejudicial to good order and military discipline for an officer to borrow money from enlisted men of his organization (CM 246503, Maeef). The obligation that flows from indebtedness to a subordinate tends to weaken authority; it can become the cause of improper favor; it impairs the integrity of required relationships (CM 230736, Delbrook; II Bull. JAG, April 1943, p. 144).

Specifications 4 through 11, Charge II, allege that the accused did with intent to defraud, make and utter seven checks and one draft, well knowing that he did not have and not intending that he should have any account with the bank on which the checks and the draft were drawn for their payment. Accused's pleas of guilty and the evidence presented by the prosecution show that the accused did on the dates, to the business firms, and in the amounts alleged, give seven worthless checks and one draft in exchange for cash; that all of the checks and the draft were drawn on banks in which he had no account for the payment of any of them; and that he knew he did not have and did not intend that he should have any account for that purpose. It was a fair and reasonable inference for the court to find from these circumstances that the accused intended to defraud the organizations from which he obtained the cash. While accused's denial that he intended to defraud may be inconsistent with his pleas of guilty, in view of the testimony presented by the prosecution and accused's own admissions, the evidence was so compelling the court was clearly justified in finding accused guilty of the offenses as alleged. It is of course well established that restitution does not condone the offenses (CM 280997, Newman).

6. War Department records disclose that this officer is 25 years of age, is married, and is a high school graduate. In civil life he was employed for approximately 4-1/2 years as a sales manager of a crew engaged

in the sale of magazine subscriptions and was for 1-1/2 years employed as a cost accountant of an aircraft company. He entered the service on 28 August 1943 and upon completion of training as an aviation cadet, was commissioned a temporary second lieutenant in the Army of the United States on 9 December 1944.

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 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 or 96.

Charles A. Luckie, Judge Advocate

Norman Mayo, Judge Advocate

Earl W. Wingo, Judge Advocate

OCT 31 1945

SPJGK - CM 290025 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 Mervin J. Burbank (O-2078431), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absence without leave for one day in violation of Article of War 61 (Specification of Charge I); of borrowing money from three enlisted men of his organization (Specifications 1, 2 and 3, Charge II), and of writing seven worthless checks and one draft with intent to defraud (Specifications 4 through 11, Charge II), all in violation of Article of War 96. There was no evidence of any previous conviction. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. 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 thereof.

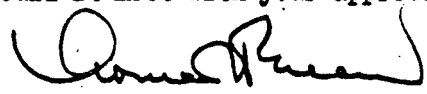
Accused was absent without leave from his organization from 29 August to 30 August 1945. He borrowed money amounting to $140 from three enlisted men, members of the same crew to which accused belonged, all of whom were subsequently repaid. Between 26 July and 27 August 1945 he drew seven checks and one draft in the total amount of $185.00 on banks in which he had no account. Each of the instruments was presented to a business firm and in each instance he received in cash the amount for which the instrument was drawn. Restitution in full for the draft and all of the checks was made subsequent to the drafting of charges but prior to their reference for trial. In explanation of his improper conduct, accused claimed that he had become financially involved as a result of gambling losses, and that he intended to make good all of the checks which he had issued "by the first of the month."

Accused's misconduct clearly establishes that he is unworthy of his commission. I recommend that the sentence be confirmed and carried into execution.

4. Consideration has been given to a letter from Mrs. Ruth Burbank, wife of accused, addressed to the Honorable Wayne Morse, Senator from

Oregon, and referred to this office, requesting 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.



3 Incls
1. Record of trial
2. Form of action
3. Ltr fr wife of accused

THOMAS H. GREEN
Brigadier General, U.S.A.
Acting The Judge Advocate General

(Sentence confirmed and ordered executed. GCMO 472, 15 Nov 1945).

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

SPJGN-CM 290026

UNITED STATES	)	SECOND AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Alamogordo, New Mexico, 18 September 1945. Dismissal, total forfeitures, and confinement for three (3) years.
	)	
Second Lieutenant WILLIAM L. BIRCH (0-685290), 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 93rd Article of War.

Specification: In that Second Lieutenant William L. Birch, Air Corps, Squadron E, 231st Army Air Forces Base Unit, did, at Las Cruces, New Mexico, on or about 22 January 1945, with intent to defraud, falsely indorse the name of Lieutenant Philip Maloof to a certain money order, in the following words and figures, to wit:

WESTERN UNION MONEY ORDER NU99873
Issued at LAS CRUCES, N. MEX. JAN 22 19 45
City and State Date
When Countersigned at
Point of Issue Pay To LT PHILIP MALOOF or Order

The Sum of FIVE HUNDRED AND NO/100-X-X-X-X-X-X-X DOLLARS ($500.00)

(50)

Amount Telegraphed From ALAMOGORDO N. MEX JAN 22 19 45
Originating Point

To the Western Union Telegraph Company
Payable Through Countersigned
FIRST NATIONAL BANK IN DALLAS 32-1
Dallas, Texas /s/ Ruth Mayfield
Money Order Agent

THE WESTERN UNION TELEGRAPH COMPANY
/s/ E. K. Huntington
Treasurer

Reverse Side
WESTERN UNION TEL CO
/s/ Ruth Mayfield
/s/ Lt Philip Maloof

which said money order was a writing of a public nature which might operate to the prejudice of another.

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

Specification: In that Second Lieutenant William L. Birch, Air Corps, Squadron E, 231st Army Air Forces Base Unit, did, at Las Cruces, New Mexico, on or about 22 January 1945, with intent to defraud, wrongfully and unlawfully represent himself to be Lieutenant Philip Maloof to the Western Union Company and by means thereof did cause the sum of $500.00 to be transferred from the Otero County Bank, Alamogordo, New Mexico, to his credit at the Western Union office, Las Cruces, New Mexico.

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

Specification: In that Second Lieutenant William L. Birch, Air Corps, Squadron E, 231st Army Air Forces Base Unit, did, without proper leave, absent himself from his organization and station at Alamogordo Army Air Field, Alamogordo, New Mexico, from about 9 July 1945 to about 31 July 1945.

The accused pleaded not guilty to Charges I and II and the Specifications thereunder, but guilty to Charge III and its Specification. He was found guilty of all Charges and Specifications and was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that prior to the date of the offenses alleged the accused and Second Lieutenant Philip Maloof had occupied adjoining rooms in the same barrack and had engaged in gambling

together with dice on numerous occasions. As a result the accused had lost considerable sums of money to Lieutenant Maloof. Although the record is not clear as to the extent of such losses, it does appear that prior to 22 January 1945 the accused had redeemed personal checks from Lieutenant Maloof aggregating $360. Lieutenant Maloof testified that he had been "usually ahead" in his gambling activities and that, in January, 1945, he had a bank balance in the Otero County State Bank of Alamogordo, New Mexico, "of several thousand dollars" (R. 10). It appears to have been common knowledge among the officers who gambled with Lieutenant Maloof that he had an account in the Otero County State Bank, the only bank in the vicinity of Alamogordo Army Air Field. He had never authorized any person to draw upon this account (R. 9-17).

On 22 January 1945 the Otero County State Bank received a telephone call, purportedly from Lieutenant Maloof, requesting that the sum of $500 be transmitted to Lieutenant Maloof at Las Cruces, New Mexico. The official who received the call directed that the request be made by telegram. On the same day a second lieutenant, representing himself as Lieutenant Maloof, appeared at the Western Union telegraph office at Las Cruces, New Mexico, and wrote out the telegram required. Upon receipt of this telegram the Otero County State Bank transmitted $500 to the order of Lieutenant Maloof (Pros. Ex. 4). Later on the same date the officer who had represented himself as Lieutenant Maloof returned to the Western Union office and asked for the money. When Miss Ruth Mayfield, the Western Union clerk, demanded that the officer identify himself, he produced a set of "dog tags" bearing the name of Lieutenant Maloof. Upon the basis of this identification a Western Union money order was delivered to him, and he signed a receipt therefor in the name of Philip Maloof. He thereafter indorsed the money order with the same name (R. 10-27; Pros. Exs. 1, 2, 3).

The identity of the accused as the officer who wrote the telegram in question, who later signed the receipt for a Western Union money order for the sum of $500, and who indorsed this money order in the name of Philip Maloof was established by the testimony of a handwriting expert of the Federal Bureau of Investigation and by the testimony of Miss Mayfield, the clerk of the Western Union Telegraph Company. The handwriting expert compared admittedly genuine specimens of the accused's handwriting with the telegram, receipt, and money order in question and testified that all the signatures had been written by the same person. This witness described in some detail the characteristics of the signature of the accused and pointed out that they prevailed in all of the instruments in question (R. 28-37). Miss Mayfield, who had received the telegram from the officer who had represented himself as Lieutenant Maloof and who had delivered the money order to him, testified that he was the accused (R. 22-23). There was also evidence showing that a pair of identification tags belonging to Lieutenant Maloof had disappeared from his room a short time prior to 22 January 1945 (R. 13).

Evidence concerning the Specification of Charge III consists of an extract copy of a morning report of the accused's organization showing that he was absent without leave from 9 July 1945 to 31 July 1945 (Pros. Ex. 7).

4. The accused, after his rights relative to testifying as a witness had been explained to him, elected to make an oral, unsworn, statement through his counsel. This statement, while devoted principally to an argument that the evidence against the accused was insufficient to prove the offenses set out in Charges I and II, pointed out that the accused had participated with "General Doolittle" in the air raid on Tokyo in April, 1942, and as a result thereof had been decorated by the Chinese Government.

5. The Specification of Charge I alleges that the accused did, at Las Cruces, New Mexico, on 22 January 1945, with intent to defraud, falsely indorse the name of Lieutenant Philip Maloof to a Western Union money order, in the sum of $500. The Specification of Charge II alleges that the accused did, on the same date and at the same place, as above stated, fraudulently represent himself to the Western Union Telegraph Company to be Lieutenant Philip Maloof and by means thereof did cause the Otero County State Bank, Alamogordo, New Mexico, to transmit $500 to his credit.

The uncontradicted testimony shows that, on 22 January 1945, the accused presented himself at the office of the Western Union Telegraph Company at Las Cruces, New Mexico, and sent a telegram to the Otero County State Bank requesting that $500 be transmitted to his credit. On the same day the accused returned to the telegraph office, identified himself as Lieutenant Maloof by the use of identification tags, procured a Western Union money order in the sum of $500, and indorsed it in the name of Philip Maloof. These facts establish beyond a reasonable doubt that the accused, with intent to defraud, wrongfully and unlawfully represented himself to be Lieutenant Philip Maloof and that by means of this fraud he caused $500 to be transferred from the Otero County State Bank, Alamogordo, New Mexico, to the credit of the Western Union Telegraph Company, Las Cruces, New Mexico. The evidence equally clearly establishes that he falsely and fraudulently indorsed the Western Union money order in the sum of $500 and thereby executed a written instrument which might operate to the prejudice of another. Although this instrument is described in the Specification as being of a "public" nature, its primary characteristics are those of a private one. This error in its description is deemed, however, to be immaterial. The evidence is, therefore, clearly sufficient to establish a finding of guilty of the two Specifications as violations of Articles of War 93 and 96 respectively.

6. The Specification, Charge III, alleges that the accused did,

without proper leave absent himself from his organization and station at Alamogordo Army Air Field from about 9 July 1945 to about 31 July 1945. Although the accused pleaded guilty to this Specification, the evidence for the prosecution in the form of an extract copy of a morning report of the accused's organization clearly establishes the offense. The record is legally sufficient to sustain the Specification of Charge III and Charge III.

7. The records of the War Department show that the accused is approximately 28 years of age. He was graduated from high school and enlisted in the military service on 15 July 1936. He was trained as a bombardier, and in 1942 he volunteered to accompany General Doolittle in his now famous raid over the Japanese mainland. For his participation in this feat the accused was awarded the Distinguished Flying Cross and the Chinese "Certificate of Meritorious and Distinguished Service". He thereafter attended Officers' Candidate School, and, on 26 June 1943, was commissioned a second lieutenant in the Air Corps.

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

Abner E. Lifscomb, Judge Advocate.

Robert Glenn, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 290026 1st Ind NOV 1 1945
Hq ASF, JAGO, Washington, 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 William L. Birch (0-685290), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of forgery in that he falsely and fraudulently indorsed the name of Lieutenant Philip Maloof to a Western Union money order in the sum of $500, in violation of Article of War 93; and of fraudulently representing himself to the Western Union Telegraph Office to be Lieutenant Philip Maloof and thereby causing the sum of $500 to be transferred from the Otero County State Bank, Alamogordo, New Mexico, to his, the accused's, credit to the Western Union Telegraph Company, Las Cruces, New Mexico, in violation of Article of War 96. In addition, he pleaded guilty to, and was found guilty of, absenting himself without leave from his organization from 9 July 1945 to 31 July 1945, in violation of Article of War 61. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for 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. 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 record shows that prior to the date of the offenses alleged the accused and Second Lieutenant Philip Maloof had occupied adjoining rooms in the same barrack and engaged in gambling together with dice on numerous occasions. As a result the accused had lost considerable sums of money to Lieutenant Maloof. On 22 January 1945 the accused presented himself at the office of the Western Union Telegraph Company, Las Cruces, New Mexico, and sent a telegram to the Otero County State Bank requesting that $500 be transmitted to his credit. On the same day he returned to the telegraph office, identified himself as Lieutenant Maloof by use of identification tags, procured a Western Union money order in the sum of $500, and indorsed it in the name of Philip Maloof.

The records of the War Department reveal that the accused has been in the service since July, 1936, and that he has a record of long and faithful service. In 1942 he volunteered for, and accompanied General Doolittle in his now famous raid over the Japanese mainland. For this exploit he was awarded the Distinguished Flying Cross and the Chinese "Certificate of Meritorious and Distinguished Service." In view of his previous good record and his courageous and distinguished service he is worthy of clemency. 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
Record of trial
Form of action

THOMAS H. GREEN
Brigadier General, USA
Acting The Judge Advocate General

(Sentence confirmed, but forfeitures and confinement remitted. Sentence as modified ordered executed. GCMO 501, 5 Dec 1945).

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

SPJGK - CM 290035

18 OCT 1945

UNITED STATES	TANK DESTROYER CENTER
v.	Trial by G.C.M., convened at Camp Hood, Texas, 22, 22 and 24 September 1945. Dismissal.
Captain ROBERT E. RUDE (O-1168446), Field Artillery Corps.	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Captain Robert E. Rude, Tank Destroyer Officer Replacement Pool, Tank Destroyer Replacement Training Center, North Camp, Camp Hood, Texas, did, at Camp Hood, Texas, on or about 24 May 1945, feloniously take, steal and carry away about $9.00 lawful money of the United States, the property of Warrant Officer Harold R. de Vore.

Specification 2: In that Captain Robert E. Rude, * * *, did, at Camp Hood, Texas, on or about 28 May 1945, feloniously take, steal and carry away about $33.00, lawful money of the United States, the property of Warrant Officer Harold R. deVore.

Accused pleaded not guilty to and was found guilty of the Charge and its specifications and was sentenced to be dismissed the service. There was no evidence of any previous conviction. The reviewing authority approved the sentence and forwarded the record of trial for action in accordance with the provisions of Article of War 48.

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

It was stipulated between the prosecution and defense that the accused was in the military service of the United States at the time the offenses were alleged to have been committed and at the time of the trial (R. 6).

On the night of 23-24 May 1945, Warrant Officer Harold R. de Vore was asleep in his barracks until he was awakened at about 0345 hours by a light being turned on in the hallway outside his room (R. 8). Through the open door of his room, he saw the accused enter a room directly across the hall (R. 7,8,10). Mr. de Vore then heard the rattle of coat hangers and leaned out of his bed to try and see what was happening. His bed springs squeaked as he moved and the noise stopped. He then saw accused come to the door of the room across the hall and stand there for three or four minutes looking into Mr. de Vore's room (R. 11). Accused did not appear to be entirely normal but Mr. de Vore could not say that accused was intoxicated (R. 14,20,21). After standing in the doorway of the room across the hall for three or four minutes, accused moved into the hallway, turned the light off and quickly entered Mr. deVore's room (R. 11). From a light down the hall, and from the reflected light from the latrine next door, de Vore could see the accused (R. 13). Accused went to the table in de Vore's room, picked up de Vore's wallet, extracted something therefrom and quickly left the room (R. 11,12,13). After accused left, de Vore got up and examined his wallet and discovered that the sum of $9.00 which had been in the wallet when he went to bed was missing (R. 12). Mr. de Vore reported the matter that night to a Captain Winters who lived in the barracks and, with Captain Winters, made a search of the barracks for the accused, but without success. The incident was also reported to a Colonel Tucker later that day (R. 14,19).

Mr. deVore decided to try and trap the accused and, on the following evening, cashed a check for $40.00 at the Officers' Club in the presence of the accused (R. 15,16,30). Mr. de Vore then went to his barracks and marked, with ink, two ten dollar bills, two five dollar bills, and three or four one dollar bills, and also wrote down the serial numbers of these bills (R. 16,17, Ex. 1). He placed the marked bills in his wallet, keeping unmarked money for spending purposes in a different pocket. That night and the following night he left the wallet on his table in his barracks room but nothing happened (R. 17,18). When he went to bed the third night, sometime after 0015 hours, he checked his wallet and the bills were still there. He again placed the wallet on the table in his room. When he awoke the next morning the bills were gone from the wallet. He reported the matter to Colonel Tucker and to the Provost Marshal and gave the Provost Marshal copies of the serial numbers of the bills and informed him as to the ink markings on the bills (R. 18,19). At noon that same day, Captain Gerald M. Bear, an investigating officer for the Provost Marshal's office, asked accused if he could see what money accused was carrying. Accused took some money out of his wallet and handed it to Captain Bear (R. 35, 39). Of the bills handed over by accused, there were two ten dollar bills, two five dollar bills and three one dollar bills bearing serial numbers corresponding to the list made by Mr. de Vore, and all bore the ink mark placed on the bills by Mr. de Vore (R. 35,42).

At the time of the alleged offenses the accused lived in a barracks removed by several buildings from de Vore's barracks. Mr. de Vore had never worked for the accused and had seen him infrequently. de Vore stated that "all my relations with (accused) have been altogether pleasant" (R. 15).

4. The evidence for the defense was in substance as follows:

Major Charles N. Sarlin, Chief of Neuropsychiatric Service at the Camp Hood Station Hospital (R. 43) testified that he examined the accused to determine his mental responsibility for the offenses here charged and, in connection with such examination, he had access to Red Cross Social Service reports. To test the accurateness of information given by accused, Major Sarlin gave accused sodium amytol injections and interviewed him. The final diagnosis was obsessive and compulsive state, which is a form of psychoneurosis (R. 44,48). An individual so suffering "is compelled by causes of which he is completely unaware, the form of behavior over which he has no conscious control." Major Sarlin was of the opinion that accused was "compelled to do certain acts against his will" and that, though accused was able to distinguish between right and wrong, he was mentally and emotionally unable to adhere to the right (R. 45,46). Accused's ailment is a form of kleptomania, and though a kleptomaniac does not usually steal money, some do (R. 48, 56). Major Sarlin also expressed the opinion that, because of his illness, accused could not establish an intent to commit the particular crime (R. 52), nor could he plan the crime of theft (R. 48). Upon cross-examination the Major stated that, in his opinion, all people who steal are psychiatric cases "of one sort or another" (R. 52). Intoxication would have no bearing on accused's acts in this instance (R. 51).

Captain John R. Bower, Assistant Chief of Neuropsychiatric Service at the Camp Hood Station Hospital (R. 54) also examined the accused and reached the same general diagnosis and conclusions as Major Sarlin (R. 55,56,58), except that Captain Bower believed accused's behavior pattern would be affected by the use of intoxicants (R. 56).

Major Robert M. Christie, who had been associated with accused in the Tactics Department of the Tank Destroyer School for about four months, testified that accused had never done anything which reflected unfavorably on his character and that accused's reputation and character were excellent (R. 59); and that accused was interested in his work and that neatness and conscientious effort characterized accused's work (R. 60).

It was stipulated by and between prosecution, defense and accused that Brigadier General Miles A. Cowles, if present in court,

would testify he had known accused for about ten months and that accused did nothing which would tend to reflect unfavorably on his character and that accused never acted in a manner unbecoming an officer. That prior to 28 May (1945) accused's character was excellent. "That Captain Rude had a bright mind; was extremely energetic, determined, and capable" (R. 60, Def. Ex. 2).

It was also stipulated by and between prosecution, defense, and accused that if Second Lieutenant Earl W. Smith were present in court he would testify that on 27 May 1945 he met accused at about 1800 and remained with him for an indefinite period, during which time he and accused consumed a fifth of a gallon of whiskey and that accused became intoxicated (R. 60).

Accused, having been fully informed of his rights with reference to becoming a witness in his own behalf, elected to testify under oath. He testified that on the evening of May 23rd he went to the officers' club for dinner and had several drinks at the bar. After dinner he continued to drink in the lounge of the club in celebration of his birth date, which was the following day. There was a dance at the club that evening and he prolonged his drinking until he became "very very drunk and intoxicated" and started feeling ill. He then returned to his barracks, but remembered that he had an assignment to have certain trucks ready for inspection the following morning, so he went to the barracks of a Lieutenant Beaver, which barracks were also occupied by Mr. deVore, to inquire concerning the assignment. He recalls that he entered several rooms in the barracks before finding Lieutenant Beaver and that he finally did find the lieutenant, who was asleep, and could not awaken him, so accused finally returned to his barracks. The following morning he counted the money in his wallet, as was his custom, and did not find any surplus money (R. 62,63).

On the evening of Friday, May 25th, accused was present at the officers' club when Mr. de Vore cashed a check. The following Sunday accused was at the club, "in and out during the afternoon." He had dinner at the club with a Lieutenant Hanson and a Lieutenant Smith. Shortly after dinner Lieutenant Hanson obtained a bottle of whiskey for Lieutenant Smith and accused. Lieutenant Smith did not "feel much like drinking" so accused consumed most of the whiskey until he "lost quite a bit of (his) reasoning." Accused had been expecting a letter or telegram from his wife during the weekend and, after leaving the club that night, decided to go to the barracks occupied by Mr. de Vore and make inquiry of an officer there who accused "thought may have been duty officer over the weekend." Accused recalls passing Mr. de Vore's room and has "an impression of seeing money on (de Vore's) table." Accused later returned to his quarters and slept until about 0830 hours next morning. Upon awakening he looked into his foot locker and found some money which did not belong

to him. By associating ideas from the previous night he concluded the money belonged to Mr. de Vore and intended to return it. However, he had an injured knee so went to the dispensary for treatment. The medical officer at the dispensary sent him to the X-ray clinic and he was not released from there until about 1150 hours. He decided that he would go to the mess hall and see Mr. de Vore there, but the representative of the Provost Marshal met accused and asked him to return to his quarters in connection with an investigation that was being conducted, and it was there the money was given to the investigating officer by accused before accused had an opportunity to return it to Mr. de Vore (R. 63,65).

5. The evidence shows that on the night of 23-24 May 1945 Mr. de Vore was asleep in his quarters until awakened by the actions of accused at about 0345 hours. Accused admits being in de Vore's barracks sometime during the early morning hours. Mr. de Vore saw accused extract something from his (de Vore's) wallet, and, after accused left, found that $9.00 was missing. de Vore then set a trap for accused and, on the night of 27-28 May 1945, at which time accused admits being in de Vore's barracks, a number of marked bills were taken from de Vore's wallet. Mr. de Vore did not see the crime take place, but an examination of accused's wallet next morning disclosed the marked bills. Accused testified that he believed the money to belong to Mr. de Vore and had intended to return the money that morning. The evidence clearly establishes the trespass and felonious taking. The only question is whether accused intended permanently to deprive Mr. de Vore of the money. In view of the circumstances, and basing its judgment on common experience, the court was justified in finding that accused intended to keep the funds so taken.

6. The only issue to be decided is whether accused was legally guilty. Two psychiatrists were called as witnesses for the defense and both testified that, in their opinion, accused was capable of distinguishing between right and wrong but was NOT capable of adhering to the right. In military law the test of legal guilt, set forth in the Manual for Courts-Martial, 1928, is that a person must be capable of distinguishing between right and wrong and also must be capable of adhering to the right. Then, to what extent may the court reject the testimony of qualified psychiatrists? In addition to other concepts, the standard of mental responsibility under military law also involves the liberal concept of the so-called irresistible impulse test, and, if a person can not resist the impulse to commit an offense he should be found not guilty by reason of the mental defect, disease, or derangement. But there is no rule of evidence which requires that the testimony of an expert witness on matters of mental accountability be accepted to the exclusion of other evidence. Nor is there any rule of law which denies to the court the right to consider circumstantial evidence in arriving at its verdict of legal responsibility. In the instant case the accused, on two occasions, left his barracks in the early morning hours and went to the barracks of another, some 300 yards distant, and cautiously

removed sums of money. The offense was carefully and cautiously executed and was apparently deliberately planned. Accused's acts were quite different than those expected of a person who could not plan or premeditate the crime of theft. Accused recalls all events leading to the offense, but can not recall anything connected with his "irresistible impulse" to take the money. Had accused lawfully been in the room of another and there seen money, perhaps the law would permit him to hide behind an "irresistible impulse." But, where accused goes out of his way to search for money in order to entertain an "irresistible impulse," not even the liberal military law will give sanctuary to his crime. Furthermore, to escape guilt, the "irresistible impulse" must have been the product of a diseased mind.

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> "In order that a person may be exempt on the ground of irresistible impulse, the impulse must be the result of disease of the mind, and it must be irresistible, or, in other words, the disease must exist 'to such an extent as to subjugate the intellect, and render it impossible for the person to do otherwise than yield thereto.' The act must have been the product of the disease solely. (Clark and Marshall Crimes, 4th Edition, par. 96.)

> "According to the Federal rule to justify a verdict of acquittal the 'reasoning powers must be so far dethroned by a diseased mental condition as to deprive the accused of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong.' (Smith v. United States, 35 F. 2nd 548)." (CM 271889, Barbera.)

In the instant case there was no evidence that accused was insane.

> "The common man does not readily believe that occasional and impulsive misconduct of a particular character by one who, in every other respect, demonstrates sane conduct and ordinary behavior, springs from such defect, disease or derangement of the mind as hopelessly deprives him of the will to refrain from doing what he knows is wrong and in this he has the respectable company of many medical and juridicial authorities. He may be persuaded, in a particular case, to believe that expert, opinion evidence has proved such derangement in such circumstances; but no rule of law should compel him to adopt or adhere to such a conclusion when other evidence in the case may reasonably and logically persuade otherwise. Moreover, members of military courts, as well as juries in civil life, bring into their deliberations their own common sense founded upon knowledge of the everyday behavior and experiences of men in the routine affairs of life, and they are not only entitled to use this knowledge in weighing the evidence but are specifically charged to do so." (CM 271889, Barbera.)

The actions of accused in the present case were of a pattern to be expected in the commission of a crime of the kind here involved, and the court, upon all the evidence, circumstantial and otherwise, was fully justified in concluding that accused was mentally responsible in all particulars and that he was not incapable of adhering to the right (14 B.R. 339).

7. War Department records show that accused is 29 years of age and is a high school graduate. According to the record of trial, he is married. In civil life accused was statistical clerk for an insurance company for eight months and, later, was salesman for a printing company for one year, and for a food concern for three years. He enlisted in the military service on 13 January 1941 and attained the grade of sergeant. He attended the Field Artillery Officer Candidate School and received his commission as second lieutenant, AUS, on 18 August 1942, and was ordered to extended active duty the same date. He was promoted to first lieutenant, AUS, on 17 February 1943, and to captain, AUS, on 10 October 1944. During his commissioned service he has received ten efficiency ratings, nine of which were "excellent", and one of which was "superior." He has had no overseas service.

8. Four of the eight members of the court recommended that the sentence to dismissal be remitted and that accused be permitted to resign the service.

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

Charles A. Luckie, Judge Advocate

Thomas M. Moore, Judge Advocate

Earl W. Wingo, Judge Advocate

OCT 31 1945

SPJGK - CM 290035 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 Robert E. Rude (0-1168446), Field Artillery.

2. Upon trial by general court-martial this officer was found guilty of the larceny of $9.00 on 24 May 1945 and the larceny of $33.00 on 28 May 1945, in violation of Article of War 93. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the provisions of 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.

During the early morning hours of 24 May 1945, Warrant Officer Harold R. de Vore, who was asleep in his barracks, was awakened by a light being turned on in the hallway. He saw accused there and watched accused enter a room across the hall. Accused remained in the room across the hall for a few moments, then returned to the hall and, after first looking into de Vore's room, turned out the light. Accused then swiftly entered Mr. de Vore's room and extracted $9.00 from de Vore's wallet which was on a bedside table. Accused then left the room hurriedly. In an effort to entrap accused, Mr. de Vore cashed a $40.00 check at the officers' club in the presence of accused. Mr. de Vore then took the bills received as proceeds of the check and marked them with ink, after first making a note of the serial numbers of the bills, and placed the bills in his wallet. Mr. de Vore continued to leave the wallet on the bedside table each night. On the night of 27-28 May 1945, sometime after 0015 hours, these bills were taken from the wallet. The matter was reported to the Provost Marshal and an examination of the bills in accused's wallet revealed $33.00 of the marked bills.

Two psychiatrists were called as witnesses for the defense and each testified that accused was able to distinguish between right and wrong, but was incapable of adhering to the right, and that he suffered from a compulsive state, obsessive, which compelled him to take the property of others. Accused testified under oath, admitting that, although he lived in barracks some 300 yards removed from the barracks of Mr. de Vore, he was in de Vore's barracks at the times the incidents occurred. Accused stated

he went there the first time to inquire concerning a duty assignment for the next morning, and went there the second time to see if an expected letter or telegram from his wife had arrived. Accused also testified he had been drinking heavily on both occasions. Accused had no knowledge of the first theft, but after his second visit to de Vore's quarters he realized that he had money which did not belong to him and, by associating ideas, concluded the money belonged to Mr. de Vore and intended to return it, but was apprehended before he had an opportunity to do so.

4. Despite the testimony of the psychiatrists that accused could not adhere to the right, the court found him guilty. The accused's actions indicate that the crimes were carefully planned and executed; the pattern of his behavior was identical with that of any normal person who plans to commit a crime, and entirely contrary to acts of a person who lacked the mental capacity to premeditate the crime of theft. The court could consider this circumstantial evidence in weighing the evidence given by the psychiatrists, and, in my opinion, the court arrived at a proper finding. An officer who engages in petty thievery in the barracks of a post is unworthy of being an officer and is not a proper person to serve in the Army. The court was lenient in failing to adjudge a sentence involving confinement. I recommend that the sentence be confirmed and carried into execution.

5. Accused has been a commissioned officer since 18 August 1942, and has received ten efficiency ratings during that time. Nine of such ratings were "Excellent" and one was "Superior."

6. Consideration has been given to the recommendation of the defense counsel and four of the eight members of the court, who recommended that the sentence be remitted and accused permitted to resign the service. This recommendation was based on (a) the long and excellent service of accused, (b) the small amounts of money involved, and (c) accused's illness which, according to the testimony of the psychiatrists, existed prior to accused's entry into the service.

7. 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

3 Incls
1. Record of trial
2. Form of action
3. Ltr fr Mr H.P. Rude dated Oct 27, 1945

(Sentence confirmed and ordered executed. GCMO 484, 15 Nov 1945).

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

SPJGQ - CM 290079

UNITED STATES v. Private ALVIN GOLDSON (39732764), 4126th Army Air Forces Base Unit, Squadron "H", San Bernardino Army Air Field, California.	SAN BERNARDINO AIR TECHNICAL SERVICE COMMAND Trial by G.C.M., convened at Los Angeles, California, 28-30 August 1945. Dishonorable discharge, total forfeitures, and confinement for life. Penitentiary.

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REVIEW by the BOARD OF REVIEW
PARTLOW, BIERER and HICKMAN, 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 Charges and Specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Alvin Goldson, 4126th Army Air Forces Base Unit, Squadron "H", San Bernardino Army Air Field, California, did, at Los Angeles, California, on or about 9 July 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Ensign Norman Bicknese, USNR, a human being, by shooting him with a pistol.

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

Specification 1: In that Private Alvin Goldson, 4126th Army Air Forces Base Unit, Squadron "H", San Bernardino Army Air Field, California, did, at Los Angeles, California, on or about 9 July 1945, in conjunction with one Wesley H. Moore, Los Angeles, California, by force and violence, and by putting him in fear, feloniously take, steal, and carry away from the person of Ensign Norman Bicknese, USNR, about Six Dollars ($6.00), lawful money of the United States, the property of said Ensign Norman Bicknese, USNR.

Specification 2: In that Private Alvin Goldson, 4126th Army Air Forces Base Unit, Squadron "H", San Bernardino Army Air Field, California, did, at Los Angeles,

> California, on or about 8 July 1945, in conjunction with one Wesley H. Moore, Los Angeles, California, by force and violence and by putting them in fear, feloniously take, steal, and carry away from the person of Marvin Ross, Seaman First Class, one Elgin wrist watch, value about Twenty-five Dollars ($25.00), and about Eighty Dollars ($80.00) lawful money of the United States, property of said Marvin Ross, Seaman First Class, from the person of Technical Sergeant Kenneth Whitehouse, United States Marine Corps, about Thirty-five Dollars ($35.00) lawful money of the United States, property of said Technical Sergeant Kenneth Whitehouse, and from the person of Private First Class Raymond J. McCullam, United States Marine Corps, about Twenty Dollars ($20.00) lawful money of the United States, property of said Private First Class Raymond J. McCullam.

He pleaded not guilty to all Charges and Specifications, and was found guilty thereof. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for 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 in the early morning of 8 July 1945 the accused and one Wesley Howard Moore, both negroes, stopped the automobile in which they were riding at or near Los Angeles, California, and offered to give two marines, standing beside the street, a lift into Los Angeles. When the marines accepted and got into the rear seat of the automobile, Moore, the driver, suggested that a sailor sitting on a bench nearby would also like a lift, whereupon the sailor was invited and got into the rear seat with the marines. Moore drove the automobile about two or three blocks, made a sharp turn to the right, then one to the left, at which time the accused drew a pistol upon the three passengers in the rear of the automobile. Moore then stopped the car, and the marines were informed that "it was a stick-up". Moore exhibited a black jack in his hand and took a billfold from Technical Sergeant Kenneth Whitehouse, one of the passengers, removed the money ($35.00) therefrom, and tossed the billfold back. Then Moore saw a wrist watch on the arm of the sailor and asked for it. When the sailor raised his arm to remove the watch, Moore struck him behind his ear with the blackjack (R. 11-16, 18), and took the watch, valued at $37.50 (R. 26, 29). The accused snatched some money ($80.00) out of the sailor's hand (R. 19, 24), and

removed $20.00 from the other marine's billfold (R. 19). Then the two marines and sailor were told to get out of the automobile, in which Moore and the accused immediately left the scene of the crime (R. 12).

Shortly after 2400, 8 July 1945, Ensigns Norman C. Bicknese and Herman J. Haase, USNR, were standing on the corner of a street intersection in Los Angeles, when Moore and the accused stopped the automobile in which they were riding and asked the ensigns if they wanted a ride. Both ensigns accepted and entered the rear seat of the automobile. Moore drove the car east on the street, turned north about five blocks and stopped the car, at which time the accused pointed a pistol at the ensigns. Moore turned around and said "Give us your money"(R. 31-33, Pros. Ex. D and G). The accused took Ensign Haase's pocketbook containing $52.00, which was later found by the police (R. 34, 40). When Ensign Bicknese got out his pocket book, Moore said to him "You give me that", and reached back and snatched it. Upon opening it Moore said "Is this all you got, six dollars?", and Ensign Bicknese replied "That's all I got", whereupon Moore "reached down", "took out a blackjack", and held it in front of the ensign "as if to threaten him". Moore then attempted to strike Ensign Bicknese, who warded off the blow (R. 34, 35). During the struggle which ensued the accused "had the gun and he pulled over to the side of the car, towards the door, he was about in the center of the car - a little off center - and he pulled over toward the door and shot" (R. 36), the bullet striking Ensign Bicknese in the left side of his chest approximately over his heart (R. 40). As soon as the shot was fired, the accused got out of the car and said "Get him out of here". Ensign Haase then got out of the car, walked around to the other side and pulled Ensign Bicknese out on the street (R. 37, 38). The accused then told him to "walk on back, don't turn around", and while his back was turned Moore and the accused drove off. Ensign Bicknese was then still alive, and after pulling him up on the curb, Ensign Haase went in search of assistance (R. 39). In a few moments several police cars and an ambulance arrived at the scene (R. 40). The injured man was taken to a hospital, but ceased breathing before reaching the hospital and was declared dead at 0140, 9 July 1945, from intra thoracic hemorrhage due to gunshot wound of the thorax (R. 46, 48; Pros. Ex. G).

4. Wesley Howard Moore, the accomplice of the accused, testified for the defense (R. 149-170). He corroborated in large part the testimony of the prosecution as to the robbery and killing of Ensign Bicknese, but stated that the fatal shot resulted from the deceased kicking the gun during the above-mentioned struggle and while it was in the hands of the accused (R. 153). Upon cross examination, however, he admitted that during the struggle and immediately prior to the shooting he shouted to the accused to "blast him" (R. 159, 160).

The mother of the accused testified that he had been a God-fearing child, interested in mechanics and active in Sunday School and YMCA work (R. 171). She said that he had suffered a brain concussion and broken neck when he was fifteen or sixteen years old, and that he had known Howard Moore since childhood, although they were not close friends (R. 172). One Barney Moore testified that the character of the accused as to honesty, integrity, truth, and veracity was good (R. 174).

5. After the accused's rights with respect to testifying, making an unsworn statement, or remaining silent were fully explained to him by the court (R. 127, 175), he elected to testify under oath (R. 175). He admitted that shortly after midnight, 8 July 1945, he and Moore stopped the automobile in which they were riding, at which time Ensigns Haase and Bicknese got in the rear seat thereof, that when the car later stopped he held a gun, pointing it at Ensign Haase, while Moore robbed Ensign Bicknese, that Moore called and said "Blast him" during the struggle with Ensign Bicknese, and that he then got the clip for the gun and it fired as he pulled the slide back when he was kicked by Ensign Bicknese (R. 177, 178). He claimed that he never intended to kill Ensign Bicknese, that he never pointed the gun at him, and that he "wouldn't kill anybody" (R. 182).

6. "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. * * * Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life. * * * The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. Malice aforethought may exist when the act is unpremeditated." Intent to commit a felony is a state of mind included in the term "malice aforethought" (Par. 148a, MCM).

"Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation" (Par. 149f, MCM). The term "felony" includes robbery (Par. 149d, MCM).

The evidence clearly shows that the accused is guilty of the crimes here alleged. On 8 July 1945, he and his confederate by putting two marines and a sailor in fear took personal property from their persons against their will by force and violence. Early the next morning the accused killed the deceased without legal justification or excuse while attempting to rob him. Although not imposed by the court, capital punishment would have been fully justified in this case.

7. The charge sheet discloses that the accused is 19 years of age and was inducted at Fort MacArthur, California, on 25 November 1944. He has no prior service and no dependents.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence. Confinement for a period of 10 years is authorized upon conviction of robbery in violation of Article of War 93, and a sentence of either death or life imprisonment is mandatory upon conviction of a violation of Article of War 92.

W D Martin Jr, Judge Advocate

A B Pierce Jr, Judge Advocate

Donald D. Hickman, Judge Advocate

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General

SPJGH-CM 290132

9 NOV 1945

UNITED STATES v. First Lieutenant REGINALD SHAFFER (0-868550), Air Corps.	FOURTH AIR FORCE Trial by G.C.M., convened at Hamilton Field, California, 30 August and 1 September 1945. Dismissal, total forfeitures.

OPINION of the BOARD OF REVIEW
TAPPY, BECK and TREVETHAN, 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: In that First Lieutenant Reginald Shaffer, Air Corps, 400th Army Air Forces Base Unit, did, at San Francisco, California, on or about 13 August 1945, feloniously take, steal and carry away about $1.00 lawful money of the United States, the property of First Lieutenant Carl H. Anderson.

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

Specification: In that First Lieutenant Reginald Shaffer, Air Corps, 400th Army Air Forces Base Unit, did, at San Francisco, California, on or about 13 August 1945, feloniously take, steal and carry away about $1.00 lawful money of the United States, the property of First Lieutenant Carl H. Anderson.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal 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 about 9 a.m., 13 August 1945, First Lieutenant Carl H. Anderson, Assistant Provost Marshal of the Fourth Air Force, and Corporal Bud A. Randau, an investigator in the Provost Marshal's office, visited the locker room at the Physical Training Office, 180 New Montgomery Street, San Francisco, California. They took with them an officer's shirt, a pair of officers' trousers, a wallet and two marked $1 bills. One of the bills belonged to Lieutenant Anderson and he had marked it by placing his initials and the date "8/13/45" on the face thereof. The other bill had been borrowed from a Corporal Figas and had been similarly marked on the reverse side (R. 10-12, 60-62, 66). The locker room was located in the basement of the physical training building and measured about 14 feet by 12 feet in dimension. The lockers were used by officers and enlisted men during exercise periods. After surveying the room, Corporal Randau proceeded to drill several peep holes through a wall which separated the locker room from an adjoining utility room. Next he placed the wallet containing the two marked dollar bills in a pocket of the pair of officers' trousers and hung both the trousers and the shirt on hooks in the locker room (R. 10, 11, 47).

No one had been given authority to take any of the money from the wallet (R. 62, 65). The arrangement of the clothing and money was part of a plan to apprehend any person who might be engaged in thievery (R. 54, 63).

After the clothing had been hung on the hooks, Corporal Randau took up a position in the utility room from where he could peer through the drilled holes into the locker room. He was instructed to apprehend whomever might go through the clothing. He maintained his vigil from 9:30a.m. until about 3:30 p.m. at which time he saw the accused enter the locker room, search the shirt, then search the trousers, remove the wallet and extract some money therefrom. Corporal Randau promptly confronted accused, conducted him to the office of the Physical Education Officer and telephoned Lieutenant Anderson (R. 12-17, 63).

When he arrived, Lieutenant Anderson asked accused what he had to say for himself to which accused replied: "Nothing. The facts here seemed to be ascertained and it was just temptation" (R. 17, 28, 40). Accused was asked to produce anything of value he had obtained from the wallet and he turned over a one-dollar bill which was the one belonging to Lieutenant Anderson that had been marked with the lieutenant's initials and the date (R. 18, 35). When Corporal Randau subsequently repossessed the shirt and trousers, the wallet contained only one of the two one-dollar bills originally placed in it (R. 48).

Accused was taken to the office of Major Morrow, Provost Marshal of the Fourth Air Force, and in the presence of Major Morrow and Corporal Randau, Article of War 24 was read and explained to him by Lieutenant Anderson. Thereafter, as accused seemed hesitant about talking, Lieutenant Anderson made a statement to him to the effect that

if he had anything on his chest he would feel better if he got it off, but did not tell him that things would be easier if he made a statement or worse if he did not (R. 19, 23, 40-43, 67). Accused then made a statement which was admitted in evidence and in which he recited that he searched the shirt and trousers hanging in the locker room, removed $1 from the wallet found in the trousers, replaced the wallet in the trousers' pocket and then encountered a corporal who conducted him to the Physical Training Office (R. 43, 44, 46; Pros. Ex. 2).

4. In support of defense's objection to the admission of accused's confession on the grounds that it was not voluntarily made, accused testified specially that when Lieutenant Anderson entered the office of the Physical Training Office he asked accused, "What do you have to say for yourself?" to which accused made a reply. They then went to the Provost Marshal's office where Lieutenant Anderson first asked accused, "What do you have to say?" or "Why did you do it?" or some such question as that. Thereafter Article of War 24 was explained to accused and he understood that he did not have to make a statement but that if he did, it could be used against him. Next Lieutenant Anderson made the statement, "Whatever you have to say for yourself, it would be better to get it off your chest." Accused then made a statement because he had already made such remarks at the Physical Training Office that he felt he could do himself "no more injustice" by making a further statement (R. 36-39).

After the prosecution completed its case in chief, accused elected to make an unsworn statement in his own behalf. He stated that after graduation from high school he enlisted in the Army in June 1940 with the intention of eventually seeking an appointment as an Air Cadet. When he applied for such appointment, he was rejected because his eyesight was below normal. He served as an enlisted instructor in a bombsight school from 1941 until June 1943 when he was appointed an Air Cadet to train as an Armament officer. After completing the requisite course at Yale University, he was retained as an instructor. Subsequently he joined the Fourth Air Force, attended Aviation Ordnance School and became an Assistant Armament Maintenance Officer. He further recited that he was married, had an income of approximately $400 per month, did not drink or gamble to excess and intended to make the Army his career (R. 68, 69).

Colonel William R. Maxwell, Captain Gene Richards and Captain John H. Brower, who were, respectively, Ordnance Supply Officer, Armament Maintenance Officer and Ordnance Supply Officer of the Fourth Air Force, testified variously that they had known accused from seven to ten months, that he was in charge of the Bombsight C 1 Automatic Pilot, that he had performed his duties excellently, that he had been promoted to first lieutenant within the past thirty days, and that, so far as they knew, his reputation for truth, veracity and honesty was good (R. 70-75).

5. Defense objected to the admission of accused's confession on the grounds that he had made his first statement to Lieutenant Anderson at

the Physical Training Office before being advised of his rights under Article of War 24 and that his second and more complete statement, although made after his rights had been explained to him, was made only because he felt he could do himself no more harm in view of his first statement.

Even had accused's confession been erroneously admitted in evidence, his substantial rights would not have been injuriously affected thereby since the record of trial contains other compelling evidence conclusively establishing beyond a reasonable doubt that accused was guilty of the offenses alleged (CM 243384, Rowley, 27 BR 353; CM 254423, Gomzelez, 35 BR 243). Accordingly, it is unnecessary for us to determine whether or not his confession had been voluntarily made.

Under Charge I and its Specification, accused was charged with larceny of $1 in violation of Article of War 93, and under Charge II and its Specification he was charged with the identical conduct as a violation of Article of War 95. At the inception of the trial, defense counsel moved that one or the other of the two Specifications be stricken because the trial of accused on both of them constituted an unreasonable multiplication of charges.

Article of War 95 includes acts made punishable by any other Article of War provided such acts amount to conduct unbecoming an officer and a gentleman. Thus, embezzlement of military property constitutes a violation of Article of War 94 as well as Article of War 95 (MCM, 1928, par. 151). The officer who steals from his fellow officers violates both Article of War 95 and Article of War 93 and may be charged in separate specifications with the same conduct violative of each of these Articles of War (CM 246125, Kangiser, 29 BR 391). Accordingly, the court's action in denying the motion of defense counsel was correct. In his argument opposing defense's motion, the trial judge advocate stated to the court that it might find accused guilty under one or the other of the Specifications but should not find him guilty under both. Such statement was incorrect. If the same acts of an accused constitute a violation of both Article of War 93 and Article of War 95, he may properly be charged with, and found guilty of, both violations (Kangiser case, supra).

It appears from the record that accused's counsel proceeded upon the theory that the defense of entrapment was available to accused. However, the facts do not support the application of that doctrine. When a person has independantly formed the intent to commit an offense and agents of the Government merely lay a trap to catch him or even cooperate with him in order to obtain proof of his guilt, the defense of entrapment is not established (CM 239845, Wohl, 25 BR 279, 3 Bull JAG p. 55).

6. Accused is 23 years of age and married. War Department records show that accused is a high school graduate. In civilian life he was

employed first as an assistant manager and later as a projectionist in a theater, his highest weekly pay amounting to $25. From 1937 to 1940 he was a member of the Reserve Officers' Training Corps and received basic training. He entered military service on 19 June 1940 and by 1 September 1942 had risen to the grade of Technical Sergeant. On 20 January 1944, after successfully completing the Armament course at the Technical School, Army Air Forces Training Command, Yale University, accused was commissioned a second lieutenant and was assigned to duty as an instructor at that school. On 30 July 1945 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 93 and mandatory upon conviction of a violation of Article of War 95.

Thomas N. Jaffy, Judge Advocate.

Wm T Bien Jr, Judge Advocate.

Robert E. Trevethan, Judge Advocate.

SPJGH-CM 290132 1st Ind NOV 20 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 First Lieutenant Reginald Shaffer (0-868550), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of larceny of $1 in violation of Article of War 93, and guilty of the same conduct as a violation of Article of War 95. 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. Apparently troubled by thievery, authorities of the Provost Marshal's office, Fourth Air Force, hung an officers' shirt and a pair of officers' trousers on wall hooks in the locker room of a physical training building used by officers and enlisted men. In a pocket of the trousers had been placed a wallet with the two marked one-dollar bills. Accused was observed to enter the locker room, search the shirt, then search the trousers, extract one of the two dollar bills from the wallet and replace the wallet in the trouser pocket. He had no authority or permission to take possession of this money.

This officer's conduct in indulging in petty thievery from one whom so far as he knew was a fellow officer was disgraceful. His conduct was comparable to the insidious peculations of a barrack's thief and conclusively demonstrates his moral unfitness to remain an officer. That the amount taken was small does not alleviate the disgracefulness of his conduct. 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.

THOMAS H. GREEN
Brigadier General, U.S.A.
Acting The Judge Advocate General

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

(Sentence confirmed, but forfeitures remeitted. As modified ordered executed. GCMO 510, 5 Dec 1945).

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

SPJGK - CM 290203

25 OCT 1945

UNITED STATES v. Second Lieutenant EDWARD F. SPRINGER (0-781091), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Luke Field, Arizona, 20 September 1945. Dismissal.

OPINION of the BOARD OF REVIEW
LUCKIE, MOYSE and WINGO, 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 95th Article of War.

Specification 1: In that Second Lieutenant Edward F. Springer, 3028th Army Air Forces Base Unit, was, at Phoenix, Arizona, on or about 3 September 1945, drunk and disorderly in a public place: to wit, the Midway Inn, while in uniform.

Specification 2: In that Second Lieutenant Edward F. Springer, * * *, did, in or near the Midway Inn, Phoenix, Arizona, on or about 3 September 1945, wrongfully commit an assault upon Private First Class Earl H. Cropper by kicking him about the body with his foot, by striking him about the head and body with his hands, and by throwing a liquid substance into his face.

He pleaded not guilty to and was found guilty of the Charge and its Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service. Five of the seven members of the court recommended, in effect, that the sentence be commuted to forfeiture of $75.00 of his pay per month for 15 months. The reviewing authority approved the sentence, but recommended that it be suspended in view of the past good record of the accused, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 3 September 1945 at about the hour of 12:30 or 1:00 A.M., Private First Class Earl H. Cropper,

age 35, who was then on a 30-day convalescent furlough and was wearing "theater campaign and Purple Heart ribbons," the latter awarded him as a result of having suffered shrapnel wounds of the leg, was seated on a stool at the bar of the Midway Inn in Phoenix, Arizona, drinking beer. To his right, seated on adjoining stools, were three women, Bessie Underwood, Leota Seals, and Dixie McGuire. Two of the women were employees of the place, but were not then on duty. Private Cropper had entered the establishment about 8:30 P.M. and during the course of the evening had five bottles of beer. After having the fourth bottle he spent "an hour or more" in the kitchen of the inn with Bessie Underwood, drinking coffee and talking (R. 8,11,12,15,17,35). Private Cropper had been invited by the bartender, Mr. Woolsey, to have dinner with him and the three ladies after the closing of the tavern (R. 25). Upon returning from the kitchen to the bar, Cropper seated himself at a stool at the extreme north end of the bar and engaged in conversation with Mrs. Underwood (R. 9,27). The barroom was described as being "rather small" and having an L shaped bar, the vertical part of which runs in a north and south direction near the west side of the building. The entrance door is at this side of the building and is at a point about six or eight feet from the north end of the bar (R. 9,13,18,50).

Accused and Flight Officer Bradley entered the establishment at about 10:30 P.M. Accused was seated at the bar not less than five or six stools to the south of Cropper and all the intervening seats were occupied. There was no conversation between the two, and Cropper testified that he had no knowledge of accused's presence until about 12:30 A.M. (R. 9,10, 32,33). Various witnesses set the time of their first conversation and resulting altercation at between 12:20 and 1:00 A.M. (R. 19,35,36). At some time during that interval, accused left his seat, approached the part of the bar at which Cropper was sitting and made some profane remarks about "men who wore service bars on their blouse" and stated, "it wasn't his fault if he wasn't sent overseas" (R. 9,27,36,48,58). Cropper made no reply and accused walked back to the place where he had been seated, took his drink and started toward the exit door, which was located some 6 feet from where Cropper was seated, and said, "I'm going outside now; if you don't follow me you're yellow." Cropper replied, "You can't be yellow over there," but did not move from his seat (R. 10,33). Accused then began cursing and using obscene language described as follows: "Those pretty shitty bars on your shirt don't mean a God damn thing." "If you didn't have a yellow streak a foot wide down your back you would come outside with me." He then called Cropper "a yellow buck-assed private" and threw the contents of the glass in his face, part of the liquid falling on Mrs. Underwood (R. 19,20,35; Pros. Ex. 1). A piece of one of Cropper's teeth was knocked out and the liquid "blinded" him. When he started to wipe his face, accused "grabbed" him by the arm and they walked out together. The bartender, Woolsey, and Flight Officer Bradley immediately followed them out. Cropper was first seen lying on the ground and the accused was striking him with his fists and kicking him several times on the body (R. 21,22,45). Cropper testified that accused had struck him on the jaw and knocked him to the ground; that

he was "jumped on, beaten and kicked on the back of the head" and that he did not remember anything after being kicked on the head' (R. 11,15). Woolsey pulled accused off Cropper and the accused said, "Will you look at the son-of-a-bitch bleed." Cropper, who at that time was in a prone position, was bleeding about the face (R. 22,46). Private Cropper was heard to say, "Where are your campaign ribbons" (R. 52), whereupon accused broke loose from Woolsey, who was holding him, and struck Cropper again. The evidence is in conflict as to whether Cropper was prone or standing at the time of the second attack, but neither Woolsey nor Bradley saw Cropper strike at the accused (R. 21,46).

Mr. Woolsey testified that there had been no conversation between accused and Private Cropper prior to the time he (Woolsey) went to the kitchen about 1:00 A.M. to turn out the lights, at which time accused was in good humor and was sitting at the south end of the bar some distance from Cropper. Accused had been drinking moderately and he and the members of his party appeared in good condition and none was boisterous (R. 19). There had been no altercation of any kind, but upon Woolsey's return to the bar from the kitchen within about five minutes, Woolsey observed accused standing in the doorway very excited and saw him throw the remainder of the drink into Cropper's face, using profanity of the kind above mentioned, and "inviting him" to come in the yard (R. 20,21,22,24).

Flight Officer Bradley testified that accused had about ten drinks of liquor, consisting of one jigger each, and four or five beers between 10 A.M. and the time the incident, which is the subject of the charge, occurred. He observed Cropper at about 11:00 P.M. seated at the north end of the bar where he remained until after Lieutenant Springer walked to his seat and engaged him in conversation for 10 or 15 minutes, according to Bradley. The witness did not recall having conversed with Cropper at any time during the evening. The conversation between Cropper and accused was quiet at first and Bradley heard nothing until he was aware of the voice of accused and "he was swearing". Thereupon Springer returned to where Bradley was sitting and was "very put out." They started to leave the place, accused carrying his drink, but on the way out Lieutenant Springer went toward Cropper and threw the contents of the glass in his face (R. 36-38, 50,54).

Bradley's testimony concerning his sobriety and that of the accused, adduced on cross-examination, is as follows:

"Q. Were you intoxicated when you got to the Midway?
"A. No, sir.
"Q. Was Lieutenant Springer as intoxicated as you were?
"A. No, sir.
"Q. You were the fellow who was just a little drunker than the other?
"A. That is correct." (R. 48).

Asked as to accused's reputation as a peaceful man, Bradley stated it was good (R. 47).

4. The evidence for the defense consists of the sworn testimony of accused and three character witnesses, one of whom, in addition, testified that the reputation of Cropper for truth and veracity was bad (R. 71-79). This witness, Mrs. Letour, was a friend of Cropper's former wife from whom he had obtained a divorce. Her knowledge of Cropper's reputation for truth and veracity was based on what she had heard about him from Cropper's divorced wife and from one other person (R. 78).

It was stipulated that accused is married and living harmoniously with his wife and has a child about two years of age (R. 80). Accused, after being advised of his rights as a witness testified in substance as follows: He will be 23 years of age on 2 November 1945, and he has been in the service on active duty since 23 February 1943, having enlisted in the "ARC" (ERC) on 12 December 1942. He has two brothers in the service and his father is a veteran of the last war. He attended the University of Wisconsin for one year and participated in boxing, both at that institution and the high school which he had previously attended, winning 61 out of 62 bouts. He never was in a fight while in the Army before. On the night in question, he, Bradley and two other officers went to the Midway Inn about 11:00 P.M. or later, but the latter two left about 12:00 or 12:15 A.M. and were not involved in the altercation. About 12:30 or 12:45, Flight Officer Bradley came to him and said that the private (Cropper) was making derogatory remarks about the Air Corps. Accused went to Cropper's seat and as he approached, Cropper said, in a low voice, "Here comes the General." Accused told the private that in the Air Corps enlisted men did not talk to officers in that manner. Cropper then said, "What theater have you been in Lieutenant?" Accused had indicated his desire for overseas service at every opportunity, but has done nothing but "sit around" with no permanent job. He told Cropper that it was not his fault he had been kept in the States and he "was telling him /Cropper/ all this stuff using profanity to the extent of Goddam and shit." "I was pretty wound up and I threw this drink in his face and walked out the door." Cropper did not say anything, but walked out in front and started fighting. Blows were struck by both parties and Cropper went to the ground. Accused kicked Cropper while he was on the ground and told him to get up and fight. After they were separated by Woolsey and Bradley, Cropper got to his feet and shouted, "Lieutenant, what theatre have you been in." Thereupon Springer broke loose and struck Cropper again, knocking him down the second time. Then accused went to his car and started to get in when Cropper came up and asked why accused had "beat him up." Accused replied that he should not be criticized because he had not had overseas duty when he always desired it. He further told Cropper "he looked up to the men with the Purple Heart." According to the accused, apologies were exchanged and they shook hands before taking leave of each other (R. 56-61,70).

Upon cross-examination, accused stated that upon starting to leave the Midway Inn it was originally his intention to take his drink with him; that he had carried out drinks on more than one occasion and the proprietor had never objected. While he did not have to pass Cropper

on his way out, the place at which Cropper was sitting was not far from the door and accused went over to talk with him. He started raising his voice when the enlisted man asked him what theater of operation he had been in and lost control of himself. He threw the liquid in Cropper's face, said something about his having a "yellow streak" and asked him to come outside and settle the argument. He admitted that Cropper did not raise his voice at any time and said nothing except ask the one question as to what theater the Lieutenant had served in. Following the drink-throwing episode, coupled with the invitation to step outside, the Lieutenant walked out the door, looked back and saw Cropper wipe his face, after which Cropper also walked out the door. He could not state who struck the first blow.

Accused admitted that he had struck his roommate, Lieutenant Nighter, in a dispute at the same place on a previous date, but contended that there was sufficient provocation and related the facts leading up to the incident (R. 62,64-67).

5. Specification 1 of the Charge alleges drunkenness and disorder in uniform in a public place in violation of Article of War 95. That accused was disorderly as alleged is so conclusively established, not only by the prosecution's witnesses but by the accused's testimony as well, as to require little comment. Suffice it to say that his profane outburst in the presence of at least three women and his casting of the liquor into the face of the enlisted man constitute a course of scandalous and disgraceful conduct of the type denounced by the 95th Article of War. While it is difficult to comprehend such acts being committed by a sober individual, we are unable to indulge in any presumption that accused was drunk at the time and must look soley to the record for proof of this element of the offense. There is evidence that he had consumed a considerable amount of intoxicants during the day and that he drank moderately at the Midway Inn bar from about 10:30 P.M. until about 1:00 A.M. There was also an effort made by the prosecution to establish through the testimony of Flight Officer Bradley that the accused was intoxicated, but the answers elicited were so vague and inconsistent as to have little or no probative value. No witness expressed the opinion that accused was drunk, nor was any evidence offered to show that his actions were characteristic of conditions commonly found in drunk persons. On the contrary, the bartender testified that accused drank moderately and his behavior was excellent until the time of the quarrel. Under these circumstances, the evidence does not establish beyond the required reasonable doubt that the accused was drunk as alleged, and is therefore legally sufficient to support only so much of the finding of guilty of Specification 1 of the Charge as involves disorder in uniform in a public place.

6. With respect to Specification 2 of the Charge, the evidence clearly establishes that the accused, who had considerable experience as a boxer, was the aggressor and made a brutal and unprovoked attack upon the enlisted man, thirteen years his senior who had been wounded in combat overseas and was

then on convalescent furlough.

Even if it may be assumed that Cropper made an uncomplimentary or slighting remark about accused's lack of overseas service, there was no justification whatsoever for accused's actions. No authority vested in accused as an officer to administer corporal punishment upon an enlisted man for an alleged insult, nor was there anything in the situation that could not have been cleared up by the exercise of discretion and good judgment by accused even if Cropper had actually been insulting. The record, however, shows that accused was the aggressor throughout. He unquestionably used vile, profane and obscene language in addressing Cropper, and later followed up this verbal attack with a physical one when he threw the liquid contents of his glass into Cropper's face, at the same time taunting the latter to go outside unless he was "yellow." The testimony clearly shows that, whether Cropper went out voluntarily or was pulled or pushed out by accused, accused ruthlessly beat up Cropper, striking him on the jaw with his fist and punching and kicking him on the head and body when Cropper fell to the ground. There is nothing whatever to indicate that Cropper attempted to or did strike accused, and, save for the statement of accused himself, there is no evidence to sustain the view that Cropper even attempted to defend himself. Further, while accused was being held after he had both struck and kicked Cropper, he broke loose and made another attack on Cropper. In the opinion of the Board the evidence fully establishes that accused wrongfully assaulted Private First Class Cropper as charged in Specification 2 of the Charge and is legally sufficient to support the finding of guilty of this Specification.

As concerns the Charge, with respect to Specification 1, accused's disorder was gross and his indecorum was conspicuous and of a disgraceful nature. According to Winthrop, engaging in unseemly altercations or broils with military persons or civilians, breaches of the peace, or other disorderly or violent conduct of a disreputable character in public constitutes a violation of the 61st (95th) Article of War (Winthrop's Military Law and Precedents, Reprint, p718). Clearly then, this is the type of conduct which is denounced by the 95th Article of War as conduct unbecoming an officer and a gentleman.

With respect to Specification 2, the rule is well settled that the conduct of an officer in kicking and striking an enlisted man of his command is conduct unbecoming an officer and a gentleman in violation of Article of War 95 (CM 239481, Wickham, 25 B.R. 183; CM 238970, Hendley, 25 B.R. 1; CM 239609, Mulroy, 25 B.R. 215). And when such an assault is inflicted without justification by an officer upon a soldier in a public place and in the presence of several civilians, it is even more reprehensible. It disgraces the officer personally and in the language of Winthrop "exhibits him as morally unworthy to remain a member of the honorable profession of arms." Accordingly, the Board of Review holds that the offenses of which accused stands convicted are both within the contemplation of the 95th Article of War and that the evidence is legally sufficient to sustain the

finding of guilty of the Charge.

7. Attached to the record of trial is a letter of recommendation for clemency, signed by five of seven members of the court (one member was unavailable by reason of transfer), recommending commutation of the sentence to forfeiture of pay in the amount of $75.00 per month for 15 months. Among the reasons assigned for clemency are accused's youth, his civilian background, his previous good military record, and the fact that the misconduct involved was due to his sensitiveness over the failure to be assigned to overseas service.

8. War Department records disclose that this officer is 23 years of age and married. According to the testimony he has one child. He is a high school graduate and attended the University of Wisconsin for one-half year. Thereafter he held two civilian positions as foundry and machine inspector from March 1941 to February 1943 until he enlisted in the military service. He enlisted in the Enlisted Reserve Corps on 12 December 1942 and was called to active duty on 23 February 1943, serving as an aviation cadet from 24 March 1943 to 26 June 1944. On 27 June 1944 he was appointed a second lieutenant in the Army of the United States and assigned to the Air Corps.

9. The court was legally constituted and had jurisdiction of the person and of the offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of the Charge as involves a finding of guilty of disorderly conduct in uniform at the time and place alleged, and legally sufficient to support the finding of guilty of Specification 2 and the Charge and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95.

Charles A. Luckie, Judge Advocate

Herman Moyse, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 290203 1st Ind

NOV 7 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 Edward F. Springer (O-781091), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in uniform in a public place (Specification 1 of the Charge) and of committing an assault on one Private First Class Earl H. Cropper (Specification 2 of the Charge), all in violation of the 95th Article of War. He was sentenced to be dismissed the service. Five of the seven members of the court subsequently recommended, in effect, that the sentence be commuted to a forfeiture of pay of $75.00 per month for 15 months. The reviewing authority approved the sentence, recommended that it be suspended because of the previous good record of accused, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of the Charge as involves disorderly conduct as alleged, and legally sufficient to support the finding of guilty of Specification 2 and the Charge and the sentence, and to warrant confirmation of the sentence.

On 3 September 1945 the accused entered a bar in the City of Phoenix, Arizona, and there became involved in a controversy with an enlisted man, who was without apparent blame. The accused used vile and profane language toward the enlisted man in the presence of several civilians, including women, hurled the contents of a glass of liquor in his face and invited him to step outside the premises, where the accused administered a vicious beating to him, striking and kicking the enlisted man while he was down and defenseless. The officer had done considerable drinking, but the evidence does not establish that he was intoxicated or indicate that the enlisted man whom he attacked was in that condition. The assault is an aggravated one, particularly since the accused, a man 23 years of age with considerable experience as a boxer chose as his victim a soldier 13 years his senior, who was wearing the Purple Heart and was on convalescent furlough. It further appears from the evidence that this officer did, on a previous occasion, use his physical prowess to settle a dispute, though the matter did not come to the attention of military authorities.

Accused's actions indicate a lack of appreciation of the duties and obligations of an officer, and demonstrate that he is unworthy of his commission. I recommend that only so much of the finding of guilty of Specification 1 of the Charge as involves a finding of guilty of disorderly conduct as alleged be approved. Under all the circumstances and despite the recommendations of clemency on the part of the court and the reviewing authority, I recommend that the sentence be confirmed and ordered executed.

4. Consideration has been given to the recommendation for clemency signed by five of the seven members of the court, to the recommendation of the reviewing authority and to the attached letters from Honorable Robert M. LaFollette, Jr., and Honorable Alexander Wiley, United States Senators from the State of Wisconsin, and from the Honorable Thad F. Wasielewski, Member of the House of Representatives of the United States from the State of Wisconsin.

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

5 Incls
1. Record of trial
2. Form of action
3. Ltr fr Sen LaFollette
4. Ltr fr Sen Wiley
5. Ltr fr Representative Wasielewski

(Findings approved in part. Sentence confirmed and ordered executed. GCMO 486, 15 Nov 1945)

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

SPJGN-CM 290214

UNITED STATES	)	FOURTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at McChord Field, Washington, 27, 28 August 1945. Dismissal, total forfeitures and confinement for two (2) years. Disciplinary Barracks.
	)	
Second Lieutenant THEODORE CAMPBELL (0-836082), Air Corps.	)	

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

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

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

Specification 1: In that Second Lieutenant Theodore Campbell, Air Corps, Squadron "V", 464th Army Air Forces Base Unit, did, without proper leave, absent himself from his organization and station at McChord Field, Washington, from 30 June 1945 to 6 July 1945.

Specification 2: In that Second Lieutenant Theodore Campbell, Air Corps, Squadron "V", 464th Army Air Forces Base Unit, did, without proper leave, absent himself from his organization and station at McChord Field, Washington, from 9 July 1945 to 16 July 1945.

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

Specification 1: In that Second Lieutenant Theodore Campbell, Air Corps, Squadron "V", 464th Army Air Forces Base Unit, did, at McChord Field, Washington, on or about 15 July 1945, wrongfully attempt to take and use without the consent of the owner, a military aircraft, property of the United States, of a value of more than $50.00.

Specification 2: In that Second Lieutenant Theodore Campbell, Air Corps, Squadron "V", 464th Army Air Forces Base Unit, did, at McChord Field, Washington, on or about 13 July 1945 wrongfully take and use without the consent of the owner, a certain automobile, to wit: a Chevrolet Sedan, property of the United States, of a value of more than $50.00.

The accused pleaded not 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 ten years. The reviewing authority approved the sentence, reduced the period of confinement to two years, 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 orders dated 19 June 1945, the accused was relieved from his assignment and duties at Tonopah Army Air Field, Tonopah, Nevada, and reassigned to Squadron V, McChord Field, Tacoma, Washington. The orders instructing him to proceed without delay to his new station provided that delay en route was not authorized, that the Transportation Corps would provide transportation, although travel by private conveyance was allowed, and included the entry "EDCMR, 26 Jun 45" (Pros. Ex. 2). The accused, having applied for and received a transportation request, departed Tonopah in the early morning of 28 June 1945. He traveled by bus to Reno, Nevada, and thence by train to Portland, Oregon, arriving in the latter city at 1005 hours on 30 June 1945. His train was scheduled to arrive at Tacoma, Washington, at 1648 hours on the same day (R. 7). The morning report of Squadron V at McChord Field revealed that he absented himself without leave on 30 June 1945, while en route to join his new organization, and remained in that status until he reported for duty on 6 July 1945 (Pros. Ex. 1). He apparently signed the Officers' Register at Headquarters, McChord Field, on 6 July 1945, indicating his arrival on the preceding day (R. 74, 75).

The accused, about this time, made the acquaintance of Miss Lila Lee Booth who, on the occasion of their first meeting, was in the company of "Mr. Austin", a guest at the Winthrop Hotel in Tacoma.

According to the testimony of Miss Booth, she spent the next four days with Austin and the accused, chiefly in carousing and drinking at local "speak-easies" and taverns (R. 10, 21-23). On one occasion, after consuming a considerable quantity of whiskey, the three decided to go to the "Derby Club" but could not agree as to who should drive the automobile in which the group intended to ride. Following the argument the accused separated himself from the others and was not seen again by Miss Booth until the early morning hours of Sunday, 15 July 1945 (R. 22-24). She and "Major Knudson" had spent the Saturday evening before drinking at the barroom in the Winthrop Hotel and later at the Derby Club (R. 11, 12, 24, 25). About one-thirty o'clock on Sunday morning they decided to visit the Officers Club at McChord Field and, while walking from the Derby Club down 11th Street in search of a taxi, encountered the accused. He joined the couple and all three rode in a taxi to the Field, the accused occupying the back seat alone while Miss Booth sat in front between the driver and Major Knudson (R. 12-14, 25-29). The latter, as they approached the Field, suggested that Miss Booth "slide down" in the seat to escape the attention of the guard at the gate. This ruse succeeded and Private First Class Anthony Shefsik, the guard, wishing to avoid "embarrassment" to Major Knudson, who "seemed unstable" and appeared to be the only passenger, allowed the taxicab to proceed a short distance inside the Field (R. 14, 15, 30, 36, 41). Shefsik fixed the time of this incident at 3:45 o'clock in the morning (R. 36). After the three passengers alighted from the car, Miss Booth spurned the company of Major Knudson and walked away with the accused to an area of the Field in which several airplanes were parked (R. 15, 16, 31, 49). Stating that he "liked to fly very well", the accused "suggested going in [a] plane". Miss Booth acceded to this proposal, entered one of the planes with him, and took her place beside him in one of the "two pilot's seats". According to her testimony, the accused "turned something and it wouldn't start" and, "disgusted" at his failure, repeated this performance in two other planes with the same ineffectual results. During the course of these experiences Miss Booth misplaced her purse and came into the possession of "earphones and a radio book" (R. 16-18, 31-33).

Daybreak found the couple walking toward the main gate and faced with the problem of leaving the Field undetected. The accused waited while Miss Booth went forward to ascertain whether a guard was on duty. She was halted and questioned by "the M.P." but persuaded him to allow her to return and search for the misplaced purse. She reported the presence of the guard to the accused, who then suggested another plan of action. She was to drive a staff car from the nearby Motor Pool and meet him on the highway outside of the post (R. 18, 19, 37). Pursuant to this scheme, Miss Booth entered the vehicle numbered "129719", drove it toward the Field's exit and, deciding that "they wouldn't let [her] through", turned the car in another direction. She was halted by a guard, returned to the Main Gate "shack", and there

questioned by the Sergeant of the Guard and Officer of the Day (R. 19, 20, 33, 36, 37, 38, 45, 47). She and the accused had consumed a considerable amount of beer and whiskey that night and she presented a sorry picture to the members of the guard. Obviously inebriated, she appeared to one witness to be "in a stupor", and, to another to be "getting over * * * a drunken spree" (R. 46, 49). Her hands were dirty, her knees "banged up", her red suit was filthy, and, all in all, she seemed unkempt and "haggard" (R. 32, 38, 47). She mumbled "incoherently" that she entered the Field with a Major and a Lieutenant, although apparently not mentioning the accused by name, and stated that she was operating the staff car with the permission of "Major Fonville". In spite of her drunken condition, she was able to direct the Officer of the Day to the spot where the "radio operator's headset" and the "Aircraft Manual" had been dropped (R. 38, 47, 48). A lady's purse, containing $20.00 in cash, a pint-sized bottle one-fourth full of whiskey, and a social security card with "Lila Lee" appearing as the "first and second" names thereon, was discovered the following day in a "B-26" parked on the Field (R. 42, 43, 48). Miss Booth was not consistent in her testimony as to the accused's attire on the night in question, at one point referring to his "sports shirt" and later indicating that he was wearing a blouse (R. 13, 27, 28, 34, 35).

By stipulation it was shown that a "B-26" aircraft and Chevrolet Sedan Staff car number W-129719, which belonged to the United States, each was valued at more than $50.00 (R. 8, 9). Captain Ross P. Holland, Flight Test Inspection Officer at McChord Field, testified that he had not granted the accused or any other person permission to operate a "B-26" airplane on the night of 15 July 1945 (R. 43).

The morning report of Squadron V at McChord Field described the accused as absent without leave from 9 July 1945 until his confinement on 16 July 1945 "awaiting trial" (Pros. Exs. 4, 5).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to testify in his own behalf (R. 50). His home was in Akron, Ohio, where, after completing high school, he was employed by Firestone Tire and Rubber Company for six months before his enlistment in the Army. The son of a "professor", he lived in a home where disaffection between his mother and father produced tension and unhappiness. The worry caused by this unfortunate situation led to a habit of excessive drinking, which, the accused realized, "ruined [his] whole Army career" (R. 51, 52, 67). His three years of service in the Army included two as an enlisted man and one as a commissioned officer (R. 64, 65). Trained as a "first pilot" on "B-24" type aircraft, he had 300 or 400 hours credit for that type airplane and "total time" of about 600 hours (R. 65, 68).

Following the receipt of orders directing his transfer from Tonopah, Nevada, to McChord Field, Washington, "pending resignation

from the Army", he, for the first time since his entry into the service, traveled alone on orders. As an enlisted man his changes of station had been "under troop movement", and, since receiving his commission, he had been accompanied by other officers between stations (R. 52, 65, 67, 69). He had on those occasions taken "the amount of time stated on the orders" (R. 69). He received his orders at Tonopah on 19 June 1945, the date of their issue, and both from their language and from his conversation with the "Chief Warrant Officer" at the Adjutant's Office, concluded that he was not scheduled to arrive at McChord Field until 26 June 1945 (R. 52, 53). He therefore received the impression that he had seven days travel time between stations and, when his departure from Tonopah was delayed because of sickness until 28 June, he considered that he was not required to report to McChord Field until the fifth day of the following month (R. 53, 60, 62, 64, 67). He remained in Portland, Oregon, for three days, arrived in Tacoma, Washington on 3 July, and on the following day obtained a room at the Visiting Officers' Quarters, McChord Field. Because he felt "terribly ill" from an excessive use of alcohol, he slept throughout most of 4 and 5 July, formally reporting at his new station on the afternoon of the latter day (R. 53, 62, 63). On 6 July he went again to Tacoma, met Miss Booth at the bar in the Winthrop Hotel, and returned to the Field for "a meeting" at 7:45 a.m. on the following morning. Even at this time he was "well under the weather" from whiskey and, when several hours later he went again to Tacoma, he resumed his heavy drinking. He spent the night of 7 July with Miss Booth at the Winthrop Hotel. On the following day a quarrel took place, during the course of which he branded her as a "gold digger", and "told her * * * where to go and what to do and that [he] didn't want to see her again". Miss Booth then left his presence, stating that "she would get even with [him] for saying such a thing". He had not seen her since that incident of 8 July (R. 54, 55, 59, 61, 66, 68).

Instead of returning to McChord Field, the accused remained in Tacoma for several days (R. 55, 56). He was still there on 14 July when, at about 11:30 p.m., he encountered "Mr. Sid Harris", whom he had known for a week, and went with him to a restaurant. Harris ordered sandwiches and the accused a "milkshake". After a few minutes they went to a "speak-easy", the accused, who was not allowed to enter attired in Army uniform, waiting outside while Mr. Harris went in for a drink. At about one o'clock they walked to the latter's room at the Savoy Hotel, where the accused replaced his blouse and "green shirt" with a light beige "sport shirt" belonging to Harris. A soldier by the name of "Perry" was there at the time. Having thus concealed his Army identity, the accused accompanied Harris to "Ann Thompson's" speak-easy, remained there until "about dawn", and then proceeded to the Bohemian Club (R. 56-59). At about 12:30 or 1:00 o'clock on that Sunday afternoon of 15 July he returned to the Harris room and changed into Army clothes. Spending the entire weekend in Tacoma, he at no

time on 14 or 15 July went to McChord Field. He pointed out that during his brief stay there he had not visited the Motor Pool or the area where aircraft were parked (R. 59, 60). He positively denied entering an airplane at any time since his arrival (R. 60). Apprehended on 16 July, he attributed his unauthorized absence to over-indulgence in alcohol (R. 61).

Private John R. Perry, testifying for the defense, related how he met the accused on the Saturday evening in question in the room of Sid Harris at the Savoy Hotel, Tacoma. At about 11:00 or 12:00 o'clock the accused exchanged his Army blouse and shirt for sportswear and, after "a short while", left the room with Harris (R. 70-73).

The stipulated testimony of Sidney Harris generally supported the statement of accused. According to Harris, the two men met at about 11:30 o'clock on the evening of 14 July. They went to a restaurant where Harris drank coffee and the accused a milkshake. They then proceeded to a speak-easy and, when the accused was not allowed to enter because of his uniform, walked to the Harris room" at the Savoy Hotel. There the accused "doffed his cap, blouse, shirt and tie" and put on a shirt belonging to Harris. The two men then went to "Ann Thompson's" and consumed several drinks of whiskey, Harris taking his departure about 2:00 o'clock in the morning. Shortly after noon on Sunday the accused returned to Harris' room and recovered his clothing (R. 74). Mrs. Harris, too, recalled that the accused visited their room, that he exchanged certain items of clothing, that her husband "returned alone" at about 1:30 a.m., and that the accused recovered his clothes at about 1:00 o'clock on Sunday afternoon (R. 74).

5. The prosecution presented, as rebuttal witnesses, Staff Sergeant Edward A. Owen, Acting First Sergeant of Squadron V at McChord Field, and Sergeant Fred V. Carlson, clerk at the Visiting Officers' Quarters. Owen, who was on duty at the Squadron Orderly Room on 4, 5, and 6 July 1945, did not see the accused there until the last mentioned date (R. 75, 76). Carlson's records did not reveal that the accused was assigned a room throughout the three-day period, but the witness conceded that the presence of accused could have escaped his attention (R. 76, 77).

6. Specification 1 of Charge I alleges that the accused "did, without proper leave, absent himself from his organization and station at McChord Field, Washington, from 30 June 1945 to 6 July 1945."

The evidence adduced by the prosecution in support of this allegation was uncontroverted. The accused, willing to acknowledge the truth of the facts so established, contended that he was nevertheless guiltless. His position was predicated upon what he considered a fair and reasonable interpretation of the orders directing his transfer, on

a permanent change of station basis, from Tonopah Army Air Field, Tonopah, Nevada, to McChord Field, Washington. The orders issued on 19 June 1945 directed him to proceed without delay to his new station, provided for transportation by the Transportation Corps, and expressly forbade any delay en route. The significant provision, to the mind of accused, was the statement fixing the effective date of change of the morning report as of 26 June 1945. This, coupled with an assertion by "the Chief Warrant Officer" in the Adjutant's Office at Tonopah, led the accused to believe that he was allowed seven days in which to reach his new station. Thus, when a period of hospitalization delayed his departure until 28 June, he fixed the proper date of his arrival at McChord Field as 5 July. After interrupting his trip at Portland, Oregon, and remaining there for three days he arrived at McChord Field on the morning of 5 July and formally reported the following day.

Should the truth of these assertions and good faith on his part be conceded, the defense so propounded can be of no avail to the accused. His orders and pertinent Army Regulations required him to proceed without delay to his new station.

> "When an officer is ordered without troops from one post of duty to another, he will proceed without unnecessary delay except where orders direct performance of travel on a specific date". Par. 1 (1), AR 605-180, 16 July 1942.

Although authorized to travel by private conveyance, he elected to proceed by rail. The allowable travel time was therefore to be computed "on the basis of the shortest usually traveled route" by that type of transportation. C.3, Par. (1) (b) AR 605-180, 16 July 1942. Whether the accused availed himself of the shortest rail route between Tonopah, Nevada, and Tacoma, Washington, is not revealed by the evidence. It was shown, however, that he traveled by bus to Reno, Nevada, and that, having applied for and received a transportation request covering his travel from Reno to Tacoma, he proceeded by train on a schedule which, if followed without interruption, would have fixed the time of his arrival in Tacoma as the afternoon of 30 June 1945. Since he failed to report at nearby McChord Field on that day, he was properly listed as being absent without leave on the morning report of the organization to which he had been assigned.

This determination of unauthorized absence is unaffected by the reference in accused's orders to the effective date of change of the morning report. This provision was apparently inserted in accordance with Army Regulations (Par. 11, AR 345-400, 3 January 1945), directing "All orders directing a permanent change of assignment of individuals * * * where it becomes necessary for such personnel to be dropped from the

morning report of one unit * * * and picked up on the morning report of another unit" to contain "the effective date of change". This requirement, the apparent purpose of which was to coordinate the making of an administrative entry concerning the transferee by the losing and gaining units, does not change the accepted rules applicable to travel and should have no definitive effect on allowable travel time. While the date of the morning report change may frequently prove to be the same as that of arrival at the new station, this is not necessarily the case. Such a coincidence would depend on a variety of circumstances, as the type of travel employed and whether or not delay en route was authorized and utilized. Certainly the provision relied on by the accused could not license a delay of several days in the face of an express prohibition to the contrary. His testimony that he arrived at McChord Field suffering from the ill effects of excessive drinking and his admitted addiction to alcohol apparently provide a more credible explanation of his unauthorized absence than the alleged misconception of the meaning and effect of his orders.

7. Specification 2, Charge I, alleges an additional unauthorized absence of the accused from his station at McChord Field from 9 July 1945 to 16 July 1945. Accused freely acknowledged his unauthorized absence as alleged and attributed his delinquency to an immoderate use of alcohol. The evidence, beyond a reasonable doubt, sustains the finding of guilty of this Specification.

8. Specification 1, Charge II, alleges that the accused did, "at McChord Field, Washington, on or about 15 July 1945, wrongfully attempt to take and use without the consent of the owner, a military aircraft, property of the United States, of a value of more than $50.00". Specification 2 of the same Charge alleges that the accused did, at the same station, "on or about 13 July 1945, wrongfully take and use without the consent of the owner, a certain automobile, to wit: a Chevrolet Sedan, property of the United States, of a value of more than $50.00".

The only testimony presented in support of the above Specifications consists of the testimony of Miss Booth. Since Miss Booth was clearly shown by other witnesses to have been in an inebriated condition on the night of 14-15 July 1945, when, according to her testimony, the two events occurred, her testimony must be viewed with great caution. The sergeant of the guard who observed her at the time in question described her as appearing to be "in a stupor" and the officer of the day described her as recovering from "a drunken spree". Her narration of the events alleged does not appear to be accurate or lucid. The accused directly contradicted the testimony of Miss Booth by denying that he was with her or visited McChord Field on the evening described by her. His testimony as to the events of the early evening of 14-15 July is corroborated by the statements of others. Furthermore, he testified that he was in a Tacoma tavern between 2:00 a.m. and 6:00 a.m., during the hours

when the two events supposedly occurred. It is a significant circumstance which tends to place doubt upon Miss Booth's testimony that the accused was not seen in the taxicab with Major Knudson when he entered the post and that the accused was not observed or found on the field during the course of an extensive search conducted about daybreak on the occasion in question. In view of all these circumstances it is the opinion of the Board of Review that the uncorroborated testimony of Miss Booth is not of such a persuasive character as to warrant a finding of guilty, beyond a reasonable doubt, of Specifications 1 and 2, Charge II, and the record is, therefore, legally insufficient to sustain the findings of guilty of those Specifications.

9. The records of the War Department show that the accused is approximately 21 years of age. He graduated from high school and enlisted in the service on 12 December 1942. He was thereafter commissioned a second lieutenant in the Air Corps on 4 August 1944.

10. 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 and 2 of Charge II and of Charge II, but 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 61.

Abney E. LeSocoff, Judge Advocate.

Robert J. Cannon, Judge Advocate.

(Sick in hospital), Judge Advocate.

SPJGN-CM 290214 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War

NOV 28 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 Theodore Campbell (0-836082), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from his organization and station at McChord Field, Washington, from 30 June 1945 to 6 July 1945 (Spec. 1, Chg. I), and from 9 July 1945 to 16 July 1945 (Spec. 2, Chg. I), in violation of Article of War 61; of wrongfully attempting to take and use, without the consent of the owner, a military aircraft, of a value of more than $50, property of the United States (Spec. 1, Chg. II), and of wrongfully taking and using, without the consent of the owner, a Chevrolet Sedan automobile, valued in excess of $50, also property of the United States (Spec. 2, Chg. II), 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 approved the sentence, reduced the period of confinement to two years, 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 insufficient to support the findings of guilty of Specifications 1 and 2 of Charge II and of Charge II, and is legally sufficient to support all of the other findings and the sentence, as approved by the reviewing authority, and to warrant confirmation thereof.

The accused, by orders dated 19 June 1945, was relieved from his assignment and duties at Tonopah Army Air Field, Tonopah, Nevada, and directed to proceed without delay to his new organization at McChord Field, Tacoma, Washington. Because of illness, his departure was delayed until 28 June 1945. He traveled by bus to Reno, Nevada, and thence by rail on a schedule which fixed the time of his arrival in Tacoma, Washington, as of 30 June 1945. He, however, interrupted the trip and left the train in Portland, Oregon, remained there for three days, and did not report to McChord Field until 6 July 1945. He again absented himself without leave on 9 July and remained away from his organization and station until he was apprehended in Tacoma seven days later.

The accused's addiction to alcohol was without doubt the cause of his delinquencies. Prior to the commission of the offenses here under consideration, he was punished by his Commanding General under Article of War 104 on account of his drunk and disorderly conduct while in uniform in a public place, the incident occurring on 19 January 1945. The record indicates that under date of 8 June 1945, the accused submitted his resignation for the good of the service, in lieu of trial by general court-martial. He conceded that his habit of excessive drinking had "ruined /his/ whole Army career". While lacking the character and stability necessary to assume and shoulder the responsibilities of an officer, and clearly demonstrating his unfitness to wear the uniform, it is believed that dismissal alone would comprise sufficient punishment for the present offenses. 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. Consideration has been given to the letter, dated 29 October 1945, from the reviewing authority, Major General Willis H. Hale, the accompanying letter of Major William P. Fonville, Trial Judge Advocate, and the attached affidavit of one Anthony P. Spadafore, the latter document attesting the presence of the accused in the city of Tacoma from 2:00 o'clock until 6:00 o'clock on the morning of 15 July 1945.

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, USA
Acting The Judge Advocate General

5 Incls
Incl 1 - Record of trial
Incl 2 - Form of action
Incl 3 - Ltr. fr. Gen. Hale
Incl 4 - Ltr. fr. Maj. Fonville
Incl 5 - Affidavit from Anthony P. Spadafore

(Findings disapproved in part. The sentence as approved by the reviewing authority, is confirmed but the forfeitures and confinement remitted. As modified ordered executed. GCMO 502, 5 Dec 1945).

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

SPJGQ
CM 290245

UNITED STATES	)	FOURTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Walla Walla Army Air Field, Washington, 31 July 1945, and 25 August 1945. Dismissal.
	)	
First Lieutenant CHARLES H. BAYLESS (0-863820), Squadron A, 423rd Army Air Forces Base Unit.	)	

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OPINION of the BOARD OF REVIEW
PARTLOW, 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: In that First Lieutenant Charles H. Bayless, Air Corps, Squadron A, 423rd Army Air Forces Base Unit, did, at Walla Walla Army Air Field, Washington, on or about 22 September 1944, with intent to deceive Colonel D. Wade, Air Corps, submit an official Report of Survey in the amount of $1625.00, containing the statement that the six cameras listed thereon were destroyed in a crash of B-24 airplane on 12 September 1944, which statement was known by the said First Lieutenant Charles H. Bayless, Air Corps, to be untrue in that the said cameras were not on the B-24 airplane at the time said airplane crashed.

CHARGE II: Violation of the 94th Article of War.
(Finding of not guilty.)

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

Specification 3: (Finding of not guilty.)

Specification 4: (Finding of not guilty.)

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He pleaded not guilty to the Charges and Specifications and was found guilty of the Specification of Charge I and Charge I, not guilty of the Specifications of Charge II and Charge II. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record pursuant to Article of War 48.

3. Evidence introduced for the prosecution, pertinent to the Specification and Charge of which the accused was found guilty, briefly summarized, was as follows.

From April 1944 to the date of trial, 25 August 1945, and specifically on 23 September 1944, the accused was Aerial Photo Officer, in Charge of the Aerial Camera Distribution Section (Stipulation, R. 8).

Aircraft B-24E, Serial Number 42-28515, departed Walla Walla Army Air Field on 12 September 1944 on a night navigation training mission, and crashed at 2110 hours that date, shortly after takeoff, at a point approximately six miles southeast of Walla Walla, Washington (Stipulation, R. 8).

Prosecution's Exhibit 1 (R. 11), a Report of Survey (WD, AGO Form No. 15, 15 October 1943), dated 22 September 1944 at Walla Walla Army Air Field, Washington, showed six cameras, therein described, of a total value of $1625, Army Air Forces property, as "Destroyed in crash of B-24 No. 42-28515 E on 12 September 1944 at about 2110, 6 miles SE of Walla Walla Army Air Base." This Report of Survey was, upon its face, verified by the purported signature of the accused to the supporting affidavit, attested by the signature of the Adjutant. The signature of the accused was identified as such by the testimony of the Base Adjutant (R. 9, 10, 14), an officer familiar with the accused's signature. The document was presented to the Adjutant for attestation on 23 September 1944 (R. 9), attested by him and placed in channels for disposition. It was approved by Colonel D. Wade, the Commanding Officer (R. 11). The Adjutant could not recall that he had the accused raise his right hand and formally declare the truth of the matter stated in the Report of Survey, though such was his usual practice (R. 10, 13), nor specifically that Exhibit 1 was the particular Report of Survey which the accused presented to him (R. 12), but was positive that the accused so presented a Report of Survey (R. 12) and that the signature to the verification on Exhibit 1 was that of the accused (R. 14).

Staff Sergeant Sargentini (R. 15), noncommissioned officer in charge of the Aerial Gun Camera Distribution Section at the time of the flight of the aircraft in question, in the temporary absence of the noncommissioned officer ordinarily in charge (R. 15, 16), testified that the practice was not to install aerial gun cameras on B-24 aircraft, type E (R. 15) or type D (R. 19), as it was impractical to put them on (R. 17). In one instance within the witness' knowledge, a plane of one of the two types was mounted with cameras by mistake, later corrected (R. 19, 20). Cameras were not installed

for night missions, as "it wouldn't do any good to take pictures at night" (R. 18), but on some occasions planes took off at night with cameras on them (R. 20). Ordinarily, the cameras in the waist position were removed at the end of each flight and the four cameras in the turrets were left on, in the case of planes equipped with cameras, (R. 17), but sometimes cameras were not removed, due to lack of time between landing and takeoff (R. 18). The witness did not inspect this particular plane at the time and so could not say whether it did or did not have cameras on it (R. 20).

Major Cole (R. 21), Director of Supply and Maintenance, believed that cameras were mounted only on "J" type aircraft. They were not, to his knowledge, mounted on Type E B-24's by reason of the lack of two turrets on that type of aircraft, so that all positions could not be fired (R. 21). Installation of cameras was possible in the four positions that were available (R. 25). Major Cole was Base Aircraft Investigating Officer and, as such, investigated the crash of the aircraft in question for the purpose of determining the cause of the crash (R. 21, 22). He arrived at the scene approximately 15 minutes after the crash (R. 22). Portions of the airplane were spread over an area of some 200 yards, in dispersed piles of wreckage. The wreckage and grass were burning. The airplane was, for practical purposes, totally destroyed. Quite a few civilians had gathered at the scene (R. 22, 23). Major Cole posted guards overnight. No immediate examination of the wrecked aircraft was then made, as attention was centered upon fighting the fire and recovering the bodies, but the witness examined the wreckage on the following morning, including the metal remnants and the guns (R. 22, 24). He did not see any parts of aerial gun cameras in the wreckage (R. 23) nor notice any part of a gun camera on a gun which he examined (R. 24). He did not have cameras in mind, as his investigation was not for that purpose (R. 23), but he knew the outward appearance of a gun camera and could recognize one on sight (R. 24).

First Lieutenant Evensen (R. 25), as Investigating Officer of the present charges pursuant to Article of War 70, advised the accused fully of his rights and interviewed witnesses in his presence. In the course of the interview, the accused spoke out voluntarily after the interview of one witness had been completed and while they were waiting for the next (R. 27). The accused so stated, in effect, that he knew he was licked in regard to the first charge, violation of Article of War 95; that there was nothing he could do about that; that he had submitted the Report of Survey dated 22 September 1944 on which appeared six cameras alleged therein to have been destroyed in the crash of B-24 airplane No. 515E, which crashed on 12 September 1944; that at the time he submitted the Report of Survey, he knew the six cameras were not on that airplane, and that his reason for submitting the Report of Survey was to cover up the loss of six cameras

which had disappeared from his section, presumably by theft. These statements were not made in response to questions. The accused merely "started talking" to the witness (R. 27). On cross examination, the witness testified that the accused then stated further that his Report of Survey showing the loss of the cameras in an airplane crash was submitted at the suggestion of Majors Cole, Coffield and Felzman that he take that means of accounting for the missing cameras. The witness questioned Majors Cole and Felzman, neither of whom recalled any such suggestion by anyone at the meeting or conversation which they had had with the accused, at which a Report of Survey was discussed. Major Coffield had left the United States and could not be reached (R. 27, 28).

Other evidence introduced for the prosecution was relevant only to the Specifications and Charge whereof the accused was acquitted.

4. The accused, duly advised of his rights, elected to remain silent (R. 53). Evidence was introduced for the defense only upon the Specifications and Charge of which he was found not guilty.

5. The accused officer was convicted of submitting an official Report of Survey in the amount of $1625 at Walla Walla Army Air Field, Washington, on or about 22 September 1944, with intent to deceive Colonel D. Wade (Base Commander), containing the statement that six cameras listed thereon were destroyed in a certain airplane crash, which statement was known by the accused to be untrue in that the cameras were not on the airplane.

The evidence in the case which carries the proof to the point of conviction beyond a reasonable doubt is the accused's own oral statement, made to the Investigating Officer in the course of investigation of the charges before their reference for trial, that he knew he was "licked" in regard to the first charge, violation of Article of War 95, and there was nothing he could do about that; that he had submitted the Report of Survey in question showing six cameras to have been destroyed in the airplane crash; that he knew when he submitted the Report that the cameras were not on that airplane, and that he submitted the Report to cover up the loss of the cameras which had disappeared from his section, presumably by theft. Covering, as it does, directly or by inference, every element of the offense charged and effectively precluding any successful defense, that statement is more than an admission against interest (See par. 114b, MCM 1928; CM 244666 Schallenberg, 28 BR 379, 385). It is, in substance and in full practical effect, a confession. As such, it was entitled to be received in evidence in the state of proof established in the case, and was properly admitted. It was wholly voluntary; in fact, volunteered, on the accused's own volition and not in response to questions addressed to him. It was fully supported by evidence aliunde that the offense

probably had been committed, sufficiently establishing the corpus delicti. The Report of Survey itself was in evidence, with the accused's signature to the supporting affidavit established by testimony, the Report showing on its face the statement specified. There was testimony that it was not customary to put cameras on airplanes of the type involved and that cameras were not ordinarily put on any planes for night flights. The wreckage of the plane was inspected, though for other purposes, and the officer who did the inspecting saw no camera parts therein. While far from conclusive, this factual situation was clearly sufficient to inspire in reasonable minds the belief that the offense charged had probably been committed, and that is enough evidence of the corpus delicti fully to qualify the confession. For that purpose, such evidence need not be sufficient to convince beyond reasonable doubt that the offense has been committed, or to cover every element of the charge, or to connect the accused with the offense (Par. 114a, MCM 1928, p. 115; CM 256407, Jaycox, 36 BR 269, 276-277; CM 252086, Kissell, 33 BR 331, 339).

Whether or not the accused raised his right hand in the presence of the officer attesting his verification of his Report of Survey and orally declared aloud his oath to the verity of its contents was wholly immaterial. The submission by the accused of the document over his signature, necessarily contemplating its presentation to the Base Commander for approval, containing the known false statement specified, constituted a false official statement whereof the purpose, by clear inference, was to deceive the Commanding Officer whose approval was requisite to release of the accused from responsibility for the items listed in the Report of Survey. That such false official statement constitutes a flagrant violation of Article of War 95 is too plain for discussion (Par. 151, MCM 1928; CM 256631, Burton, 36 BR 315, 321; CM 256706, Siddon, 36 BR 335, 342).

6. The accused officer is 27 years of age, single, a native American citizen. He is a graduate of Allegheny College, having majored in Geology. As a civilian, he was employed from September 1941 to February 1943 as a machine tool assemblyman. He received training as an aviation cadet from 29 February 1943 at Yale University and was appointed temporarily a second lieutenant, Army of the United States, 15 July 1943, and assigned to the Air Corps. He was promoted to the grade of first lieutenant 8 September 1944. His training and service have been as an Aerial Photographic Officer; his performance ratings, Excellent.

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

W. T. Pantaw Jr., Judge Advocate

R. H. Fiser, Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 290245 1st Ind NOV 16 1945

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Charles H. Bayless (0-863820), Squadron A, 423rd Army Air Forces Base Unit.

2. Upon trial by general court-martial this officer was found guilty of making a false official statement in a Report of Survey submitted by him, that six cameras listed thereon, worth $1625, were destroyed in the crash of a certain airplane, knowing that the cameras were not on the airplane at the time of the crash, in violation of Article of War 95. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 48.

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

The accused officer was Aerial Photographic Officer in charge of the Aerial Camera Distribution Section at Walla Walla Army Air Field, Washington from April 1944 through 23 September 1944 and thereafter at the time of trial, 25 August 1945. On 12 September 1944 a B-24 airplane left the field on a night training mission and crashed shortly thereafter at a point about six miles from the field, in a condition of complete wreckage. On 22 September 1944 the accused submitted a Report of Survey wherein he listed six aerial gun cameras, of the total value of $1625, as destroyed in the crash of the airplane on 12 September 1944. The Base Commanding Officer approved the Report of Survey on that representation. Evidence established that it was not the general practice to equip with cameras that type of plane, nor any planes at the base for night missions, and that no camera parts were observed on inspection of the wreckage. The accused admitted to the investigating officer that he knew that the cameras were not on the airplane and that he submitted the Report of Survey to cover up the disappearance of the cameras from his section, presumably by theft. He elected to remain silent at his trial and offered no evidence, explanation or extenuation concerning this offense.

Such resort by an officer to deliberate falsehood in an official statement designed to relieve himself of substantial pecuniary responsibility is regarded as warranting his dismissal. However, as there is reason to believe that the accused officer may have acted from a misguided lack of appreciation of the seriousness of the offense involved, and commensurate with the like disposition of similar cases heretofore, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $50.00 of his pay per month for three months, and that the sentence as thus modified be carried into execution.

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

THOMAS H. GREEN
Brigadier General, U.S. Army
Acting The Judge Advocate General

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

(Sentence confirmed, but commuted to a reprimand and forfeiture of $50. pay per month for three months, AS commuted ordered executed. GCMO 498, 5 Dec 1945).

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

SPJGQ
CM 290353

28 OCT 1945

UNITED STATES v. Private SALVATORE P. ROSAFORTE (39845039), Headquarters and Headquarters Company, 1206th SCU, Fort Niagara, New York.	SECOND SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Niagara, New York, 2 October 1945. Dishonorable discharge and confinement for four (4) years. Eastern Branch, Disciplinary Barracks.

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HOLDING by the BOARD OF REVIEW
PARTLOW, BIERER and HICKMAN, Judge Advocates

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

2. As finally approved by the reviewing authority, the accused has been found guilty of (a) assault with intent to do bodily harm with a dangerous weapon, to wit, a policeman's club (Specification 1 of the Charge); (b) assault with intent to do bodily harm by striking another in the face with his fist (Specification 2 of the Charge), both such offenses being in violation of Article of War 93; and (c) assault and battery in violation of Article of War 96 (Specification 3 of the Charge). The approved sentence involved dishonorable discharge, total forfeitures, and confinement at hard labor for four (4) years.

3. The evidence is legally sufficient to support the findings of guilty of Specification 1 and the Charge and of Specification 3 of the Charge in violation of Article of War 96, and to support the sentence, all as approved. The question requiring consideration is the legal sufficiency of the record to support the finding of guilty of Specification 2 as a felonious assault in violation of Article of War 93, such Specification reading as follows:

> Specification 2: In that Private Salvatore P. Rosaforte, Headquarters and Headquarters Company, 1206th Service Command Unit, Fort Niagara, New York did, at Niagara Falls, New York, on or about 1 September 1945, with intent to do him bodily harm, commit an assault upon Felix Jandreszek by willfully and wrongfully striking the said Felix Jandreszek in the face with his fist.

4. The evidence clearly establishes that shortly after midnight on the morning of 1 September 1945, in a park in the city of Niagara Falls, New York, the accused committed assault and battery upon one Angeline Pescrillo (R. 33-36; Specification 3 of the Charge) and, immediately thereafter, he committed an assault upon one Joseph Theriault, a State Park Commission Police Officer, by striking such officer with a police club or "night stick" (R. 8-11, 37, 52; Specification 1 of the Charge). Insofar as pertinent to the allegations of Specification 2, the evidence shows that thereafter a search was made for the accused and sometime around one-thirty o'clock the same night he was apprehended while wearing a police cap and carrying a police club and taken into custody by City Police Officers Terhune and Jandreszck (R. 19, 21, 25, 26, 29). The accused was then taken to a police station but, on alighting from the car, he "took off down the street" and escaped from custody (R. 19). About ten or fifteen minutes later, Police Officer Jandreszck saw the accused on the street and, having noticed a bump on the accused's head at their previous meeting, asked the accused "where did you get that egg" (R. 26, 30). The accused replied that "while I was bowling tonight, I slipped and fell". Jandreszck then told accused that he was under arrest. The accused said, "you can't arrest me, because you are a civilian police". The officer then told accused "to come along and yanked him along and the first thing I knew I got a clip on the jaw" with "his fist" (R. 26). Jandreszck and the accused then "grappled" and in the melee Jandreszck received a scratch on his nose which aggravated his eye and brought on a stye. He hit the accused over the head with a black jack and the accused then broke away and ran (R. 26, 27). The effects of the blow which the accused delivered to the officer's chin were described by the officer as: "It left a mark on my chin made by a ring. It knocked my head down and it took me a few seconds to regain my senses" (R. 27).

The testimony of the accused as to this particular assault was as follows: "I went up town and this officer saw me and grabbed ahold of me and said 'we want you', so I just hit him and took off again" (R. 77). He further testified that he did this because he was scared (R. 81).

The evidence was in sharp conflict as to whether the accused was intoxicated, the police officers contending that he was not drunk (R. 12, 22, 26, 27), several soldiers testifying that he was very drunk (R. 66, 67, 68, 69, 71, 73), and the accused himself testifying that he had consumed a large amount of intoxicants during the day and evening (R. 74, 75), had lapses of memory (R. 75, 78), but knew what he was doing some of the time (R. 78).

5. In the opinion of the Board of Review the evidence is legally insufficient to sustain the conviction of felonious assault under Specification 2 in violation of Article of War 93, but legally sufficient only to support a finding of guilty of the lesser included offense of assault and battery in violation of Article of War 96. Ordinarily

a blow on the jaw with one's fist does not constitute a violation of Article of War 93 (CM 267877 Williams, 44 BR 143, 148). The accused struck this police officer only after the latter took hold of him and for the obvious purpose of effectuating his escape. Such evidence does not establish the commission of any acts by the accused which would warrant the legal inference, beyond a reasonable doubt, that he intended to do bodily harm (CM 229366 Long, 17 BR 125; CM 238970 Hendley, 25 BR 1; CM 249165 Crawford, 32 BR 47).

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of Specification 2 of the Charge as involves findings of guilty of assault and battery by accused, as alleged, and at the time and place alleged, in violation of Article of War 96; legally sufficient to support the findings of guilty of Specification 1 of the Charge, and the Charge; legally sufficient to support the findings of guilty of Specification 3 of the Charge in violation of Article of War 96; and legally sufficient to support the sentence.

OCT 25 '45 PM

W. D. Partlow, Jr., Judge Advocate

[illegible], Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 290353 1st Ind

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

OCT 25 1945

TO: Commanding General
Second Service Command
Army Service Forces
Governors Island
New York 4, New York

1. In the case of Private Salvatore P. Rosaforte (39845039), Headquarters and Headquarters Company, 1206th SCU, Fort Niagara, New York, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specification 1 of the Charge, and the Charge; legally sufficient to support only so much of the findings of guilty of Specification 2 of the Charge as involves findings of guilty of assault and battery by accused, as alleged, and at the time and place alleged, in violation of Article of War 96; legally sufficient to support the findings of guilty of Specification 3 of the Charge in violation of Article of War 96; and legally sufficient to support the sentence, which holding is hereby approved. Upon approval of only so much of the findings of guilty of Specification 2 of the Charge as involves findings of guilty of assault and battery by accused, as alleged, and at the time and place alleged, in violation of Article of War 96, under the provisions of Article of War 50½ you will have authority to order the execution of the sentence.

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

(CM 290353).

1 Incl
Record of trial

John M. Weir

JOHN M. WEIR
Brigadier General, U. S. Army
Acting The Judge Advocate General

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

SPJGK - CM 290463

25 OCT 1945

UNITED STATES v. Second Lieutenant W. C. CHILDS, JR. (0-2073899), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Aloe Army Air Field, Victoria, Texas, 25 September 1945. Dismissal, total forfeitures, and confinement for one (1) year.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant W. C. Childs, Jr., Air Corps, did, on a public highway at or near Victoria, Texas, on or about 31 August 1945, involuntarily and unlawfully kill Corporal Leon J. Jasinski by striking him with an automobile.

He pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

At the time of the commission of the offense with which he is charged accused was and at all times since has been a member of the military service, assigned to Squadron K, 2538th Army Air Forces Base Unit, Aloe Army Air Field, Victoria, Texas (R. 5).

Shortly after eleven o'clock in the evening of 31 August 1945 as Second Lieutenant William M. Breen and his wife, Mrs. Isabell F. Breen, were waiting for a cab in front of Club Tropical, a night club, located

about a mile from Victoria, Texas, where they had stopped for a few drinks, accused emerged from the club and invited them to ride into Victoria with him (R. 6, 21,25). Although they had not known accused previously, they accepted the invitation and entered his car, a dark colored 1938 or 1939 Chevrolet sedan, occupying the front seat with him. As accused started to back away from the club, he was cautioned by several bystanders that there was a cab parked behind him, and was delayed in leaving until the cab driver returned (R. 7,26). Upon reaching the highway (which is about 100 yards from the club (R. 28)) he stopped momentarily to permit a truck to pass, but immediately after getting on to the highway began to drive "quite fast," attaining a rate of speed of 60 miles an hour, according to the estimate of Lieutenant Breen, and of 65 to 70 miles an hour, according to that of Mrs. Breen, as they approached the bridge which marks the city limits of Victoria. Neither, however, looked at the speedometer (R. 7,8,22). Both mentioned to accused that he was driving very fast and attempted to engage him in conversation, but he merely gave a "quick" and "unpleasant" answer and accelerated his speed (R. 8,21,26). Lieutenant Breen, who saw a car, likewise traveling towards Victoria, when it was about 800 yards ahead of them, called accused's attention to the car, but the latter did nothing about the matter until he was "right back of" the car, when he pulled out, hitting the left rear fender of this car with the right front fender of his car. This accident occurred about 200 yards before reaching the bridge. Although Lieutenant Breen advised accused that he had hit the car, accused merely accelerated his speed and proceeded across the bridge (R. 8,9,21). After accused's car had rounded a curve on the Victoria side of the bridge, Lieutenant Breen called accused's attention to the presence of two soldiers in the road about one-eighth of a mile ahead, and again told accused to slow down. Accused "kept right on going" and just before he reached these two pedestrians, one of whom was on the shoulder of the road and the other on the edge of concrete, proceeding in the same direction in which accused was traveling and on the same side of the road, Lieutenant Breen "hollered" at accused "to stop." Accused did "nothing" until "about the moment of the impact" with the soldier on the concrete section of the road, when he "hit the brakes," and "swung" the car to the left (R. 9,10,13-19,21,22-24,27). At that time, according to Lieutenant Breen's estimate, accused was driving at about 40 miles an hour (R. 10). The right front fender of accused's car struck the soldier, the force of the blow throwing him into the air and driving his head against the windshield. Accused's car almost simultaneously struck a car which was proceeding in the opposite direction on its right side of the highway (R. 10,16,17). Mrs. Breen did not see the actual impact of the car with the soldier, as, realizing the imminence of the accident, she had thrown her hands over her eyes. However, she felt "a thud," followed by "a crash," which jolted her (R. 23,24). After accused's car came to a halt, all three left the car and both Lieutenant and Mrs. Breen saw a soldier lying in the road, bleeding profusely (R. 11,22,24). Neither engaged in any conversation with accused (R. 12,18,25). Just as accused was walking away from his car toward the stricken soldier, Second Lieutenant Wade H. Williams drove up. Lieutenant Williams was one of the

occupants of the cab which had temporarily prevented accused from leaving the Club Tropical. He described the car which had been held up as a dark Chevrolet sedan, with a "fairly tall radio aerial on the back left bumper." This car, traveling at between 40 and 50 miles an hour, had passed the car in which Lieutenant Williams was likewise traveling towards Victoria, prior to reaching the bridge, and Lieutenant Williams saw it sideswipe another car proceeding in the same direction. The car from which Lieutenant Williams saw accused walking at the scene of the accident was, in his opinion, the same car which he had seen at Club Tropical and which had sideswiped another car near the bridge (R. 29-30,32). Lieutenant Williams did not get any closer than six feet to the accused, and had only a very brief conversation with him, concerning the calling of an ambulance (R. 32). A few minutes later, Mrs. John S. Gaston, a registered nurse, arrived at the scene of the accident, and found the soldier dying. He was suffering from injuries which apparently had been in existence for only "a matter of minutes". In about five minutes after her arrival he expired (R. 46,47,48). Shortly thereafter at 2350 Captain John A. Ralston, Medical Corps, also arrived and pronounced the stricken soldier dead. Subsequently Captain Ralston conducted a post-mortem examination of the body and diagnosed the cause of the death as profuse bleeding from the right ear due to a basal skull fracture. In his opinion the injuries which caused the soldier's death had occurred within a half hour prior to his arrival at the scene of the accident. The dead soldier was definitely identified as Corporal Jasinski (R. 44,51). When Major John R. Pugh, Provost Marshal at Foster Field, arrived at the scene of the accident at about 11:45 P.M. accused was standing in a group near the body. In response to a general inquiry by Major Pugh, accused stated that it was his car that had "hit the man" (R. 44).

Mr. Frank J. Strelsky, operator of a filling station located on the street on which the accident occurred, about two blocks from the bridge, also witnessed the tragedy. He was about 75 feet from the point where Corporal Jasinski was struck. He had seen two soldiers walking on the highway, but could not say whether they were on the concrete section or the shoulder. He testified as follows as to what he observed:

> "The first I knew there was a car that had hit another car. The car that was hit was going towards the bridge on the right side of the street going towards Aloe Field. And this other car hit that car and bounced over and then I happened to see something fly like that and that was the man or soldier. Then I broke and run over there." (R. 35)

The car which struck the soldier was that driven by accused. Mr. Strelsky heard accused remark to Mr. Austin A. Willemin, the driver of the car which he had struck, that "he didn't intend to hit the car," and "something like, "My God, I hope he isn't dead" (R. 34-36). Mr. Willemin testified that he was driving at from 15 to 20 miles an hour at least three to four feet on his side of the center line of the highway when his car was struck by accused's car. He was partly blinded by the lights on accused's car and did not see the impact between it and the soldier (R. 38-40).

The accident occurred within the city limits of Victoria on Moody Street, also known as U. S. Highway 77, in a "little business community," where are located several gas stations and stores and a cafe. The area has a number of neon lights and is "quite well lighted" (R. 18,19,36,43,50).

Various views were expressed as to accused's sobriety. Both Lieutenant and Mrs. Breen had drunk moderately at the Club Tropical and doubted whether, with liquor on their own breaths, they would have detected an odor of alcohol in accused's car had there been such an odor (R. 12,14,25,26). According to Lieutenant Breen there "appeared to be something wrong with accused" who "evidently *** had been drinking." He based his opinion upon accused's failure to react to the warnings about the proximity of the car, which accused sideswiped, and to the warnings about the presence on the road of the two soldiers, and upon his lack of attention to the car and the soldiers, despite the fact that they were clearly visible to witness at a substantial distance (R. 13). Mrs. Breen did not think that accused was drunk, but believed that he had been drinking. She based her conclusions on the unpleasant answer he gave to her questions, and the high rate of speed at which he drove, in disregard of her and her husband's warnings and protests (R. 26). When she saw him that night at the jail, he seemed "sort of dazed and dull" and he walked "sort of relaxed" (R. 25). Lieutenant Williams formed no opinion as to accused's sobriety and did not get close enough to him at the scene of the accident to detect liquor on his breath (R. 31). Mr. Willemin smelled no liquor on accused's breath and accused appeared to him to be sober (R. 41). Major Pugh, who saw accused shortly after the accident, was of the opinion that accused was drunk and not simply dazed from the accident. He smelled liquor on accused's breath, accused's uniform was disheveled, his step was halting, and "his tone and tongue was thick when speaking" (R. 44,45).

For the Defense.

Second Lieutenants Robert R. Ogren and Delbert Q. Berryman had known accused since March 1944, when they were all preflight students together. Since that time they had been closely associated with accused, whose conduct was always that of a gentleman, and who was, in their opinion, a credit to the Army (R. 53-54, 55-56). Captain Jesse M. Kerby had known accused for thirteen months and was his instructor for fifteen weeks during his advanced training. Based on his close observation he considered accused a reasonably capable cadet in flying and in the performance of military duties, and knew of no act on the part of accused, while under his supervision, which would bring discredit upon accused or the Army (R. 57-58).

After the law member had advised the accused of his rights, the accused personally stated to the court that he elected to remain silent.

Summary.

The evidence clearly establishes that on the night of 31 August 1945, between 2315 and 2330, accused, while driving his car on his right hand side of a public highway or street in a fairly well lighted section of the City of Victoria, Texas, ran into and killed Corporal Leon J. Jasinski, who was walking on the same side of the street or highway in the same direction as that in which accused was traveling. The victim of the accident was on the edge of the concrete section of this street or highway, and a companion of his was on the shoulder. Both were visible from accused's car for more than an eighth of a mile from where the tragedy occurred, and accused's attention had been repeatedly called to their presence on the highway. Despite this fact, accused did not diminish his rate of speed, which was estimated at forty miles an hour, even after the impact with deceased. Immediately after striking deceased, accused cut to his left and ran into another car, which was across the center line of the highway, proceeding in the opposite direction. Deceased was thrown into the air by the force of the impact with accused's car, and his head was hurled against its windshield. He died within a few minutes after the accident as a result of his injuries so received. Shortly prior to this accident, accused had sideswiped another car which had been visible for approximately eight hundred yards before it was struck. Accused had been fully warned of its presence, but instead of cutting down his speed, had accelerated it. The two occupants of accused's car had cautioned him that he was traveling at too high a rate of speed, estimated as being between fifty and seventy miles per hour.

While there is no direct proof that accused had partaken of intoxicating liquor prior to the accident, the evidence is compelling that he was actually under its influence when the accident occurred. Accused's apparent failure to observe the two pedestrians on the road, as well as the car which he sideswiped, his complete disregard of the warnings given to him by Lieutenant and Mrs. Breen, both on this score and as to the high rate of speed at which he was traveling, his sharp and unpleasant answers to Mrs. Breen's friendly questions, his disheveled appearance, and the positive testimony by the Provost Marshal as to his condition, are convincing that accused was in fact drunk. To arrive at a different conclusion would be equivalent to a conclusion that accused deliberately ran into deceased.

4. The Manual for Courts-Martial, 1928 (par. 149a) defines manslaughter and involuntary manslaughter as follows:

> "Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary."
>
> "Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law."

In determining what constitutes "culpable negligence," the Board

of Review has adopted the same standard as that by which the civil courts are governed (CM ETO 393, Caton, 1 B.R. (ETO) 325; CM 240043, Vislan, 25 B.R. 349; CM 202359, Turner, 6 B.R. 87; CM 274812, Tracy):

> "The degree of negligence necessary to be shown in a prosecution for involuntary manslaughter, based upon an unintentional killing by a motor vehicle, is more than is required on the trial of an issue of negligence in a civil action. The general rule is that negligence, to become criminal, must necessarily be reckless or wanton and of such a character as to show an utter disregard for the safety of others undercircumstances likely to cause injuries". (Blashfield, Cyclopedia of Automobile Law and Practice, Vol. 8, pp. 108-109).

> "At common law, one causing the death by negligent driving is not criminally responsible unless the negligence is so great that the law imputes a criminal intent. A motor vehicle is not a deadly or inherently dangerous instrumentality, so as to impose liability for mere carelessness in its use or operation, and the degree of negligence necessary to support a conviction is such recklessness or carelessness as is incompatible with a proper regard for human life. It is sufficient, however, if it reasonably appears that death or great bodily harm was likely to result from the driver's conduct." (Sec. 1380, 42 C.J., pp. 1356-1357) (Underscoring supplied.)

Applying these principles to the facts as established in the present case, it is clear that accused committed the offense of involuntary manslaughter. His negligence was so gross and flagrant that it is properly classified as a wanton disregard of the safety of others. As summarized in the preceding paragraph, the evidence shows conclusively that accused was culpably negligent in driving his car at a high rate of speed through a street within the city limits of Victoria, Texas, without regard to the rights of others while under the influence of intoxicating liquor; in failing to maintain a proper lookout and to observe the presence of the deceased on the highway, although the latter was plainly visible from his car for more than an eighth of a mile, and in not slowing down, stopping or taking any other step to prevent striking the deceased when warned of the excessive rate of speed at which he was proceeding and of the presence of the deceased and the latter's companion on the highway. It is not controverted that accused's culpable negligence was the proximate and sole cause of Corporal Jasinski's death, and it is elementary that accused's intoxicated condition does not constitute a defense (See CM 202359, Turner, 6 B.R. 87, and CM 274812, Tracy). Consequently, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty.

While the Specification under which accused was tried may be subject to criticism, it clearly charges him with having committed involuntary manslaughter. It does not impute any specific act of carelessness or negligence

to accused, but it does set forth that accused involuntarily and unlawfully killed the deceased by striking him with an automobile at or near Victoria, Texas, on 31 August 1945. Accused offered no objection to the lack of definiteness in the Specification, the Specification contained the essential elements and fully apprised him of the offense with which he was charged, there is no suggestion that the defense was taken by surprise, and accused's conviction bars the possibility of his again being placed in jeopardy for the killing of Corporal Jasinski. It can not be said, therefore, that any of accused's substantial rights were injuriously affected by the lack of detail in the Specification (A.W. 37, CM 280840, Fischer).

5. Three of the seven members of the court joined the defense counsel in recommending clemency, based upon the "accidental nature of the offense," and accused's good character and military record.

6. War Department records show that accused is 22 years and 10 months of age and is single. He graduated from a high school in Austin, Texas, and shortly thereafter, 11 June 1941, enlisted in the Army, attaining the rank of sergeant. He became an aviation student on 1 September 1943, and upon completion of the prescribed course was commissioned a temporary second lieutenant, Air Corps, Army of the United States, with the rating of "single-engine pilot". He has had no occupational experience in civil life.

7. The court was legally constituted and had jurisdiction over the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the course of the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant the confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93.

Charles A. Luckie, Judge Advocate

Norman Mayo, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 290463 1st Ind

Hq ASF, JAGO, Washington 25, D. C. NOV 7 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 W. C. Childs, Jr. (0-2073899), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of involuntarily and unlawfully killing an enlisted man on a public highway by striking him with an automobile, 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 may direct for one year. Three of the eight members of the court joined the defense counsel in recommending clemency. 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 and sentence and to warrant confirmation of the sentence.

On the night of 31 August 1945, this officer, while apparently under the influence of intoxicating liquor, after leaving a night club drove his car at a high rate of speed on a highway leading to Victoria, Texas. Before reaching the bridge which marks the city limits he sideswiped a car, traveling in the same direction as that in which he was proceeding, despite the fact that the car so struck was plainly visible to other occupants of his car for a considerable distance and he had been warned of its presence. Thereafter, without stopping, he continued across the bridge into the City of Victoria, at an accelerated rate of speed, estimated as being between 50 and 70 miles an hour. While he was thus proceeding, one of the occupants of his car called his attention to the presence of two pedestrians, going in the same direction as accused, on or near the edge of the paved section of the highway on the same side as that on which he was traveling. Without slowing up or heeding the warning, accused continued at a high rate of speed and struck one of the pedestrians, Corporal Jasinski, with such force that the latter was thrown into the air, his head striking the windshield of accused's car. Accused's victim died a few minutes later as a result of the injuries so received. Just as accused struck the deceased, accused cut his car to the left and hit another car, which was proceeding in the opposite direction on its right side of

the highway.

Accused offered no evidence whatsoever in extenuation of his actions, and the record of trial is devoid of any circumstances which mitigate the serious offense of involuntary manslaughter, of which he was properly found guilty. Despite the youth of accused and his prior good record, I recommend that the sentence 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. Consideration has been given to (a) the recommendation for clemency, signed by the defense counsel and three members of the court-martial; (b) 44 pleas for clemency, all attached to the record of trial, from various individuals, including Honorable Luther A. Johnson, Honorable Lyndon B. Johnson, and Honorable W. R. Poage, all members of the House of Representatives of the United States from the State of Texas; and (c) memoranda from Honorable Tom Connally and Honorable W. Lee O'Daniel, Senators from the State of Texas, forwarded herewith, to each of which was attached a letter from Mr. Tilden L. Childs, uncle of accused, requesting assistance in procuring clemency for accused.

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

3 Incls
1. Record of trial
2. Form of action
3. Memo fr Sen Connally w/incl

(Sentence confirmed but forfeitures remitted. As modified ordered executed. GCMO 473, 15 Nov 1945)

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

SPJGH-CM 290558

31 OCT 1945

UNITED STATES v. Second Lieutenant HAROLD C. LOBE (0-1332835), Infantry.	AGF REPLACEMENT DEPOT NO. 2 FORT ORD, CALIFORNIA Trial by G.C.M., convened at Fort Ord, California, 4 October 1945. Dismissal, total forfeitures and confinement for three (3) years.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Second Lieutenant Harold C. Lobe, Company "D", Officers School, Army Ground Forces Replacement Depot No. 2, Fort Ord, California, did, at Fort Ord, California, on or about 6 August 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at Oakland, California, on or about 21 September 1945.

The accused pleaded not guilty to the Charge and Specification by appropriate exceptions and substitutions, but guilty to the lesser included offense of AWOL for the period alleged in violation of Article of War 61. He was found not guilty of desertion, but guilty of absence without leave for the period alleged in violation of Article of War 61. Evidence was introduced of one previous conviction by general court-martial on 31 July 1945 for AWOL from 23 July 1945 to 28 July 1945, in violation of Article of War 61, for which accused was sentenced to forfeit $50 of his pay per month for six months. For the offense here involved he was sentenced to dismissal, total forfeitures and confinement for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution offered in evidence without objection a duly authenticated extract copy of the morning report of accused's organization showing accused from duty to AWOL on 6 August 1945 (Pros. Ex. 1). It was stipulated by and between the prosecution, defense and accused, that while dressed in the uniform of a second lieutenant, United States Army, and under the influence of intoxicating liquor, accused was apprehended by a civil police officer in Oakland, California, on 21 September 1945, and returned to military control on the same date (Pros. Ex. 2).

4. After being fully advised of his rights as a witness, accused elected to be sworn and testify in his own behalf. He stated that he was born and reared in Parkston, South Dakota, and graduated from Parkston High School. He attended the University of South Dakota for two years and in 1933 accepted employment with his father as a bookkeeper, which lasted until 1935 when he enlisted in the Army for a period of three years. In 1938 his enlistment expired and he reenlisted for one more year. Upon the expiration of this last enlistment on 29 August 1939, he was employed by John Brown and Company, a meat packer, located at Sioux Falls, South Dakota, and made his home there until 20 January 1944, when he was inducted in the Army. He served as an enlisted man until 3 March 1945, when upon graduation from Officer Candidate School, he was commissioned a second lieutenant of Infantry in the Army of the United States. He was ordered to Fort Ord, California, 13 July 1945, and prior to that date had never been in any trouble with the civil authorities, had never been punished under the 104th Article of War, and had never been court-martialed. He began to drink heavily about five or six months prior to his trial, and on the evening of 5 August 1945, he had a few drinks at Fort Ord and then went to Salinas, California, where he drank more. During the days he was absent he spent almost all of his time in Oakland, California, with the exception of a short time in Salinas and one evening in Richmond, about five or six miles from Oakland, California (R. 11). At the time he left, 5 August 1945, he intended to return and did not intend to be absent without leave or to desert the Army (R. 12). All of his personal belongings, his clothing, personal papers, and correspondence, with the exception of the Class A uniform he had on, were left in his quarters (R. 12). During his absence he wore the uniform of an officer in the United States Army. He did not even take his toilet articles with him, had no baggage and registered under his own name in the hotel. He had his identification card and dog tags with him at all times.

During the period of his absence he was under the influence of liquor practically all of the time (R. 13). He did not intend to desert or go AWOL when he left and at no time while he was gone did he intend to remain away. During July 1945 he was absent without leave for five days and liquor was the cause of that difficulty also (R. 14). He stated he would like to stay in the Army until he could get an honorable discharge; that he would accept any other kind of punishment

but did not want to end his Army career this way. He realized he made a mistake and was willing to take his punishment but asked that he be not given a dishonorable discharge (R. 15).

Three honorable discharges from the United States Army were admitted in evidence as Exhibits A, B, and C. His graduation certificate from the Communications School, Fort Benning, Georgia, was admitted in evidence as Exhibit E. At the time he left, an inventory of personal property was compiled by an officer who took charge of his belongings. A list of said articles was admitted in evidence as Exhibit F (R. 13). It was stipulated that the accused was registered at the City Club Hotel, 1428 Alice Street, Oakland, California, from 9 August 1945 to 17 August 1945 under his own name and at all times wore the uniform of a second lieutenant in the United States Army (R. 17; Def. Ex. H). It was stipulated that during the time of the month of August 1945 when the accused was registered at the City Club Hotel he had no luggage or personal effects of any kind with him (R. 17; Def. Ex. I).

5. The prosecution's evidence and accused's plea of guilty clearly establish his unauthorized absence from 6 August 1945 to 21 September 1945, and fully supports the court's findings of guilty. Accordingly, the record of trial is legally sufficient to support the findings of guilty and the sentence.

6. War Department records show accused to be 35 years of age, married, and the father of one child three years old. He is a high school graduate and attended the University of South Dakota two years. He served as an enlisted man in the Regular Army from 10 September 1935 to 29 August 1939, with no time lost under Article of War 107 and with two honorable discharges. He was inducted 20 January 1944 and again honorably discharged with character excellent on 2 March 1945, and commissioned a second lieutenant of Infantry, Army of the United States.

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. The sentence imposed is authorized upon conviction of a violation of Article of War 61.

Thomas N. Jaffey, Judge Advocate

William H. Bamberger, Judge Advocate

Robert C. Trevethan, Judge Advocate

SPJGH - CM 290558 1st Ind NOV 21 1945

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

TO: The Secretary of War

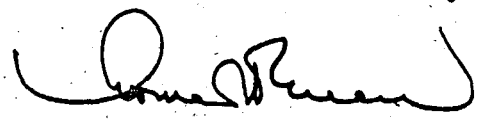
1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Harold C. Lobe (0-1332835), Infantry.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 6 August 1945 to 21 September 1945, in violation of Article of War 61. He was sentenced to dismissal, total forfeitures and confinement for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. 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. Accused absented himself without leave from his organization and station at Fort Ord, California, 6 August 1945, and remained absent without leave until apprehended by a civil police officer at Oakland, California, 21 September 1945. Accused was intoxicated at the time of his apprehension and ascribed his addiction to intoxicants as the reason for his unauthorized absence. He claimed to have been under the influence of intoxicating liquors throughout the entire period of his absence.

Accused served honorably for four years as an enlisted man in the regular Army between September 1935 and September 1939, with no time lost under Article of War 107 and with character rating of excellent. I recommend that the sentence be confirmed, but in view of accused's age, previous honorable service as an enlisted man in the regular Army, and the fact that he has a wife and minor child to support, I recommend that the sentence be confirmed, but that the forfeitures and confinement be remitted and that the execution of the sentence as thus modified be suspended with directions that the commission of accused be administratively terminated.

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



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

THOMAS H. GREEN
Brigadier General, U.S.A.
Acting The Judge Advocate General

(Sentence confirmed but forfeitures and confinement remitted.. GCMO 508, 5 Dec 1945).

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

SPJGQ
CM 290561

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at Topeka Army Air Field, Topeka, Kansas, 24 and 25 August 1945. Dismissal and total forfeitures.
Captain DONALD W. SALISBURY, JR. (0398511), Air Corps.	

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OPINION of the BOARD OF REVIEW
PARTLOW, BIERER and HICKMAN, 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 Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Captain Donald W. Salisbury, Junior, Air Corps, attached unassigned Squadron K, 484th Army Air Forces Base Unit, did, at Shawnee County, State of Kansas, on or about 2 August 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private First Class James Rockefeller, a human being, by shooting him with a pistol.

He pleaded not guilty to the Specification and Charge and was found guilty of the Specification except the words "with malice aforethought, deliberately, and with premeditation", of the excepted words not guilty, and of the Charge not guilty but guilty of a violation of Article of War 93. Evidence was introduced of one previous conviction, by general court-martial, for failure to test a B-17 airplane for flight before flying it, in violation of Article of War 96, for which he had been sentenced to forfeiture of $50 per month for 12 months and to suspension from promotion. He was sentenced to dismissal, total forfeitures and confinement at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved only so much of the sentence as provides for dismissal and total forfeitures, and forwarded the record of trial for action under Article of War 48.

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

Shortly after 0100 hours on 2 August 1945, at White Lakes Country Club, near Topeka, Kansas (R. 7, 21, 38, semble), Technician Fourth Grade Wilbur L. Elliott (R. 47) and Private Louis J. Schmitz (R. 20) were seated with Private First Class James Rockefeller, hereinafter called the deceased, on a driveway curbing outside the club house, waiting for a bus (R. 21). The three soldiers had been together through the evening and had consumed some beer and whiskey but none of them were drunk, according to the testimony of Schmitz (R. 25, 28, 29) and Elliott (R. 51). A Buick convertible automobile, the property of the accused, was parked, unoccupied, some ten or twelve feet from them (R. 29, 52, 35, 46).

Major Samuel A. Mitchell (R. 35) and First Lieutenant Lynn L. Bockes (R. 6) came out of the club to go home, and missed a bus. Major Mitchell recognized the parked automobile as that of the accused, with whom he, but not Lieutenant Bockes, was previously acquainted. They waited at the car to ask the accused for a ride. The accused appeared and agreed to take them back to the base. Major Mitchell and Lieutenant Bockes waited in the car while the accused went to look for another officer (R. 7, 36).

Lieutenant Bockes testified that the deceased appeared at a window on the left side of the car and asked for a ride out to the base. The witness told him that the car was not the witness' car and that he did not know whether there would be room. The deceased became abusive and asked the witness to get out of the car. Lieutenant Bockes did so, on the right side of the car. The deceased came around the car and confronted him, saying that all officers were "chicken shit" and the Lieutenant in particular a "God damn bastard", and, with other profanity and abuse, asked the Lieutenant to take off his brass, step out back and settle with him (R. 7). The deceased came within eighteen inches of Lieutenant Bockes (R. 12).

Major Mitchell saw and heard Lieutenant Bockes and the deceased in an argument. He got out of the car to see what was going on and try to stop the difficulty. The deceased then stated abusively to the Major that anybody who had brass on his collar was a "chicken shit son of a bitch", which went for him (R. 36, 39). A brief discussion ensued, wherein the deceased became more abusive and belligerent while the two officers told him that they did not want any trouble with him and tried to quiet him. During this disturbance, the accused returned to the scene. Major Mitchell ordered the deceased to go away, to which the deceased paid no attention (R. 7, 36). Major Mitchell, Lieutenant Bockes and the deceased were on the right side of the car (R. 10, 37), the accused on the left side (R. 9).

In Lieutenant Bockes' opinion, the deceased was drunk (R. 13). In Major Mitchell's opinion, he was very aggressively drunk (R. 40). They observed that he "looked pretty big", larger than either of them, and had his tie off, his collar unbuttoned and, they believed, his sleeves rolled up. His arms were definitely large (R. 11, 12, 39, 40). He was very belligerent (R. 43).

As First Lieutenant Bockes and then Major Mitchell started to get back in the car (R. 7, 36), according to Major Mitchell, the deceased started to follow them into the car. The Major ordered him away, to which the deceased paid no attention (R. 36). The accused then, in a loud voice, ordered the deceased to get out of there and to "beat it: we don't want any trouble with you". As this order was ignored by the deceased, the accused produced a pistol, said "I have a loaded gun and I want you to get away", and fired once into the air, then again ordered the deceased away, saying "You see, it's loaded, now get on out of here". Then, as his order was not obeyed, the accused again fired into the air (R. 7, 36, 37).

Lieutenant Bockes and then Major Mitchell got into the back seat of the car, the Lieutenant on the left, immediately behind the driver's seat, and the Major on the right (R. 7, 36, 41).

The foregoing testimony concerning the affair between the deceased and the officers is that of Major Mitchell and Lieutenant Bockes. Sergeant Elliott saw the deceased leave the group of enlisted men and go around the car, but paid no attention and did not hear any of the conversation (R. 51). Private Schmitz did not notice when the deceased left the group, but saw him standing by the car talking with two officers (R. 22, 26). He heard none of the conversation (R. 26). Schmitz was, or had been, talking with some stranger, never identified and whose further presence or absence was never accounted for (R. 22, 25). Elliott was starting to light a cigarette (R. 49). The attention of both of them was drawn to the scene at the car by hearing two shots fired. They then jumped up from the curb and started toward the car (R. 22, 49). As they did so, both saw the deceased come around the front of the car and approach the accused, at the door by the driver's seat on the left side of the car (R. 22, 24, 49, 50). According to Elliott and Schmitz, the car was not moving (R. 57, 31, 32). Elliott testified that the lights were not on and was "pretty sure" that the motor was not running (R. 31, 32). Elliott was not sure about the lights (R. 49) or the motor (R. 52). Both testified that the accused was partly standing outside the car, with the door open and accused behind it (Schmitz, R. 22, 30, 31, 32) and with one foot on the ground, the other perhaps in the car (Elliott, R. 57).

When the deceased was about three or three and a half feet from the car door, according to Private Schmitz (R. 27, 28, 30, 31), a third shot was fired, which struck the deceased in the neck, and

the deceased fell back and was caught in his fall by Private Schmitz, who was then immediately behind him (R. 22, 23, 24, 27, 28, 30). Sergeant Elliott, behind Schmitz (R. 49), about ten feet away (R. 56), heard the third shot (R. 49) and saw the deceased fall, wounded in the neck, and saw Schmitz catch him (R. 50, 51, 56). According to Elliott, the deceased was then three or four feet from the accused (R. 50, 51), close to the car (R. 55). The car then quickly started and drove away (R. 22, 34, 52, 55). Neither Elliott nor Schmitz saw the shot fired (R. 23, 26, 30, 50). Schmitz did not see the gun nor anyone with a gun (R. 23). Elliott testified that "the Captain had the gun" and that the shot came "out of the car . . . it was partly in the car and partly out of the car". He did not see the flash, but heard the shot (R. 50). He did not see a pistol or weapon of any kind at any time (R. 53). Neither soldier heard any argument or loud talking (R. 26, 28, 32, 52).

Major Mitchell and Lieutenant Bockes testified that, after the accused fired the two shots into the air and as Major Mitchell got into the car, Lieutenant Bockes already being seated in the car, the accused got into the driver's seat and started the car forward; that it had moved forward a foot or two when the accused stopped the car to avoid running into the deceased as the latter moved rapidly around the front of the car (R. 8, 14, 15, 18, 19, 36, 37, 41, 42). The lights were on and the motor running. (R. 7, 14, 15, 19, 36, 41) The doors were closed (R. 18, 44, 45). The deceased reached the car door (R. 8, 15, 18, 36, 42, 45).

Lieutenant Bockes saw the head and shoulders of the deceased partially enter the car and heard a scuffle and a definite thud sounding like a blow with the fist and saw the accused lurch or sway to the right. Simultaneously, or almost so, he heard a shot and saw the deceased slump out of sight (R. 8, 15, 16). The witness estimated that ten seconds elapsed as the deceased came around the car and this action took place (R. 18).

Major Mitchell testified that, before the accused could start the car again after stopping it to avoid hitting the deceased as the latter came around the front of the car, the deceased "stuck his head and shoulders in the window of the car and hit Captain Salisbury in the face, and just very shortly thereafter I heard a shot. The soldier jumped back . . ." (R. 36). This action was almost simultaneous, like an interval represented by snapping the fingers twice as rapidly as possible (R. 43). "It was just one continuous motion. It couldn't have been over half a second for the whole operation". The soldier reached the car, reached in, and the shot was fired (R. 47). The Major saw the deceased's fist come in the car, saw the accused lurch, heard a smack, and heard the shot fired almost simultaneously (R. 42). He did not see the gun, but had the impression that it was fired inside the car (R. 38).

Both officers testified that the accused drove the car away immediately, saying "My God, we've got to call the police!" (R. 36, 8, 19). They drove to the nearest telephone, at the Criterion Cafe, about a quarter of a mile away, and there went in and the accused called the police (R. 8, 36). Major Mitchell stayed with him until the police arrived and the accused handed his gun to the military police and got into the police car with them. Major Mitchell drove the accused's car into town. At the Cafe, the accused was bleeding from the nose. There was a considerable amount of blood on his face, which the Major wiped off with a damp cloth or towel procured from a waitress (R. 36, 37).

The prosecution introduced in evidence (R. 13) its Exhibit 1, a diagram of the scene of the homicide, which was referred to throughout the trial. Exhibit 2 (R. 20) was a stipulation that the White Lakes Club is on Highway 75, in Shawnee County, Kansas, and Exhibit 3 (R. 34) stipulated the authenticity of an autopsy report on the deceased, introduced as Exhibit 4 (R. 34). Exhibit 4 showed a report of an autopsy performed upon the body of the deceased at Winter General Hospital, Topeka, Kansas, by Captain George H. Curfman, Jr., Medical Corps, showing, among other findings not pertinent here, a gunshot wound penetrating the neck and involving the soft structures, pharynx, spinal cord and vertebra, the bullet remaining in the neck at the third cervical vertebra. The bullet, as described and photographed in Exhibit 4, was a .22 caliber lead bullet. Death was attributed to damage to the cervical cord resulting from this wound. A pinpoint "peppering" was observed about the wound and attributed to small grains of powder from the gun used in inflicting the wound. Postmortem blood alcohol determinations showed 1.5 milligrams per cubic centimeter in blood from the heart and 1.7 milligrams per cubic centimeter in blood from the scalp.

Lieutenant Bockes regarded the accused as sober (R. 17). A blood alcohol analysis performed on a sample of the accused's blood on the morning of August 2d showed 2 milligrams per cubic centimeter (R. 111).

Recalled at the court's request at the end of the trial, Major Mitchell testified as before, that the accused was standing at the left side of the automobile when the first two shots were fired, and was seated in the driver's seat when the third shot was fired. The deceased was on the right side of the automobile, leaning against the open door by the witness' side, when the first two shots were fired. The deceased then went around the car and his head and shoulders and both hands were inside the automobile, on the left side, when the third shot was fired. He struck the accused in the face with one fist. The witness could not see the other hand because of the accused's position. The witness could not see immediately the result of the blow on the accused's face, but saw blood on his face and his nose bleeding slowly at the cafe (R. 113, 114).

4. For the defense, Mrs. Dorothy Du Frain (R. 61) and her husband, Phillip Du Frain, Jr. (R. 64), testified that they operated the Criterion night club, on Highway 75 about one-half mile from White Lakes Country Club, and were there after 1:00 o'clock on the morning of 2 August 1945. About 1:20 or 1:25, the accused and Major Mitchell came in. The accused wanted to use the telephone to call the police. He said that he had an accident. His face and hands were bloody and he was bleeding quite badly from the nose, wiping his face with his hands. Mrs. Du Frain gave him a clean towel dipped in ice water, with which he wiped his face and which he held to his nose to try to stop the blood (R. 62, 64, 65). In trying to dial the telephone, the accused was nervous and confused, and asked Mr. Du Frain to call the police for him, which Mr. Du Frain did. Accused showed his Adjutant General's Office identification card. He said he had an accident. They did not know what kind of an accident (R. 66).

Major Martin J. Ryan, Medical Corps, Chief, Eye, Ear, Nose and Throat Department at Topeka Army Air Base (R. 67), made a nasal examination of the accused on the morning of 2 August 1945 and found remnants of a blood clot consistent with a blow to the nose, a few hours old, indicating that the accused had had a bloody nose (R. 68).

Major John N. Round, Medical Corps (R. 68), examined the accused at Station Hospital, Topeka Army Air Field, about 0430 on the morning of 2 August 1945, talked with him, examined him physically and checked his general coordination and orientation. In the witness' opinion, the accused was not intoxicated (R. 69).

Second Lieutenant J. Z. Hearon, Sanitary Corps (R. 69), General Laboratory Officer at Winter General Hospital, Topeka, Kansas, performed the blood analysis in the post mortem on the deceased. He found the blood from the heart to contain 1.5 milligrams of alcohol per cubic centimeter. The analysis was made between 10:30 and 11:00 o'clock in the morning after Private Rockefeller died at 2:15 (R. 70).

Captain George H. Curfman, Medical Corps, Chief of Laboratory Service at Winter General Hospital, performed the autopsy and signed the report, Ex. 4 (R. 73). From experience and familiarity with gunshot wounds, it was his opinion that the weapon which inflicted the wound on the deceased was fired at fairly close range, as there were powder burns on the face of the deceased, in the form of pin-point black specks extending four centimeters below and to either side of the bullet hole beneath the left side of the jaw and up to the level of the mouth. These gave the appearance of peppering (R. 74, 80). The witness placed the range anywhere from inches to four feet (R. 76). He had made no study of the distance at which a .22 caliber pistol would make powder burns or oil specks (R. 75). A blood alcohol level of above 1.5 milligrams per cubic centimeter is accepted medically as evidence of being under the influence of alcohol, but it is rather

difficult to state definitely the significance of blood alcohol determinations without clinical findings. There is no noticeable decrease in blood alcohol content after death, within eight hours, if the blood is refrigerated (R. 76). The blood oxidizes rather rapidly in the live individual, but not after death. Alcohol content would have decreased to some extent after the deceased was brought to the hospital and before his death within an hour or two, but not a great deal. It takes about 24 hours for a fairly sizeable amount of alcohol to be eliminated completely from the body (R. 78). The blood tested was not withdrawn from the deceased in this case until after 10 o'clock in the morning (R. 80). At the court's request, the witness prepared a pencil sketch of the distribution of powder burns or specks on the neck and jaw of the deceased, which was introduced in evidence as Defense Exhibit A (R. 81, 82).

Warrant Officer Ralph W. Templin (R. 82), Range Officer at Topeka Army Air Base, was an amateur gunsmith before entering the service and had had about seven years' experience in handling and testing small arms. He was familiar with the Colt Woodsman .22 Caliber (R. 82) and had made tests with that type pistol to determine the distance at which it would leave powder burns, powder specks and lubrication specks. Below one inch range it leaves a blow or rip, from one inch to about seven inches, a distinct powder burn, from about seven to fourteen inches, unburned powder with lubrication specks, and from about twelve to seventeen inches, lubrication specks only. From twenty inches on it is impossible to get a spot on any garment from the shot fired, with a six-inch barrel. At four feet there would be nothing but a clean hole. The witness had made these tests on a cloth. Shown Defense Exhibit A, the witness placed the range at from three to eight inches (R. 83) if the peppering was a powder burn, not over fourteen inches if it was lubrication specks. It would have been impossible at four feet (R. 84). Cross-examination and interrogation by the court elicited further detail only (R. 84-86).

The service record of the deceased (R. 87; Def. Ex. C) was introduced in evidence upon stipulation (R. 87; Def. Ex. B). Military Police Trouble Report of 27 July 1945, Topeka Army Air Field, was introduced as Defense Exhibit D (R. 88). These exhibits indicated two previous occasions where the deceased had been engaged in drunk and disorderly fighting and assaults.

The accused testified (R. 89). In the military service five years and eight months, his duty assignment was airplane commander of a B-29. He had previously served as flying cadet, flying instructor and operations officer. He had several times requested overseas duty and was then awaiting such duty. He testified as to his activities through the evening and night hours preceding the events here involved, which previous activities were innocuous (R. 89-90). He started to leave White Lakes Country Club about five minutes to one o'clock,

having driven there in his automobile, a 1941 Buick Convertible Coupe. He found Major Mitchell, with whom he was acquainted, and Lieutenant Bockes waiting in his car and agreed to take them home (R. 91). He drove the car from its parking space to a point in the driveway, where he stopped and left the car, with the lights on and the motor running, while he went to the clubhouse entrance and called for a friend, Flight Officer Bradford. Failing to locate Bradford, he returned to the car (R. 91, 92). As he approached the car and started to enter it on the driver's side, he heard voices on the other side of the car. Looking over the car he saw a tall private talking to Lieutenant Bockes and Major Mitchell, and heard him say "chicken shit son of a bitch, and that goes for everyone with brass on" (R. 92). Accused sat down in the front seat and watched the argument. He heard the soldier repeat his offensive language to Major Mitchell, and saw him arguing down at the Major, as he was taller. The soldier was "definitely being offensive". Accused stood up on the floor of the car, looking over the top, "and there was" his pistol, a .22 caliber automatic Colt's Woodsman with a six-inch barrel. Accused took the pistol in his right hand, laid it on the top of the car and called to the soldier, "I want you to get away from here. We don't want any trouble with you". The soldier glanced at the accused and kept on arguing at Major Mitchell. Accused said, "I've got a gun here, and it's loaded". Accused fired one shot into the air. The soldier paid no attention, except to look at the accused again. Major Mitchell turned to get into the car. The soldier started after him "a little bit". Major Mitchell turned back and said to the soldier something about "You're not going with us". Accused again took the gun and ordered the soldier away, reiterating that he had a gun and it was loaded. Accused fired a second shot into the air. This time the soldier stood and looked at him for a second and Major Mitchell got in the back seat of the car. The accused got in the car (R. 93). He pulled the door shut and started the car forward in first gear. Having just started and gone about a foot, he saw the soldier in front of the car, jammed on the brake, and stopped. The soldier was coming around the left side of the car, and, the next thing the accused knew, the soldier's head and shoulders were in the car window and he hit the accused a blow of his fist on the nose. It was a good lick. The accused lurched over. The gun was in accused's hand, in his lap. He testified: (R. 94)

> "As I lurched over I felt this pull, and he definitely grabbed hold of the barrel of the gun, and I heard an explosion, and it went off".

Accused saw the soldier fall away from the window, and said "I've got to call the police". The car had stalled. Accused started it up and drove to the Criterion Cafe, about a quarter of a mile away. There he got out of the car and went into the cafe to the telephone. He dialed the police number two or three times. He was very nervous, and

wiping the blood from his face with his hands. He knew he had a bloody nose (R. 94). A man there helped him get the call through to the police and a woman gave him a cold cloth and an aspirin.(R. 95). After a few minutes, the police came. Accused went to his car with them and got his gun, unloaded it and handed it over to a military policeman (R. 95).

The deceased soldier was a big man, who stood well above Major Mitchell (R. 95). Accused did not observe him as to sobriety, but he was arrogant and offensive and seemed to be picking a fight with the officers, which accused thought was not right. Accused fired into the air to scare him and break up the argument. When accused got in the car to drive away, he thought the incident was over, and stopped only to avoid hitting the deceased, who appeared in front of the car (R. 96).

When the deceased reached into the car, hit the accused and knocked him over, the deceased must have reached down and grabbed the gun, as it went off just as soon as accused "felt that tug on it". That is the best of accused's knowledge, as it "all happened so suddenly". Accused did not at any time intend either to shoot or to kill, had nothing against the deceased, was not even angry with him, and "would give anything if something could bring him back" (R. 97).

Under cross examination, the accused restated his testimony as to the events involved (R. 97-102), and did so again under interrogation by the court (R. 102-105). Further, he testified that he had had three or four or about five beers in the afternoon and one drink before and one with his dinner, and a couple of swallows only out of a highball with Flight Officer Bradford that night. "It wasn't too many". Major Mitchell had been an acquaintance, upper classman and instructor of accused at three stations, but not a social intimate or friend (R. 98, 99). Accused habitually carried his gun in his car for protection, in a holster that he made in the upholstery at the left hand side (R. 99). His mind was perfectly clear when he drew the gun and ordered the deceased to go away. He was not quite sure what he did with the gun when he started to drive away, but thought that he held it in his hand while he shifted into first gear. He pulled the car door "to" (R. 100). He did not think he had a foot outside the car, as he would have to use his left foot on the clutch to get the car in motion. The deceased struck him with his right hand (R. 101). The gun was in accused's lap and in his right hand (R. 101-102). It took "about a second" for accused to realize that the gun had gone off. He saw the deceased fall back away from the car and thought that he must have been hit, as the gun went off at such close range. Accused was in the car and deceased pulled on the gun. Accused said "My God! There's been an accident, I've got to call the police," started the car and drove out. He believed that he then laid the gun on the seat at his right, as that was where he found it when he turned it over to the military policeman (R. 102).

5. The accused officer was tried for murder and found guilty of the lesser included offense of voluntary manslaughter. The evidence clearly establishes the facts that Private First Class James Rockefeller met his death as a result of a gunshot wound received by him from the discharge of a .22 caliber automatic pistol held in the hand of the accused on 2 August 1945 on a country club driveway near Topeka, Kansas, at the time and place specified. It establishes as clearly that the deceased was advancing upon the accused to assault him or was in the act of assaulting him when the fatal shot was fired. Though four bystander witnesses testified for the prosecution, nobody saw the shot fired, and it is only by inference from circumstances in evidence and by the testimony of the accused himself that the lethal weapon is shown to have been in the hand of the accused at that time. By the same means only can it be determined whether the shot was fired intentionally or by unintentional mischance arising from the deceased's own acts.

Two soldiers who were behind the deceased did not see nor participate in the events which preceded the shooting. They heard two shots fired into the air, then saw the deceased move rapidly around the front of accused's automobile and advance upon the accused, the latter then standing partly in and partly out of his car, by the driver's seat. They heard another shot and the deceased fell back, shot in the neck, three to four feet from the accused.

Two officers who were waiting in the accused's car to ride with him to their base were accosted by the deceased, who first asked for a ride, then cursed and vilified them as officers and individually, and belligerently, profanely and abusively sought to start a fight. The officers got out of the car and tried, without success, to quiet the deceased and restore order. The accused came onto the scene on the other side of his car, by the driver's seat. After the deceased had ignored orders to go away, the accused produced a .22 caliber pistol from his car and fired twice into the air, further ordering the deceased to go away. All three officers got into the car, the accused at the wheel and the two officer witnesses in the back seat. The car started to move away, but stopped immediately as the deceased rushed around in front of the car and reached into the car at the driver's seat, striking the accused a blow on the nose. The accused lurched over to his right, the gun went off and the deceased fell back from the car. The accused drove the car away immediately, saying "My God! We've got to call the police". He did call the police from a nearby telephone at a roadside tavern, where his nose was found to be bleeding and a cold, wet cloth was administered. The accused's bloody nose was verified as a physical fact by witnesses at the tavern and by medical inspection within about three hours, introduced for the defense, but wholly uncontroverted and fully corroborated by the prosecution's witness, Major Mitchell, one of the officers with the accused, who went into the tavern with him to call the police.

The physical facts of the accused's bloody nose and an area of powder specks imbedded in the deceased's skin around the bullet wound, fully established by the uncontroverted medical evidence, strongly support the officers' version of the proximity of the deceased to the accused when the shot was fired, and verify that he was not three or four feet away, but in contact with, and in the act of assaulting, the accused. These enlightening circumstances appear in the evidence for the prosecution and as a part of its circumstantial case, merely emphasized by the evidence for the defense.

On the medical evidence, blood alcohol tests showed some alcohol in the systems of both the accused and the deceased. The officers thought that the deceased was intoxicated, judging from his speech and actions; the soldiers thought that he was not. A medical officer who examined the accused about three hours after the shooting, five or six hours before the blood test, found him not intoxicated.

The accused himself testified that the firing of the fatal shot was entirely involuntary on his part - the result of a tug on the pistol in his hand, lying in his lap as he tried to drive the car rapidly away, which must have resulted from the act of the deceased in grasping the gun after, but almost simultaneously with, his striking the accused the blow on the nose which knocked him over momentarily in the seat of his automobile. He testified that he had no intention to fire the pistol or to shoot the deceased. That testimony is consistent with the circumstances in evidence and inherently credible.

Manslaughter is unlawful homicide without malice aforethought. (Par. 149a, MCM 1928, p. 165). Malice aforethought was eliminated from consideration in this case by the court's findings, very properly. As in the case of murder, "unlawful" means without legal justification or excuse (Par. 148a, MCM 1928, p. 162). Justification arises from the performance of a legal duty (Par. 148a, MCM), and is not substantially involved here, in our view of the case. Legal excuse may arise from accident or misadventure in doing a lawful act in a lawful manner or from the reasonably apparent necessity of self-defense on a sudden affray (Par. 148a, MCM 1928, p. 163). Circumstances suggestive of self-defense appear in the evidence in the instant case, properly raising that inquiry in the trial court and here, but the testimony of the accused himself largely removes that defense from the case, even if it were shown that the accused was reasonably apprehensive of great bodily harm, in that a shooting in self-defense implies an act of volition on the part of the accused which he here disavows, and ordinarily a wholly unintentional shooting is logically inconsistent with the motivation of self-defense (CM 237543, Alvarez, 24 BR 47, 56).

The defensive factor presented by the evidence here is that of accident. A defense of accidental killing, to a prosecution for homicide, denies that the killing was intentional (26 Am. Jur. 354, Homicide, Sec. 290). Ordinarily a purpose or intent to inflict injury or death may be inferred from the apparently intentional use of a deadly weapon, and the firing of a shot under such circumstances that the person firing it must know that it will probably hit someone renders the resulting death an unlawful homicide unless otherwise excused, and not the result of accident or misfortune (26 Am. Jur. 306, Homicide, Sec. 220; Id., p. 300, Sec. 211). However, where it appears that a killing was the result of a true accident or misadventure, in that the homicidal act was itself unintentional or done without wrongful purpose in the course of a lawful enterprise performed in lawful manner, the killing is not voluntary manslaughter, and if also it was not the result of negligence it is not manslaughter at all, nor any unlawful homicide, but is excused on the ground of accident. In such case, the essential elements of crime are lacking, and no criminal responsibility attaches (26 Am. Jur. 305, 306, Homicide, Sec. 220).

To excuse the homicide, the accident must occur in doing a lawful act in a lawful manner (Par. 148a, MCM 1928, p. 163). The unlawful use, or even the culpably negligent use, of firearms in a manner likely to endanger human life may render the resulting homicide manslaughter, though unintentional (26 Am. Jur. Homicide, p. 293, Sec. 204; p. 300, 301, Sec. 211, 212). But where the use was not unlawful then, (assuming for present purposes only, and not deciding, that involuntary manslaughter is a lesser included offense of murder and within the scope of the findings of guilty in this case) at least the proof must show that death resulted from some culpably negligent use by the accused of the weapon concerned. The essential element of criminality in such case is knowledge, actual or fairly imputed, that the act of the slayer tended to endanger life. The fatal consequence of the negligent act must reasonably have been foreseeable (26 Am. Jur. 299, 300, Homicide, Sec. 210).

In the instant case, the action of the accused in introducing a firearm into the contention between his fellow officers and the pugnacious soldier, even for the lawful and proper purpose of restoring order and perhaps acting under Article of War 68, was ill-advised and imprudent, but the deceased was not struck by either of the two shots which the accused fired into the air and that action was not the proximate cause of the ensuing fatality. That situation had come to rest without injury. The officers were about to leave the scene and would have done so except for the action of the deceased himself in rushing around the car and attacking the accused. Though the pistol would better have been left out of the affair entirely, its being or remaining in the hand of the accused at that point was not such criminal negligence as to support a conviction for manslaughter on that ground.

Thus the case for conviction rests solely upon the inference of guilt from the factual situation that a pistol in the hand of the accused was discharged and, at close range, inflicted the fatal wound upon the deceased, who was then attacking him, as the accused sought to drive away from a disorderly altercation in which he had fired twice into the air to impress the deceased with a show of force in support of orders to desist from threatening the other officers and go away. The sufficiency of that evidence to sustain the necessary inference is the decisive question here presented for review (CM NATO 550, Mitchell; CM 253683, Filipow, 35 BR 65, 67; CM 212505, Tipton, 10 BR 237, 244). To sustain conviction, such evidence must not only be consistent with guilt, but inconsistent with innocence. It must exclude to a moral certainty any fair and rational hypothesis except that of guilt. It must prove the accused guilty beyond a reasonable doubt (Par. 78a, MCM 1928, p. 62, 63). In our opinion, the evidence here not only fails to exclude reasonable hypotheses that the discharge of the pistol was the result of the deceased's own acts, without the volition of the accused, but leaves some such hypothesis the most probable in the case. The evidence is entirely consistent with an attempt by the deceased to disarm the accused, thus expressing his disdain for the officer's show of force, in the course of which effort it is entirely likely that he did seize the gun and give it a tug such as the accused testified that he felt, causing the discharge without any affirmative action by the accused. Otherwise, it is entirely likely that the blow by the deceased which knocked the accused over in the car may have caused an involuntary pressure on the trigger by the accused. Either hypothesis is consistent with the innocence of the accused and not with his guilt. From the standpoint of the accused, the shooting was accidental. The evidence does not sustain the inference that the accused willfully or unlawfully shot the deceased, and does not sustain the findings of guilty.

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

W. K. Parsons Jr., Judge Advocate

[illegible], Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGN-CM 290561 1st Ind 4 DEC 1945
Hq ASF, JAGO, Washington, 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 Donald W. Salisbury, Jr. (0-398511), Air Corps.

2. The accused was tried by general court-martial for the crime of murder, but was found guilty of the lesser included offense of voluntary manslaughter. After evidence of one previous conviction by general court-martial for failure to test an airplane for flight, in violation of Article of War 96, had been 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 years. The reviewing authority approved only so much of the sentence as provided for dismissal and total forfeitures and forwarded the record of trial for action under Article of War 48.

3. The opinion of the Board of Review concludes that the record of trial is not legally sufficient to support the findings and the sentence. I do not concur in the Board's opinion.

The record shows that shortly after midnight on the morning of 2 August 1945, three soldiers, including the deceased, were outside the White Lakes Country Club near Topeka, Kansas, waiting for a bus. Two officers, Major Samuel A. Mitchell and First Lieutenant Lynn L. Bocks, came out of the club, and recognizing the accused's automobile nearby, waited there to ask the accused for a ride. When the accused appeared, he agreed to take the two officers in his car. Prior to their departure the deceased, who appears to have been partially intoxicated, was refused a ride in the car. He became very belligerent and used abusive language toward all the officers. The accused, after ordering the deceased to "beat it" and asserting that "we don't want any trouble with you," said, "I have a loaded gun and I want you to get away." He thereupon produced a .22 caliber pistol and fired into the air, and again ordered the deceased away from the car, saying "You see, its loaded, now get out of here." When this order was not obeyed the accused again fired into the air. He then got in the driver's seat of his car and started forward. He stopped the car, however, just after it had started in order to avoid running into the deceased. As the car stopped the deceased came to the side of the car and his head and shoulders partly entered the car. At that time the two officers who were on the rear seat heard a definite thud like the sound of a blow

from a fist and saw the accused lurch or sway to the right. Almost simultaneously they heard a shot and saw the deceased slump out of sight. Two enlisted men testified that when the deceased was about three or three and one-half feet from the car door a third shot was fired and that the deceased fell back into the arms of Private Schmitz, who was immediately behind him.

Immediately following the firing of the fatal shot, the accused drove away, saying, "My God, we've got to call the police!" He drove to a cafe about a mile away where the police were called. There he was observed to have a bleeding nose.

The accused testified, in his own behalf, that the deceased inserted his head and shoulders into the car and struck him a blow on the nose. At that time the accused stated that he was holding his pistol in his lap and he explained the firing of the fatal shot, as follows:

> "As I lurched over I felt this pull and he definitely grabbed hold of the barrel of the gun and I heard an explosion and it went off."

He testified further that he did not intend either to shoot or to kill the deceased and that he was not even angry with him. He admitted that he had been drinking and a blood test taken a few hours later showed two milligrams per cubic centimeter of alcohol, which is interpreted as drunkenness.

The Board of Review, after correctly stating the law applicable to the present facts, erroneously concluded that the evidence established neither a voluntary nor an involuntary manslaughter, but showed rather that the death of the deceased was the result of a legal accident for which the accused was not criminally responsible. It may be observed that the Manual for Courts-Martial defines and explains voluntary manslaughter, as follows:

> "Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation.
>
> * * *
>
> "In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm."

The Manual also defines involuntary manslaughter, as follows:

"Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law.

* * *

"* * * To use an immoderate amount of force in suppressing a mutiny is an unlawful act, and if death is caused thereby the one using such force is guilty of manslaughter at least.

"Instances of culpable negligence in performing a lawful act are: Negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be discharged; carelessly leaving poisons or dangerous drugs where they may endanger life." (MCM, 1928, par. 149a).

When the evidence is considered in the light of the definition of voluntary manslaughter, it clearly appears that the court was warranted in concluding that the accused committed that offense. Although none of the witnesses saw the pistol in the hand of the accused at the time the fatal shot was fired, they described a scene which logically compels the inference that the accused intentionally fired the fatal shot. Even the accused admits that the pistol was in his hand at the time the shot was fired, and the testimony showing that the accused had just been struck in the face, presented a natural provocation for the accused's unlawful act.

Even if we accept the accused's own statement that the firing of the fatal shot was an involuntary act on his part and that the shooting was caused by the act of the deceased in grasping the barrel of the pistol, which is contrary to the reasonable inferences drawn from all the circumstances by the court, the record must be held legally sufficient to sustain a finding of guilty of involuntary manslaughter and legally sufficient to sustain the sentence. Since the accused was not in the performance of official duties, he had no legal right to display a pistol and to fire it into the air. The accused's conduct in the use of a privately owned pistol was, therefore, not only unwise, but also unlawful. His actions clearly fall within a pattern of conduct which has led to many a homicide. His threat having been challenged, he carried it into execution with a fatal result. It cannot be correctly concluded, therefore, that the accused was acting in a lawful manner, or that the deceased's death was due to a legal accident. In view of all the evidence, I am of the opinion that the record of trial is legally sufficient to sustain the court's findings of guilty and legally sufficient to sustain the sentence.

Although the accused acted under considerable provocation in the commission of the crime in question, his shameful conduct in shooting down a partially drunk soldier cannot be condoned. Since the reviewing authority has already extended clemency to the accused by approving only so much of the sentence as provides for dismissal and total forfeitures, I think that the further extension of clemency is unwarranted. I recommend, therefore, that the sentence be confirmed and ordered executed.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(Senetnce as approved by reviewing authority confirmed and ordered executed. GCMO 518, 18 Dec 1945)

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

SPJGN-CM 290568

U N I T E D S T A T E S	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Aloe Army Air Field, Victoria, Texas, 24 September 1945. Dismissal, total forfeitures, and confinement for two (2) years.
First Lieutenant JAMES W. THATCHER, JR. (0-816179), Air Corps.	)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant James W. Thatcher Jr., Air Corps, did, at Aloe Army Air Field, Victoria, Texas, on or about 20 August 1945, feloniously take, steal and carry away two hundred and seventy dollars ($270.00), lawful money of the United States, the property of First Lieutenant Andrew N. Kandis.

The accused pleaded not guilty to, and was found guilty of, the Specification and the Charge. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that First Lieutenant

Andrew N. Kandis, Air Corps, was awakened by a noise in his quarters, Apartment D, building 757, at the Aloe Army Air Field, Victoria, Texas, at about 0100 on 20 August 1945. Seeing the accused at the foot of his bed, facing his wardrobe locker, he asked, "What's going on?". The accused immediately ran out and Kandis chased him around the barracks area for about 45 seconds finally catching him on the south side of the Bachelor Officers Quarters building 756. Upon questioning, the accused's first remark was, "I've been drinking". After asserting that he had met a Filipino in or near the latrine who asked him if he lived in building 757 and whether he was missing any money, the accused explained that he had entered to determine whether anything had happened to a friend who lived in the end of the barracks (Pros. Ex. 2). The accused and Kandis sat on the boardwalk behind the barracks for awhile and then came around to the front. Kandis went into his apartment, and the accused continued along the walk. Second Lieutenant Charles G. Malm, Jr., who had been "awakened by shouting and some people running by my apartment", looked out of his window and saw the accused stoop over for a second, straighten up, and go into his own apartment (R. 17).

First Lieutenant Robert P. Rippstein, Air Corps, who occupied the apartment with Kandis, was awakened when the latter dashed out after the accused. Thinking that Kandis had had a "nightmare or something", Rippstein jumped out of bed and ran out after him. After Rippstein had been outside for a minute or less, Kandis, who ran by chasing accused, told him that "someone had been in the room and had been in his [Kandis'] wallet". Rippstein returned to his quarters and found his belongings intact. Upon picking up Kandis' sheet which had fallen off the bed, he found Kandis' wallet underneath on the floor. When Kandis returned to his room, he discovered missing from his billfold one 100 dollar bill, eight 20 dollar bills, and one 10 dollar bill, a total of $270.00 (Pros. Ex. 2).

Kandis reported the loss, and an investigation was made. The accused was awakened, and a search was instituted for the Filipino to whom the accused had referred. Second Lieutenant Geronima M. Aclan, Philippine Army Air Corps, who was interrogated, stated that at 0100 on 20 August 1945, he had seen a man bearing a similarity to the accused in the latrine but their conversation had been limited to "Hi" and a response of "Hi there" (R. 8).

At approximately 1600, on 20 August 1945, First Lieutenant Harvey R. Adams, Air Corps, left the shower room in the latrine adjoining building 757 and, while walking along, looking down, saw money under the boardwalk. He informed Lieutenant Kandis, who called the Provost Marshal (R. 23). The latter lifted up the walk and recovered one 100 dollar bill, eight 20 dollar bills, and one 10 dollar bill (R. 27). The money had been projecting slightly through a crack in the boardwalk at approximately the place identified by Lieutenant Malm as the point where the

accused had bent over prior to his entry into his apartment (R. 22-23).

4. The accused, having been advised of his rights relative to testifying or remaining silent, testified that about 1100 on 19 August he went to the Officers' Club and during the afternoon drank some beer and whiskey. Between 1700 and 1800 he, First Lieutenant Norman L. Larson, Air Corps, and Captain George W. Evans, Air Corps, left the club taking three pints of liquor with them (R. 39). They went to Victoria where they "picked up" three girls and proceeded to Port Lavaca to a dance. There they continued to drink. Between 2300 and 2400 they departed, and the accused drove to Victoria (R. 40). Larson drove from Victoria to Aloe. Accused had one drink after arriving at Aloe (R. 40).

Accused undressed and went to the latrine, clad only in his shorts and without shoes. There he met an officer whom he believed to be Lieutenant Aclan. After he left the latrine, someone called from the stoop of the barracks. He walked over and was asked if he lived in the Bachelor Officers Quarters and whether he was missing any money. Upon receiving a negative reply, the man, who was standing at the door to Apartment D, said, "Come in here". Accused did not recognize him but walked to the stoop and entered. As soon as the accused got in the door, Lieutenant Kandis "hollered". The accused, becoming startled, ran away and in the process fell down (R. 41). After Kandis caught up with him, they sat for awhile on the boardwalk and then returned to the Bachelor Officers Quarters, Kandis going to his apartment and the accused continuing on to his. While proceeding down the walk, the accused stopped by the light in order to look at his knees to determine how badly they were injured. Although they were pretty badly skinned, he did not go to the hospital but put a bandage on them at the Bachelor Officers Quarters (R. 42). The spot at which he paused to look at his knees was approximately where Lieutenant Malm saw him bend over and where the money was found (R. 43).

Accused was right on the inside edge of the door of Kandis' room but did not notice the wall locker (R. 43). He did not know the man who called him at the stoop and could not see how he was dressed (R. 44). Accused weighed about 192 pounds (R. 46). When caught, he told Kandis about the man calling to him on the stoop. Accused did not know what he was looking for when he went to Kandis' room (R. 46). He was there just a second or so before Kandis awakened. Kandis never gave him any money (R. 47). Accused did not take any money out of Kandis' wallet and did not put any money under the boardwalk (R. 42, 49).

By a stipulation it was shown that Captain George W. Evans, Jr. would testify that the accused was too drunk to drive, but not too drunk to know what he was doing while returning in the car from Victoria to Aloe on the night of 19-20 August 1945.

First Lieutenant Norman L. Larson testified that he drove accused's car from Victoria to Aloe on the night of 19-20 August because accused was "a little bit too drunk to drive".

5. The Specification alleges that the accused "did at Aloe Army Air Field, Victoria, Texas, on or about 20 August 1945, feloniously take, steal, and carry away two hundred and seventy dollars ($270.00) * * * the property of First Lieutenant Andrew N. Kandis".

> "Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein" (MCM, 1928, par. 149g).

The evidence in the record shows beyond a reasonable doubt that accused was present clad only in shorts and without shoes in the apartment of First Lieutenant Andrew N. Kandis at the Aloe Army Air Field, Victoria, Texas, at about 0100 on 20 August 1945; that Kandis was awakened by a noise and, upon seeing accused in his bedroom called out, "What's going on?"; that accused immediately ran and was caught about 45 seconds later by Kandis; that, after being released, the accused was seen by Second Lieutenant Charles G. Malm Jr., to stoop over for a second in the shadows on the walk and then straighten up and go into his apartment; that Lieutenant Kandis on returning to his apartment found $270.00, consisting of one 100 dollar bill, eight 20 dollar bills, and one 10 dollar bill missing from his wallet. At approximately 1600, 20 August 1945, First Lieutenant Harvey R. Adams observed money under the walk and $270.00, consisting of one 100 dollar bill, eight 20 dollar bills, and one 10 dollar bill, was recovered from under the walk at approximately the same spot where Lieutenant Malm had seen accused stoop over.

The testimony places the accused at the scene of the alleged theft just prior to its discovery and at a time when he had no legitimate reason for his presence there, and shows that he ran therefrom upon being discovered. This evidence of the accused's trespass and flight, viewed in the light of the testimony showing that the stolen money was found under the walk at a place where the accused was observed to have hesitated and stooped, presents a series of circumstantial factors which is inconsistent with any reasonable hypothesis except that of the accused's guilt. Although there was some testimony indicating that the accused had been drinking on the night of the offense in question, the evidence clearly establishes that at the time of the offense he was mentally capable of directing his conduct and had a full realization of his actions. The evidence is legally sufficient, therefore, beyond a reasonable doubt, to sustain the findings of guilty.

6. The records of the War Department show that the accused is

about 23 years and 9 months of age and that he is single. He completed two years of high school and was employed as a tree surgeon from July 1941 until his enlistment in the Army on 30 September 1942. He was commissioned a second lieutenant in the Army of the United States on 3 November 1943.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 290568 1st Ind NOV 6 1945
Hq ASF, JAGO, Washington, 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 James W. Thatcher, Jr. (0-816179), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of larceny of two hundred and seventy dollars ($270), 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 two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The Acting Staff Judge Advocate of the Army Air Forces Central Flying Training Command has advised that prior to the present case, the accused was punished on 14 February 1945 under the 104th Article of War for having sexual intercourse with an unmarried woman in a pullman berth. Punishment was again administered upon him under Article of War 104 for misconduct with female elevator operators in the Rice Hotel, Houston, Texas.

Records of the War Department show that accused has been awarded the Distinguished Flying Cross and the Air Medal for achievement in aerial flights in the European Theater of Operations. The Acting Staff Judge Advocate of the Army Air Forces Central Flying Training Command, has further advised that "in nine months' service in England he completed 59 combat missions and was awarded the Air Medal with six oak leaf clusters and the European and Mediterranean Theater Ribbon with four stars". I recommend that the sentence be confirmed, but in view of the accused's meritorious military service; that the forfeitures be remitted, that the period of confinement be reduced to one year; that the sentence as thus modified be ordered executed; and that an appropriate 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.

THOMAS H. GREEN
Brigadier General, U.S.A.
Acting The Judge Advocate General

2 Incls
Record of trial
Form of action

(Sentence confirmed, but forfeitures remitted and confinement reduced to one year. As modified ordered executed. GCMO 487, 15 Nov. 1945).

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

20 December 1945

SPJGK - CM 290790

UNITED STATES	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	)	
Second Lieutenant JOSEPH P. BUCKLEY (O-2063300), Air Corps.	)	Trial by G.C.M., convened at Ellington Field, Texas, 5 October 1945. Dismissal, total forfeitures, and confinement for two (2) years.

OPINION of the BOARD OF REVIEW
MOYSE, KUDER and WINGO, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Joseph P. Buckley, Air Corps, did, at Ellington Field, Texas, on or about 7 September 1945, feloniously take, steal, and carry away one wallet containing about ninety-one dollars ($91.00) lawful currency of the United States, property of Flight Officer Earl Harlan Sampson.

He pleaded 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 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. For the prosecution.

At the time of the commission of the offense with which he is charged

accused was and at all times since has been a member of the armed forces of the United States (Pros. Ex. 1).

Upon awakening at about 0615 hours on 7 September 1945, Flight Officer Daniel Grogan who slept on the first floor of barracks No. 342, Ellington Field, Texas, observed someone quietly enter his barracks. The intruder walked towards the bed where Mr. Grogan had a pair of trousers hanging. The latter saw the trousers moving "as if someone were putting their hands in there, trying to get something out of the pocket". The intruder, identified by witness as accused, then retraced his steps and went slowly out of the door. Nothing was missing, as Mr. Grogan had previously removed everything from his pockets. He reported this incident to the Provost Marshal at approximately 0930 hours on the same day. He had previously loaned some money to accused which had promptly been repaid. At the time of repayment accused attempted to borrow additional money from him stating he desired to purchase an automobile (R. 9-11).

Before retiring on the night of 6 September 1945, Flight Officer Earl H. Sampson, who slept upstairs in barracks No. 342, placed his "clothes" on a chair near the head of his bed. He left in his "clothes" his wallet containing "approximately" $92 in currency, consisting of four $20 bills, one $10 bill and two $1 bills. Upon awakening at about 0745 the next day he discovered his wallet and money were missing, and reported this loss to the Provost Marshal. He never authorized anyone to take his wallet and money and never loaned any money to accused (R. 6-8).

A search was started for accused at about 1000 or 1030 hours on 7 September 1945, but he was not located until 1200 when he was met at the "ramp" as he "got off an airplane down the line" (R. 12). Accused was immediately taken to the Provost Marshal's office where, after being warned of his rights, he was questioned (R. 13,19). Accused admitted taking the money after being questioned (R. 13,19). Accused admitted taking the money after being questioned about 30 minutes and after $127 in cash was found on his person and a wallet identified as the one missing from Flight Officer Sampson's clothes was found in a navigation kit accused was carrying (R. 7, 20,21). Upon being asked by the Provost Marshal "why in the world an officer would risk his reputation as being an officer and stealing a measly $91" accused replied, "You don't know how bad I need money," and further stated that "they had a baby recently and he bought an automobile and borrowed all the money he could and * * * part of that money he paid back bills with and his mother-in-law was here and wanted to go back to New York and he had a fifteen day leave that he was going to take her back in this automobile" (R. 22).

Accused signed a statement, consisting of questions submitted to and answers given by him, which was admitted in evidence without objection. This statement may be summarized as follows: On 7 September 1945 accused, who slept in building No. 222 arose at about 0615 hours and proceeded to barracks 342 "to see is anyone was up." The purpose of this visit was "to borrow some money, so [he] could use it on [his] leave to take [his] mother-in-law home." He had lived in barracks 342 and knew Flight Officer Smith, Flight Officer Grogan and Flight Officer Rucker who still lived there.

Upon arrival "/He/ looked in the lower bay to see if anyone was up. Everyone was asleep. /He/ turned around and started to go out, saw some trousers hanging on the posts, and /he/ went out and started to go to the Mess Hall and thought that there might be someone upstairs who was awake; went upstairs to see if anyone was awake; everone was asleep; it was dark; /he/ turned around and saw some trousers hanging over the corner chair, and /he/ took the wallet from them." When he left the barracks he removed the money, which amounted to $91, from the wallet, placed the money in a separate compartment of his own billfold and retained Flight Officer Sampson's wallet. He then ate breakfast, and at 0730 went on a flight. He flew for four hours, during which time he became ill and vomited. While on the plane he saw a cigarette ration card through a window compartment of the billfold and first realized it belonged to Flight Officer Sampson. It made him "feel pretty bad" and if "he could have returned the whole thing, /he/ would have." It was the "first time" and he believed that that was the reason he became sick on the plane. He realized it was wrong and "wished /he/ had it undone." When a radio call came during the flight for him to report to a Captain in Operations he removed the remaining contents of the wallet and threw them out. He then wrapped Mr. Sampson's wallet inpaper and placed it in a navigation kit. In reply to a request as to the reason he took the wallet and money he stated, "That's hard to say. For one thing, I needed the money rather desperately" (R. 26, Pros. Ex. 5).

4. For the defense.

Accused, after being apprised of his rights as a witness, elected to take the stand and testify under oath (R. 28). He reiterated in substance the statement made by him to the investigating officer. In addition he stated that he had purchased an automobile which had given him considerable trouble, costing him $300 the first two months "just to run it." He was at that time supporting his mother-in-law, his wife, his three-months old child, and himself and the need for money was great. His mother-in-law was "pressing the idea" of going home (New York) and he bought the car in order to take her home and possibly save money that would be involved in going by train. He also "figured" he would take his wife and child at the same time and show the child to his (accused's) mother. He attended the College of New York for 4-1/2 years and taught English in a New York City high school for a while. Just prior to entering the service he passed competitive examination and met the qualifications for appointment to a position with the New York City Police Department. His indebtedness at the time of the alleged offense was approximately $2,000 and was a result of "bad judgment." When he heard about the radio call he became frantic and threw the identification cards out of the window of the plane. When he entered the barracks he had no idea of stealing money, the impulse came in a weak moment and it was the first time in his life he ever took anything that did not belong to him (R. 28-40).

First Lieutenant Edwin A. Bernardoni testified that he had known accused for more than two years and that accused's reputation for truth and veracity was "unquestionable" (R. 41).

First Lieutenant Joseph F. Pullock testified that he had known accused for about two and one half years and that so far as he knew accused always told the truth and always conducted himself as an officer and a gentleman (R. 42).

Thelma Irene Buckley, wife of accused, testified that accused had always been "very true and honest and very fair about everything he had ever done." The only knowledge she had as to what may have led accused to commit the offense for which he was charged was that they were in debt and were about to go hime and had insufficient funds for the trip (R. 44).

5. The undisputed evidence presented by the prosecution, substantiated by accused's plea of guilty and his testimony of record, conclusively shows accused's guilty of larceny as alleged in the Specification.

6. At a hearing before the Board accorded a relative of accused, the contention was made that accused's action in committing the larceny in itself showed that he was mentally irresponsible. Not only is there not the slightest suggestion in the record that accused was or claimed to be suffering from a psychosis or was otherwise acting upon an irresistable impulse, but his unequivocal statement discloses fully the motive which actuated the theft.

7. War Department records disclose that this officer is 24 years of age, is married and is the father of one child. He graduated from the City College of New York in 1943 with a B.S. Degree, having majored in English. He entered the service on 17 February 1943 and, upon completion of training as an aviation cadet, was commissioned a temporary second lieutenant in the Army of the United States on 3 July 1944. He has had no occupational experience in civil life.

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 93.

Herman Moyse, Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 290790 1st Ind JAN 11 1946

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 Joseph P. Buckley (0-2063300), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of the larceny of $91, in violation of Article of War 93. 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 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. 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.

At approximately 0615 hours on 7 September 1945 the accused was seen stealthily to enter the first floor of a barracks and surreptitiously place his hands in a pocket of a pair of trousers hanging at the foot of a bed on which a flight officer was apparently sleeping. Nothing was missing from these trousers as the flight officer had previously removed all their contents. Shortly thereafter a flight officer who slept on the second floor of the same barracks discovered that a wallet containing approximately $91 was missing from his trousers which he had placed on a chair near his bed the previous night. Upon being questioned by the provost marshal the accused admitted the theft of the $91 and related the circumstances surrounding its commission. He stated that he had originally entered the barracks for the purpose of borrowing money but found it was dark and everyone was asleep. Under an impulse during a weak moment he removed a wallet and its contents from a pocket of a pair of trousers, participated in a scheduled flight starting at 0730 hours, and during the flight threw away the contents of the wallet with the exception of the money. In explaining the motive for his actions he stated that he needed money "rather desperately" as a result of a recent unwise purchase of an automobile, and expenses incident to the birth of a baby and the support of his mother-in-law.

Larceny by an officer is a serious offense and such misconduct clearly demonstrates unworthiness of a commission. A month after his conviction the accused requested a psychoneurotic examination, but there is

nothing in the record which indicates that he was not mentally responsible for his actions, nor did he offer any such defense at the time of the trial. However, in view of his previous good civilian and military record, his marital status and his youth, I recommend that the sentence as approved by the reviewing authority be confirmed but that the period of confinement be reduced to one year, 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. Consideration has been given to (a) letters from Mrs. Thelma Irene Buckley, wife of the accused, to the President of the United States, requesting clemency, and to the Honorable James M. Mead and the Honorable Robert F. Wagner, Senators from New York, requesting their assistance in procuring clemency; (b) letters of a similar nature to the same officials from Michael C. Buckley, brother of accused, who, in addition, in his letters to the Honorable James M. Mead and the Honorable Robert F. Wagner, requested further consideration of a purported psychoneurotic condition of accused; (c) three letters from the National Jewish Welfare Board, one of which contained an alleged medical history of accused and a request for further psychoneurotic investigation, and another of which contained as inclosures (1) a copy of a letter from accused to the Commanding Officer, 2517th Army Air Forces Base Unit, Ellington Field, Texas, dated 6 November 1945, one month subsequent to his conviction, requesting a psychoneurotic examination, (2) a copy of the reply thereto from the Commanding Officer dated 14 November 1945, denying the request, and (3) a copy of a complaint dated 20 November 1945 addressed by accused to the Commanding General, Western Flying Training Command, under Article of War 121, that he had never been given a thorough psychoneurotic examination; (d) first indorsement by the Commanding General, Headquarters, Army Air Forces Western Flying Training Command, to a communication from The Judge Advocate General, and the medical and clinical records and personal data pertaining to accused forwarded in connection therewith; (e) statement as to good character and educational qualifications of accused by Mr. Egbert M. Turner, Acting Dean, The School of Education, The College of the City of New York; and (f) informal argument presented to the Board of Review on 23 October 1945 by Mrs. Sylvia Buckley, sister-in-law of accused. All letters and other documents referred to are forwarded herewith.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

~~(GCMO 40, 6 Mar 1946).~~

8 Incls
1. Record of trial
2. Form of action
3. Ltr fr Sen Mead to TAG w/incl
4. Memo fr Sen Wagner 25 Oct 1945 w/incl
5. Memo fr Sec Pres 23 Oct 1945 w/ltr fr wife of accused
6. Memo fr Sec Pres 22 Oct 1945 w/ltr fr Michael C. Buckley
7. Ltr to CG, AAF, Cen Fly Tr Com, w/ cpy ltr fr Jewish Welfare Board, 16 Nov 1945, 1st Ind thereon w/6 incls
8. Ltrs fr Nat'l Jewish Welfare Board, 6 Dec and 7 Dec, w/incls with latter letter

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

SPJGQ
CM 292400

UNITED STATES v. Captain THOMAS J. COATES (0-1040511), 9200 TSU-TC, Hq, Boston Port of Embarkation, Army Base, Boston, Massachusetts	BOSTON PORT OF EMBARKATION Trial by G.C.M., convened at Boston Port of Embarkation, Boston, Massachusetts, 26 July, 8 and 15 August, 19 September, 17, 18, 19 October 1945. Dismissal, total forfeitures, and confinement for four (4) years.

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OPINION of the BOARD OF REVIEW
PARTLOW, BIERER 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 93rd Article of War.

Specification 1: In that Captain Thomas J. Coates, TC, 9200 TSU-TC, Headquarters, Boston Port of Embarkation, Boston, Massachusetts did, at Wood Island Camp, Boston, Massachusetts on or about 10 April 1945, feloniously embezzle by fraudulently converting to his own use $45.00, the property of the Unit Fund, 870th Port Company, entrusted to him as custodian of said fund.

Specification 2: In that Captain Thomas J. Coates, TC, 9200 TSU-TC, Headquarters Boston Port of Embarkation, Boston, Massachusetts, did at Wood Island Camp, Boston, Massachusetts, on or about 10 April 1945, feloniously embezzle by fraudulently converting to his own use $25.00, the property of the Unit Fund, 870th Port Company, entrusted to him as custodian of said fund.

Specification 3: (Finding of not guilty.)

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

Specification: In that Captain Thomas J. Coates, TC, then 870th Port Company, 9200 TSU-TC, Headquarters, Boston Port of Embarkation, Boston, Massachusetts, being in command of his said organization, and it being his duty to make and render true and proper vouchers for expenditures from the Unit Fund, 870th Port Company, Boston Port of Embarkation, Boston, Massachusetts, did at Boston, Massachusetts, on or about 10 April 1945, knowingly make and present a false voucher, which voucher was false in that it showed the said Captain Thomas J. Coates, TC, as custodian of the Unit Fund, 870th Port Company, received cigarettes and sundries for EM in the amounts of $45.00 and $25.00, when in truth and in fact, he, the said Captain Thomas J. Coates, TC, then well knew that he did not receive merchandise of the cost stated therein.

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

Specification 1: In that Captain Thomas J. Coates, TC, 9200 TSU-TC, Headquarters, Boston Port of Embarkation, Boston, Massachusetts, did, at Wood Island Camp, Boston, Massachusetts, during January 1945, borrow the sum of $10.00 from 1st Sgt. Otis Boyd, Jr., 870th Port Company, an enlisted man under his command, to the prejudice of good order and military discipline.

Specification 2: In that Captain Thomas J. Coates, TC, 9200 TSU-TC, Headquarters, Boston Port of Embarkation, Boston, Massachusetts, did, at Camp Plauche, Louisiana, about 17 December 1944, borrow the sum of $30.00 from Technician Fourth Grade Robert Harston, 870th Port Company, an enlisted man under his command, to the prejudice of good order and military discipline.

Specification 3: In that Captain Thomas J. Coates, TC, 9200 TSU-TC, Headquarters Boston Port of Embarkation, Boston, Massachusetts, did, at Wood Island Camp, Boston, Massachusetts, wrongfully retain in his possession over the period of 15 February to 31 March 1945, the sum of $106.50, property of Unit Fund, 870th Port Company, entrusted to him by the Costodian, Boston Port of Embarkation Post Trust Fund by Check #87, dated 15 February 1945.

Specification 4: In that Captain Thomas J. Coates, TC, 9200 TSU-TC, Headquarters Boston Port of Embarkation, Boston, Massachusetts, did, at Wood Island Camp, Boston, Massachusetts, on or about 28 April 1945, wrongfully take and use the sum of $35.00, property of the Boston Port of Embarkation Exchange.

Specification 5: In that Captain Thomas J. Coates, TC, 9200 TSU-TC, Headquarters, Boston Port of Embarkation, Boston, Massachusetts, did, at Wood Island Camp, Boston, Massachusetts, on or about 16 May 1945, wrongfully take and use the sum of $30.00, property of the Boston Port of Embarkation Exchange.

Specification 6: (Finding of not guilty.)

He pleaded not guilty to all Specifications and Charges and was found not guilty of Specification 3 of Charge I and of Specification 6 of Charge III, guilty of all other Specifications and of all 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 four years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Briefly summarized, the evidence for the prosecution, pertinent to the Charges and Specifications whereof the accused was found guilty, was substantially as follows.

The accused officer was in command of the 870th Port Company from its activation at Camp Planche, Louisiana, in October, 1944, to June, 1945 (R. 71, 16). He was custodian of the Unit Fund of that company from 1 January 1945 to 11 July 1945 (R. 14). The company moved to Boston Port of Embarkation in January 1945, and was barracked at Wood Island Camp, where it was served by Wood Island branch of the Post Exchange (R. 16).

Specifications 1 and 2, Charge I

Private, formerly Technician Fifth Grade, Ushry W. Best (R. 15), a member of the company, was employed from about 1 April to 15 May, 1945, as enlisted manager of the Wood Island Exchange, responsible for its cash and for supervision of its sales (R. 16, 20). Only himself and the other clerks, Privates Vaughn, Blakey and Harrison, had authorized access to the cash register (R. 21). A fund of $50 cash, daily, was kept for making change (R. 17). Twice, between 1 and 10 April, 1945, the accused borrowed money from this cash fund of the Exchange (R. 17). On one occasion, Private Best gave him the money. On the other, the accused himself got it out of the cash register (R. 18). On or about 10 April, 1945, Private Best asked the accused to return the money, as it was time for an inventory to be taken by the Post Exchange Officer (R. 17). The accused then gave Best a check drawn on the 870th Port

Company Unit Fund, which check he made out in Best's presence in the orderly room (R. 21). This check (Pros. Ex. 1; R. 22) was for $45, drawn on the Unit Fund account with the National Shawmut Bank of Boston, dated 10 April 1945, payable to Post Exchange, Boston Port of Embarkation, Wood Island Branch, signed by the accused as custodian of the Fund, and was paid out of the Unit Fund account with the drawee bank (Stipulation, R. 14) on 11 April 1945 (R. 97). Private Best accepted it for $45 due Wood Island Exchange from the accused (R. 23). Best put the check in the cash register and put $45 from the cash register into the change fund (R. 22, 43).

Some days later, the accused got $25 more from the Exchange, either in various amounts or at one time. Again Private Best called upon the accused in the orderly room and told him that the money would have to be repaid to the change fund, as another investory was expected. The accused then made out and gave to Private Best a check for $25, on the 870th Port Company Unit Fund (R. 23, 24) dated 10 April, 1945, signed by the accused as custodian, on the National Shawmut Bank of Boston, payable to the Exchange, Wood Island Branch (Pros. Ex. 2; R. 24: Stipulation, R. 15). Private Best put the check in the cash register and put $25 cash from the previous day's receipts into the change fund (R. 24). The check was paid by the drawee bank on 13 April, 1945 and charged to the Unit Fund, 870th Port Company (R. 15, 97). The 870th Port Company did not owe the Exchange any money except, at one time, $3.52 for beer for the baseball team. No part of the $45 or the $25 checks was in payment for any merchandise bought by or for the company fund (R. 55).

Private Best kept account of the money taken by the accused from time to time by jotting down the amounts of the "loans" in a small pocket memorandun book and marked out the entries when the accused repaid the money. The witness left the book in the safe at the Exchange when he went on furlough 15 May 1945. When he returned, 13 days later, the book was gone and he could not find it (R. 16, 17, 18, 19, 23, 24). He had shown the book to Private Vaughn and the other men in the Exchange at Wood Island (R. 54, 77) and specifically called it to Vaughn's attention when he, Best, went on his furlough (R. 55, 77-78). Vaughn, however, testified that he found no such book in the safe, never saw it, and Best never showed it to him (R. 60, 61, 101-102).

Specifications 4 and 5, Charge III

After 10 April and before the end of April, 1945, the accused got other amounts of money from the Exchange cash register, sometimes in the presence of the witness, Best (R. 25, 26) and sometimes when observed by Vaughn (R. 56, 59) or Blakey (R. 64, 65), soldiers also working as clerks at the Exchange, who so testified. The accused would go behind the counter and help with sales to customers sometimes

when the Exchange was busy, and would make change from the cash register (R. 52, 64). He would also take sums from the cash register and report them to Best, who noted them in his memorandum book (R. 52, 53) or the accused would put slips or notes in the cash register drawer (R. 59, 65). As a result of this practice, Best called on the accused for repayment of $36 about 28 April 1945, and the accused said that he would repay it to the change fund before an inspecting officer would arrive the next day (R. 27). The next morning, after inventory had begun and the change fund had been found $36 short, the accused came into the Exchange and left his personal check for that amount (R. 28). Two or three days later the accused took up the check with cash, which was restored to the change fund (R. 29). Accused gave the check to Mr. Becker, Post Exchange representative then present, who left it there(R. 28, 29, 45). Mr. Philip B. Becker (R. 102), civilian manager, Boston Port of Embarkation Exchange, testified to his participation in an inventory of the Wood Island Branch about 25 to 28 April 1945 at which a shortage in the change fund was discovered and was made good by the accused, who left his personal check after Best went out and brought him in, but Becker's best recollection was that the amount was about $25 (R. 104, 105, 108, 109).

Private Best further testified that after the accused repaid the $36 change fund shortage on or about 28 April 1945, the accused borrowed additional sums from the change fund, sometimes in Best's presence (R. 29). When Best went on furlough, 15 May 1945, he expected the Post Exchange Officer to come the next day, take inventory and count the change fund, so, prior to turning the Exchange over to Corporal Beal to manage during his absence, Best asked the accused to repay $30 which the accused had so borrowed, plus $3.52 which was owed for beer which the accused had bought for the company baseball team. The accused told Best that he would give the money to Private Vaughn the next morning (R. 30). Best told Vaughn about the matter and gave him instructions (R. 31, 57). Corporal Vaughn testified that, pursuant to Best's instructions, Vaughn asked the accused for $33.52 the next day, and the accused said that he would "see" Vaughn before the Post Exchange Officer would arrive (R. 58). However, the Exchange Officer arrived and found the change fund short $33.52, whereupon Vaughn again called on the accused and the accused gave Vaughn $30, which Vaughn turned over to the Exchange (R. 58). Corporal Beal, Mr. Becker, Captain Cantor and the accused were then present, as was Lieutenant Hertz. Lieutenant Hertz, (Assistant Post Exchange Officer, R. 118), there told the accused not to go behind the counter or into the cash register or bother the change fund any more (R. 58, 121).

In course of investigation by the Inspector General's Department, the accused stated that he had borrowed from the Post Exchange at Wood Island $35 in two separate borrowings in the latter part of April and $30 in May shortly before Best went on furlough. At first he stated that he got the money from Best, but, under questioning, stated that he got money from the cash register twice in Best's absence, by taking

the money himself, leaving a slip and telling the enlisted man present about it. He repaid the $35 about the end of April by leaving his check with Mr. Becker at the Exchange and taking it up with cash a few days later, and the $30 in cash after Best went on furlough and Vaughn told him that Lieutenant Hertz had found the cash fund short. Lieutenant Hertz then told the accused that he should not borrow money from the Exchange. The accused said that he realized it, and did not do it any more (R. 181).

Private Best had the sole responsibility for the change fund (R. 43, 121). He was not instructed that he could not make loans out of it, but "knew it was not right" (R. 43). On return from his furlough, he was not further employed at the Exchange (R. 17). At that time, he was a corporal (R. 40), receiving $66 monthly pay and $33 additional as soldier manager of the Exchange. He lost his job at the Exchange as a result of his transactions with the accused (R. 51, 53). He was investigated by an officer of the Inspector General's Department (R. 46).

Specification, Charge II

Captain Harry Cantor (R. 78), Transportation Corps, was commanding officer of the provisional battalion of which the 870th Port Company was a part for some purposes (R. 32, 79). Captain Cantor audited the council book of the Unit Fund of that company for April, 1945 (Pros. Ex. 4; R. 72), early in May (R. 79). He advised the accused by buck slip and later in oral conversation of certain discrepancies that required correction. The conversation occurred while Corporal Ushry Best was away on furlough (R. 80). The witness required that invoices from the Post Exchange be furnished to cover Voucher number 1, which was a voucher dated 10 April 1945, for cigarettes and sundries for enlisted men, purchased from Wood Island Branch, Post Exchange, showing "Cigarettes and Sundries for EM, $45; Cigarettes and Sundries for EM, $25; Total $70; Payment made by Check No. 2 and 3". The voucher bore the signature of the accused as custodian of the Unit Fund (R. 81; Pros. Ex. 5; R. 82). Check No. 2 was for $45 (Pros. Ex. 1) and Check No. 3 for $25 (Pros. Ex. 2), both to Post Exchange, Wood Island Branch, both dated 10 April 1945. These checks were those referred to in, and supported by Voucher No. 1 (R. 82). As the Inspector General had required invoices to cover this voucher (R. 80, 81), Captain Cantor made out a sales slip showing a sale from the Post Exchange to 870th Port Company of 44 cartons of cigarettes for $57.20 (Pros. Ex. 6; R. 83) and another sales slip showing a sale from the Post Exchange to 870th Port Company of 4 cases of beer at $2.64, $10.56, and 56 4-cent cigars at $2.24, Total $12.80 (Pros. Ex. 7; R. 84), both dated 10 April, 1945. Captain Cantor marked both sales slips "Paid by check April 10, 1945" and signed both slips "Ushry W. Best, PX Mgr." Captain Cantor prepared these slips on information furnished by the accused and signed Best's name to them (R. 82-84). Best testified that he did not sign either of them (R. 24, 25) and sold no merchandise on credit to 870th Port Company except $3.52 worth of beer for which he did not receive payment and which was not included

in the checks for $70 ($45 and $25) received by the Exchange on funds of the 870th Port Company (R. 193). The accused received no merchandise for that $70 (R. 55). (Best took the $3.52 for the beer out of the change fund and rung it up in the cash register as a cash sale, expecting to get it back from the accused for the change fund (R. 195). The $3.52 appeared as part of the shortage in the change fund discovered after Best went on furlough (R. 30, 55, 57, 58, 61, 62). However, the accused paid for the beer by a check dated 26 April 1945 but perforated as paid 20 May, for $2.64 on the Unit Fund, testified to by Vaughn (R. 63; Pros. Ex. 3)). Lieutenant Galassi (R. 71), company executive officer and member of the Unit Fund Council, signed the audit for the month without inquiring into the expenditure shown in Voucher No. 1, assuming it to be legitimate. The supplies shown in the voucher were not received or given out by the company, to his knowledge, but might have been distributed while the witness was out in the field with the troops (R. 76, 77). The accused and the other member of the council signed the book (R. 73). It was stipulated (R. 70) that the accused prepared Voucher No. 1 to support an expenditure of $45 and $25 from the Unit Fund, 870th Port Company, for cigarettes and sundries, and presented the voucher with the account for the Unit Fund to support the expenditures of those amounts.

Testimony and exhibits were introduced at some length tending to show that the Exchange had no cigars selling at 4¢, to discredit that item in the voucher ($2.24). However, Best testified that the Exchange did have 4¢ cigars (R. 155).

As a rebuttal witness, Lieutenant Warner, the only Orientation Officer for the 870th Port Company, testified (R. 196) that he conducted orientation lectures during March, April and May, 1945, at which two cartons of cigarettes were given out at one time to the men, some of them by the accused, but the cigarettes were obtained by the witness from the Port Morale Division, and none from the Company Unit Fund. He did not have positive knowledge that the accused had not held other orientation classes at which the witness was not present (R. 197).

Specification 1, Charge III

On or about 15 January 1945, shortly after the 870th Port Company moved from Camp Plauche, Louisiana, to Boston, the accused requested and received from First Sergeant Otis Boyd, Jr., under his command, a loan of $10 "until he went over to the barracks and he would give it right back". He repaid the $10 about ten days to two weeks later, right after pay day. Sergeant Boyd did not request it from him in the meanwhile, as he did not need it. No one else was present (R. 138-140).

Specification 2, Charge III

In December, 1944, at Camp Plauche, Louisiana, the accused asked and received from Technician Fourth Grade Robert W. Harrison (not Harston, as specified) a loan of $30. Harrison was in charge of quarters. Some of the men were going on furlough and the accused wanted the money for them. Accused said that he had lost his wallet, and would repay Harrison the next day when the banks opened. Accused repaid the money within the next two or three days. No one else was present (R. 142-144).

Specification 3, Charge III

On 16 February, 1945, accused, as custodian of the 870th Port Company Unit Fund received from the custodian of the Post Trust Fund, Boston Port of Embarkation, check No. 87 on the Post Trust Fund, dated 15 February 1945, payable to the custodian, Unit Fund, 870th Port Company, on the National Shawmut Bank of Boston in the sum of $106.50. Accused endorsed this check in his custodial capacity and cashed it at the drawee bank (R. 163, stipulation, stipulated testimony and Pros. Ex. 14). The bank records showed deposits to the unit fund account of $123.65 on 3 March 1945, $148.62 on 31 March 1945, and later deposits. None were made prior to 3 March and no others between that date and 31 March (Stipulated testimony, R. 128). Accused later admitted in the course of investigation that he made no deposit in bank of the check or its proceeds until 31 March 1945, when he made a bank deposit for the Unit Fund of $148.62, which consisted of the mentioned $106.50 and $42.12 received for the fund in March. A previous deposit on 2 March, when the account was opened, consisted of funds brought from Louisiana and did not include the $106.50 (R. 171-172). Judicial notice was invoked of Army Regulations 210-50, dated 20 January 1945 and change thereof, and of Technical Manual 20-221, War Department, dated February 1945, requiring prompt deposit in banks of cash received for unit funds, permitting custodians of such funds to keep in personal possession only amounts necessary for working balances to meet cash payments, with the approval of the commanding officer (R. 164). The commanding officer in this case, Colonel Charles H. Brenneke, Transportation Corps, gave no such permission, nor did custodial officers of his command hold cash of unit funds in personal possession to his knowledge or with his consent (R. 34).

Other evidence was introduced for the prosecution but pertained only to the specifications of which the accused was acquitted or was of too little materiality to justify exposition here.

4. For the defense, some evidence was introduced relating to the specifications of which the accused was found not guilty. The accused

elected to make an unsworn statement (R. 189), part of which pertained to the specifications and charges of which he was found guilty (R. 190-193).

According to that statement, the accused, in March and April, 1945, bought from the Post Exchange at Wood Island Camp cigarettes, cigars and beer "in the amount", for the use of the men of his company. He bought these items from Corporal Best and left it to Best "to keep his records at times when this merchandise was received and others, and Corporal Best, I left a note stating how much I had taken" (R. 190). The beer was "given out" once at the Post Exchange and once on the baseball field, cigarettes at orientation meetings. On an audit of the unit fund books by the Inspector General's Department about 15 April 1945, a voucher for cigarettes and sundries was required to be "further explained". At the next audit, by Captain Cantor, accused showed this voucher with a typewritten statement signed by Corporal Best that accused had purchased "some cigarettes and sundries for enlisted men in the amount of $70". As the Inspector General had held this showing of "sundries" to be insufficient, Captain Cantor "made another voucher supporting the voucher which - - was sales slip from information I (accused) supplied him". Accused did not know what Captain Cantor did with "the voucher signed by Corporal Best" (R. 190). On 9 April, Best asked him to settle the account, as he was expecting an inventory. Accused gave Best a check for $45, which he thought was the amount due, but found out it was more. Later, accused "took merchandise to complete a total of $25", and gave Best another check, for that amount (R. 191).

On 16 December 1945, accused received a check for the Unit Fund from the Post Trust Fund in the amount of $106.50. As the Unit Fund "was not deposited here in the Boston bank at that time", he cashed the check and "held the cash for any emergency expenditures which might come up". On 3 March 1945, he opened an account at the Boston bank, transferring the Unit Fund deposit from the New Orleans bank, but "forgot an envelope containing $106.50". Due to "other company duties and press of business", and because he did not make many trips to the Base, he did not deposit the $106.50 until 31 March. He did not know that it was unlawful for him as custodian to hold such funds in his personal possession, since his council book showed the amount of cash on hand (R. 190).

Prior to about 28 April, he had borrowed on different occasions "an amount of $35" from the Wood Island Exchange change fund (R. 190). Only on one occasion he got the money himself, as he "had been working behind the counter helping the men in rush sales and had been going in the cash register before". On other occasions, it was given to him by Corporal Best. On 28 April, Best told him that Mr. Becker was there counting the change fund and "requested the money". Accused went over

and showed Becker a check of a third party, which accused proposed to cash and return the money, which he did "in a very few days", and Becker "seemed to think that was all right". Thereafter, and until about 15 May, accused borrowed from the change fund amounts totalling $30. "As before", the money was given to him by Corporal Best except one time when he got it himself. "At times" he did get it himself, he left a note stating the amount he had taken, signed it, showed it to one of the men, and put it in the cash register. Lieutenant Hertz then explained to him that this was improper and forbidden and he did not do it thereafter (R. 191).

Accused was not a criminal, but was under great mental strain and anxiety by reason of family troubles and financial burdens. His mother had been left with the accused and six other small children when his father deserted the family, when the accused was eight months old. Accused spent his childhood in an orphanage in North Carolina, leaving there at the age of 16. His mother then sent him to business school, which he finished in 1939. Being unable to find employment, he enlisted in the Army to help support his mother. He served 27 months in Panama, where he became secretary to the Commanding Officer, Panama Canal Department (R. 191). Returning to the continental United States in March, 1942, he completed anti-aircraft Officer Candidate School in June, 1942 (R. 192). Having had no associations with women in Panama, he made a hasty and unfortunate marriage with a woman who was interested only in getting a monetary allotment from him. They separated, but he was unable to get a divorce and for over two years, while he moved from station to station frequently, he had sent her an allotment of $100 monthly. His mother had been an invalid since early 1944 and required hospitalization. She was largely dependent upon him for support, as her other children would not help substantially. Accused had 77 discharge points, but intended to waive them and enlist in the Regular Army, making the Army his career, but due to his mother's needs he could not do so. All this placed him under "mental hazards", so that his "mistakes could have been made by anyone". His investigation and being relieved of his command, sent to hospital, then placed in arrest, caused him a great deal of "humility and embarassment". Although he was under a great deal of strain, he was not insane (R. 192). For three months he had been permitted no visitors, had not been permitted to leave camp, and had been put on various construction jobs with the same men he had formerly commanded, who missed him very much and frequently would ask him when he was returning to the organization. He now has six years in the Army and is 24 years of age. He wanted to impress the court that the charges against him are based upon the negligent handling of money and he has not deprived anyone of anything that belongs to them (R. 193).

5. The accused officer was found guilty of two Specifications of embezzlement from the 870th Port Company Unit Fund, of which he was custodian, in the sums of $45 and $25, in violation of Article of War 93 (Specifications 1 and 2, Charge I); of knowingly making and presenting a false voucher showing the purchase of cigarettes and sundries for his men from the Unit Fund, in violation of Article of War 95 (Specification, Charge II); of two Specifications of wrongfully taking and using money belonging to the Post Exchange, in the sums of $35 and $30, in violation of Article of War 96 (Specifications 4 and 5, Charge III); of wrongfully retaining in his possession, from 15 February to 31 March, $106.50 of the Unit Fund, which should have been deposited in a bank (Specification 3, Charge III) and of borrowing $10 and $30 from noncommissioned officers under his command, in violation of Article of War 96 (Specifications 1 and 2, Charge III).

The evidence clearly establishes that in April and May, 1945, while the accused was in command of the 870th Port Company at Wood Island Camp, Boston Port of Embarkation, Boston, Massachusetts, he took advantage of the fact that one Corporal Best, an enlisted man under his command, was in charge of the branch Post Exchange serving his area, to finance his personal needs by a continued series of raids on the Exchange cash register. The accused had no authorized connection whatever with the Exchange, but made himself fully at home there, going freely behind the counter and "helping out" with sales during rush periods, and familiarizing himself with that useful device, the cash register. The branch Exchange maintained in cash a daily change fund of $50, to make change on payments for purchases by customers. The soldier-manager, Corporal Best, was in charge of this fund and personally responsible for it. With Best's active or tacit permission, the accused would "borrow" small sums from this fund, sometimes by getting them from Best and sometimes by tapping the cash register himself in Best's absence and leaving signed notes or slips showing his abstractions, calling them to the attention of other enlisted Exchange clerks present. Best would keep track of these "loans" by notation in a pocket notebook, later lost and not in evidence. Just before periodic inventories, Best would call upon the accused to pay back the money so that the change fund would not be caught short. On the first two such occasions in evidence, about 10 April and again a few days later, the accused paid up by drawing checks on the Unit Fund, as its custodian, for $45 and $25 respectively, which restored the Exchange change fund without discovery of shortage. Then, to cover up his extractions from the Unit Fund, the accused made, and submitted with his accounts, a voucher showing a wholly spurious purchase of "cigarettes and sundries" for enlisted men, for $45 and $25. Upon inspection, this voucher was promptly questioned for want of any invoice to support it, so, in the absence on furlough of Corporal Best, the accused told the provisional battalion commander, who was auditing the accounts, that he had bought $70 worth of cigarettes, beer and cigars

beer and cigars for his men, from the Unit Fund, and the auditing officer, who likewise had no connection with the Exchange, was sufficiently credulous and naive to prepare sales slips on Post Exchange blank forms showing sales of $57.20, cigarettes, and $12.80, beer and cigars, to receipt them as "paid by check", and to sign Best's name to them as Post Exchange Manager, all in Best's absence and wholly without his authority.

The accused made a feeble effort, by unsworn statement, to support his voucher by asserting that he did buy the cigarettes, beer and cigars and distribute the cigarettes to his men at orientation lectures and the cigars and beer to his company baseball team, but he was woefully vague on details and no witness appeared to corroborate the distribution of such bounty. If it were true, witnesses should readily have been available. Best testified that the accused made no such purchases, and that the Unit Fund checks for $45 and $25 to the Exchange repaid the accused's own personal "borrowings" from the change fund in the cash register. The court believed that version. So do we.

Before investigation of the above matters brought discovery and unpleasant consequences, the accused continued tapping the Exchange change fund. By 28 April, he owed it $35. This time he responded with less alacrity to Best's request to pay up before inventory and paid only after the civilian Post Exchange representative had found the change fund short, but the accused did pay it with his own money. Not yet forewarned, his still continued "borrowings" from the till left him again indebted for $30 when Best went on furlough on 15 May after asking him to pay up, and the next day the Assistant Post Exchange Officer found the change fund $30 short. A clerk delegated by Best called him in, post haste, to make it good, which he did. The Assistant Exchange Officer then told him about the propriety of staying out of other people's money in cash registers. Having received this surprising intelligence, he was able to refrain from further pilfering in that convenient source of supply, especially, perhaps, as he was beginning to hear at about that time from the $70 Unit Fund voucher of the previous month.

That the taking and use by the accused of the money of the Exchange was wrongful is too obvious for discussion, as also that it constituted discreditable military misconduct violative of Article of War 96. Best had no right or authority whatever to authorize such taking and use of funds of the Exchange, entrusted to him for the Exchange's use, as Best well knew and the accused, in common sense and ordinary experience, must have known. Such authorization was wholly nugatory and void (Cf. CM 268259, Stevens, 44 BR 241; CM 267678, Rankin, 44 BR 57, 74).

The use of money from the Unit Fund to repay the accused's personal debt to the Exchange for money abstracted by him from its cash till clearly constituted embezzlement (Par. 149h, MCM 1928; CM 192530 (1930), Dig. Op. JAG 1912-40, sec. 451 (18)), and the submission of the spurious voucher as custodian of the Unit Fund clearly constituted a false official statement, in violation of Article of War 95.

The evidence further established, without contradiction, the commission by the accused of the three other offenses of which he was found guilty: two instances of borrowing money from enlisted men under his command, $10 from his first sergeant in January, 1945, and $30 from Technician Fourth Grade Harrison about 17 December, 1944, and one instance of holding in his personal possession $106.50 of the Unit Fund from 16 February to 31 March, 1945, when he was required by Army Regulations (Par. 16b, AR 210-50, 20 January 1945, and C 1, 19 February 1945) as by ordinary care and business practice, to deposit such funds in a bank, all violative of Article of War 96 as charged. The variance in the name of Harrison, erroneously specified as Harston, appears not to have misled the defense nor to have resulted injuriously to any substantial right of the accused. The same is true of minor variances in dates appearing in the record of trial.

6. The accused officer is 24 years of age, married but separated from his wife. He has a high school and business college education, completed in 1938. He served in enlisted status from 10 October, 1939, attaining the grade of technical sergeant, performing duty as stenographer at Headquarters, Panama Canal Department. He was appointed a temporary second lieutenant, Army of the United States, through Anti-Aircraft Artillery Officer Candidate School, Camp Davis, North Carolina, 12 June 1942, promoted to the grade of first lieutenant 26 January 1943 and to that of captain 17 August 1943. He has served as Battery Commander in training activities in a manner reported as excellent.

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 thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95, and is authorized upon conviction of violations of Article of War 93 or Article of War 96.

W. D. Pardee Jr., Judge Advocate

[illegible], Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 292400 1st Ind 14 DEC 1945

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Thomas J. Coates (O-1040511), 9200 TSU-TC, Hq, Boston Port of Embarkation, Army Base, Boston, Massachusetts.

2. Upon trial by general court-martial this officer was found guilty of embezzlement of $45 and $25 from the company Unit Fund, of which he was custodian, in violation of Article of War 93 (Specifications 1 and 2, Charge I); of knowingly making and presenting a false voucher for the expenditure of the same $45 and $25, representing that cigarettes and sundries for enlisted men were received for those sums, in violation of Article of War 95 (Specification, Charge II); of borrowing $10 and $30 from enlisted men under his command (Specifications 1 and 2, Charge III); of wrongfully retaining in his possession from 15 February to 31 March, 1945, $106.50 of the Unit Fund (Specification 3, Charge III); and of wrongfully taking and using $35 and $30, property of the Post Exchange (Specifications 4 and 5, Charge III), all in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for four years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, 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 sentence and to warrant confirmation of the sentence. I concur in that opinion.

The accused was commanding officer of the 870th Port Company, stationed at Wood Island Camp, Boston Port of Embarkation, Boston, Massachusetts, and custodian of the Unit Fund of that company. In December, 1944, he borrowed $30 from a noncommissioned officer of his company and in January 1945 he borrowed $10 from his first sergeant. He repaid both loans within a short time, but later than he had agreed to do. On 16 February, 1945, he received a check for $106.50 for the Unit Fund, which it was his duty under Army Regulations and good practice to deposit promptly in a bank. Instead, he cashed the check and held the money in his personal possession until 31 March, 1945, when he

finally deposited it at the same bank where he had cashed it a month and a half before. From about 1 April to 15 May, Corporal Ushry Best, an enlisted man under the accused's command, was employed as soldier-manager of the Wood Island branch of the Post Exchange, serving the area in which the accused's company was barracked, with three other enlisted men as clerks. The accused, who had no authorized connection with the Exchange, would go behind the counter and "help out" with sales during rush periods, and thus made himself familiar with the cash register. With Corporal Best's permission in some cases and tacit acquiescence in others, the accused took from a daily cash fund of $50, kept in the cash register as a change fund for use in making sales, money in various amounts for his personal use. Best kept track of these amounts in a pocket notebook, and would call upon the accused for payment in advance of periodic inventories or inspections by representatives of the Post Exchange. In this manner the accused took from the Exchange cash register $45 prior to 10 April 1945, $25 more within the next few days, $35 more by 28 April 1945 and $30 more by 15 May 1945. When Best demanded payment of the $45 and $25 in advance of inspections, the accused paid these sums to the Exchange by checks for those amounts, both dated 10 April 1945, drawn by him as custodian upon the bank account of the Unit Fund, thus diverting $70 of that fund to his personal use and committing the embezzlements charged. He then sought to conceal these diversions by making, and presenting with his Unit Fund accounts, a false voucher purporting to show purchases from the Exchange on 10 April 1945 of $45 and $25 worth of "cigarettes and sundries" for enlisted men of his company. No such purchases were made. On 28 April and 15 May, 1945, he failed to pay back to the Exchange, upon demand made by or for Corporal Best, the amounts of his abstractions, $35 and $30, in time to avoid discovery of the corresponding shortage in the change fund upon inspections on those dates, but did repay them after discovery, and, upon these occasions, apparently with his own money.

The case is one of abuse by a company commander of his military authority and of his trust to alleviate his constant petty financial embarrassment. I am of the opinion that the misconduct of the accused stems from inexperience and bad judgment rather than from criminal design, and that the embezzlement proved is purely technical. The accused's conduct was illegal and unethical, but he appears to be honest. He was reared in an orphanage and enlisted in the Regular Army in 1939 at the age of 18. In 1942 he was honorably discharged in the grade of Technical Sergeant to accept the appointment of a Second Lieutenant. Through his ability and efficiency he has become a Captain with excellent efficiency ratings. In his six years of enlisted and commissioned service, his record is clear. He is helping to support his mother who is an invalid.

After careful consideration of all the circumstances in this case, 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 the foregoing recommendation into effect, should it meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(Sentence confirmed but forfeitures and confinement remitted. Sentence as modified ordered executed. GCMO 515, 18 Dec 1945).

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

SPJGN-CM 292409

UNITED STATES	)	FIRST AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Seymour Johnson Field, North
Second Lieutenant ALBERT	)	Carolina, 9 October 1945.
L. SENN (0-2038941),	)	Dismissal, total forfeitures,
Air Corps.	)	and confinement for one (1)
	)	year.

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 93rd Article of War.

Specification: In that Second Lieutenant Albert L. Senn, Air Corps, 340th Bombardment Group, Seymour Johnson Field, North Carolina, did, at the Officers' Club, Seymour Johnson Field, North Carolina, on or about 15 September 1945, feloniously take, steal and carry away, about one hundred dollars ($100.00), lawful money of the United States, property of Mrs. Marie Grover Carruth.

The accused pleaded not guilty to, and was found guilty of, the Charge and Specification. He was sentenced to be "dishonorably discharged" the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for three years. The reviewing authority approved the

sentence, reduced the period of confinement to one year, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that, on Saturday evening, 15 September 1945, a party was in progress at the Officers' Club, Seymour Johnson Field, Goldsboro, North Carolina. There was dancing on the first floor of the Club and on the balcony above several groups of people were seated at tables placed there for the convenience of those not presently dancing. One such group included Major and Mrs. Ullman J. Carruth and another "Major and his wife" (R. 6, 9, 11). When, at about 11:45 o'clock, these two couples went down to the dance floor, Mrs. Carruth left her purse and gloves on the table at which she had been sitting. Second Lieutenant Harry R. Sinclair then observed the accused, carrying a lady's purse in his hand, enter the pool room from the adjacent balcony. Under the watchful eye of Sinclair, the accused was seen to return almost immediately to the balcony and, after placing the purse on a table, to "scoop up" another "black bag". His suspicions aroused, Sinclair, after the accused had gone down the stairway with purse in hand, reported his observations to several officers who were engaged in a card game on the balcony (R. 11, 17). These were Lieutenant Colonel James F. McCarthy, Jr., Major Albert E. Templin, Major James E. Egan, "Major Bates", Captain Ronald D. Shirlaw, and "Lieutenant McGinley" (R. 17, 19, 22, 24). They noticed that the accused reappeared shortly on the balcony and that, in an apparent attempt to place the purse on one of the tables, he dropped it to the floor. He then walked down the stairway to the dance floor and, after he had disappeared from view, the officers at the card table "began to take action." Lieutenant Colonel McCarthy and Major Templin were not successful in their attempt to follow the accused, but he was discovered in the cloak room a few minutes later by Major Egan and Captain Shirlaw. The latter addressed the accused with the question, "What do you mean by going through a woman's purse?", to which the accused, appearing "so drunk [that] he could not" talk, made no answer. In attempting to comply with a request to produce his "AGO card" by which his identity was established, he dropped "a lot of loose money" and a "large wad of money" on the floor. Captain Shirlaw recovered the "loose money" and gave it to Lieutenant DeMaestri, the accused's companion; Major Egan placed a twenty-dollar bill in the accused's billfold; and Lieutenant Colonel McCarthy, who had arrived on the scene by this time, returned the "wad of bills" to the accused's "left hand pocket" (R. 11, 12, 16, 17-28). The group moved from the cloak room to the Club office and the search of the accused's person was there "continued" (R. 23).

These events were reported to the officer in charge of the Club, Captain Roy P. Lacy, who, with Lieutenant Sinclair, recovered the purse which had been dropped by accused on the balcony floor. A search of the contents revealed money in the amount of $1.02 and a

letter bearing the name "Marie Carruth" (R. 14, 18, 27). Mrs. Carruth was thereupon paged and she identified the purse as her own. Examination showed the presence of her "red billfold," but missing was the sum of $150.00, consisting of seven twenty-dollar bills and one ten-dollar bill, which the wallet contained when Mrs. Carruth arrived at the Club that evening (R. 6-9, 18, 23, 27). It was her opinion that she had been on the dance floor some twenty or twenty-five minutes when called to the Club office (R. 6). A suggestion was made that "everyone search" the accused and, although about $51.00 was discovered on his person, the large bills which had been seen earlier could not be found (R. 18, 20, 25, 28). He was allowed to leave the Club office for a few minutes and, in his absence, a search was made of the raincoat which he had brought from the cloak room. Nothing was found in the pockets but, when Captain Shirlaw "shook it three or four times," five twenty-dollar bills "fell out of evidently the lining of the coat" (R. 18, 20, 26). The accused appeared to have been drinking heavily and was obviously under the influence of liquor, but, after being approached and questioned about the money, sobered "very rapidly" (R. 19, 25, 27). He was placed under arrest by the Provost Marshal at about 0130 hours (R. 29).

4. The accused, after his rights relative to testifying or remaining silent had been explained, elected to testify in his own behalf. On the night in question, he arrived at the Officers' Club at approximately six o'clock, ate his evening meal, and then walked up to the balcony to observe a card game which was in progress. When one of the players announced an intention to depart, the accused, expecting to enter the game, removed the money from his wallet and placed the currency in one of his pockets. The officer who had expected to leave the game apparently changed his mind, and the accused, at about 7:30 o'clock, walked from the balcony down to the bar. He did not return to the balcony at any time throughout the remainder of the evening. Having "checked" a "fifth" of liquor, "three-fifths full," at the bar, he spent the next two hours consuming the entire amount. At about 9:30 o'clock he encountered Lieutenant DeMaestri and remained in his company for the remainder of the evening. After imbibing "a few drinks," they left the bar and spent considerable time watching a card game being played at a table on "the edge of the dance floor." Friends of the accused who were members of his "old outfit overseas" were engaged in the game. During the course of the evening the accused walked away from the card table several times, once "to page Lieutenant Roberts as a joke," once at about 11:30 o'clock to get sandwiches, and once to visit the latrine. He was gone the last time for only four or five minutes and, upon returning to the table, suggested to DeMaestri that they take their departure. The two officers walked to the cloak room where the accused, being accosted by several officers, was asked to empty his pockets and to produce his "AGO" card. He was "pretty drunk" at the time and "didn't know what they were trying to get across." The money which "they said"

fell from his pocket he believed to be a portion of the sum of $138.00 which he had brought with him to the Club. He was later told that part of the recovered money was put in his wallet by DeMaestri and that the "wadded up" bills were placed in his pocket by another officer. The accused was not in the room when the money fell from his raincoat. At no time during the evening did he "handle any women's purses" (R. 37-43).

It was stipulated that the accused had received $50.00 by money order on 3 September 1945, and $121.90 as "regular pay," two days later (R. 30).

Colonel William F. Chapman, Commanding Officer of the accused, went to the Officers' Club when he heard that accused was in trouble. Colonel Chapman was impressed with the "difficulty" experienced by the officers who were "trying to piece together from what they had seen the identity of one who had handled a woman's purse" (R. 30).

First Lieutenant Norman R. DeMaestri spent most of the evening in question in the company of accused. They met in the bar of the Officers' Club at about 8:30 o'clock, had several drinks together, and, at approximately 10:00 o'clock, walked out of the bar and "stood around all the rest of the evening" observing a poker game. Around 11:20 o'clock the accused went to the bar for a drink; thirty minutes later he and DeMaestri went to the dining hall for sandwiches; and, at midnight, the accused again left the group, stating that he was going to the "men's room." Returning in about five minutes, he was observed walking from the direction of the bar and not from the direction of the stairway leading to the balcony (R. 32-34, 37). He suggested to DeMaestri that they take their departure, and, after finishing their drinks, the two officers walked to the cloak room, procured their "raincoats and hats," and were about to leave the building when the accused was stopped by several officers. He was "ordered" to produce his "AGO" card, and, without expressing actual consent to the search of his person, he "turned his pockets inside out" (R. 33, 34). DeMaestri, who testified that he did not see the accused on the balcony that evening, stated that he had no way of knowing the amount of money which the accused had in his possession at the time (R. 35). The witness overheard Lieutenant Sinclair make the remark that, because the "charge" was a serious one and due to his uncertainty as to the identity of the person involved, he was most reluctant to make a statement (R. 36). DeMaestri considered the accused "drunk" and "not sure of the things he was doing at the time" (R. 35, 37). The accused, who had been known to the witness for nine months, enjoyed a "good" reputation among the men of his organization (R. 33).

Lieutenants George A. Roberts and Lloyd S. Canon, who had

participated in the card game which had been played at a table on the first floor of the Officers' Club, recalled that the accused and DeMaestri spent most of the evening watching the game. The accused left the group once to page Roberts, another time to obtain sandwiches for the poker players, and "two or three times to go the latrine," remaining away the last time for about five minutes. Canon was of the opinion that "it would have been impossible" for the accused to purloin the money, as alleged, in this short period of time. Roberts believed the accused "very drunk" on the night in question. Both Roberts and Canon attested to the good character and financial integrity of the accused (R. 30, 31).

Captain Robert G. Woolcott, who had served, and shared the same quarters, with the accused for several months while overseas, had twice loaned money to him and, in both instances, was promptly repaid. Woolcott considered the accused honest (R. 31).

5. The Specification of the Charge alleges that the accused "did, at the Officers' Club, Seymour Johnson Field, North Carolina, on or about 15 September 1945, feloniously take, steal, and carry away about one hundred dollars ($100.00), lawful money of the United States, property of Mrs. Marie Grover Carruth."

The offense of larceny is defined as "the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein." (Par. 149g, MCM, 1928).

The evidence established beyond any question of doubt the taking and carrying away by trespass. Several officers were positive and unequivocal in identifying the accused as the person who had "handled" the purse, and Mrs. Carruth was no less certain in her conviction that currency in the amount of $150.00 had been removed from her pocketbook. The conclusion is inescapable that the "roll of bills", which fell from the accused's pocket almost immediately after he was observed with the purse, was the property of Mrs. Carruth.

Although the accused was shown to have been partially intoxicated, his actions in taking Mrs. Carruth's purse, of removing the money therefrom, and of then returning the purse to the place where he had taken it, reveals the carrying out of a plan requiring thought and comprehension, and warranted the court in finding that he was motivated by a specific intent permanently to appropriate the money taken. The evidence is legally sufficient, therefore, to sustain the court's findings of guilty and legally sufficient to sustain the sentence.

6. The accused is about 21 years of age. After completing Air Cadet

training, he was appointed a Flight Officer on 30 September 1944 and was commissioned a Second Lieutenant on 20 May 1945. For meritorious achievement while participating in aerial flights during attacks upon military objectives in the Mediterranean Theater of Operations, he was awarded the Air Medal and three Oak Leaf Clusters.

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.

Abner E. Lipscomb, Judge Advocate.

Robert Glamon, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 292409 1st Ind
Hq ASF, JAGO, Washington, D. C. JAN 11 1946
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 Albert L. Senn (0-2038941), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the larceny of $100 in currency, in violation of Article of War 93. He was sentenced to be "dishonorably discharged" the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for three 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. 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 spent the evening of 15 September 1945 at the Officers' Club at Seymour Johnson Field, North Carolina. He consumed several drinks of whiskey and, at about midnight, walked up to the balcony above the dance floor, there picked up a lady's purse, and carried it down to the first floor. He was seen within a few minutes to return to the balcony, to drop the purse on the floor, and walk to the cloak room below. He was followed there by several officers and, during the interrogation which followed, the accused produced a large amount of currency, amounting to at least $100.00. The owner of the purse, Mrs. Marie Grover Carruth, identified it and discovered that the sum of $150.00 was missing therefrom. She had left her purse on a balcony table approximately ten or fifteen minutes prior to the time it was taken by the accused. In view of the close sequence of events, the conclusion is inescapable that the "large wad of money" found on his person had been removed from the purse in question.

The conduct of the accused, prior to the commission of the present offense, was apparently exemplary. He received Air Cadet training, was appointed a Flight Officer, and subsequently received his commission as a Second Lieutenant. Because of his participation, as a bombardier, in some thirty-two combat missions in the Mediterranean Theater of Operations, he received the Air Medal with Oak Leaf Clusters. Several members of his overseas unit appeared as witnesses and testified that they considered him honest and his character good. The members of the court, in their recommendation for clemency, stated that the accused

had "always enjoyed a very good reputation among his associates and was generally considered to be a very excellent type of person." Finding that there was not a "sufficient degree of intoxication to negative the * * * intention" necessary for a conviction of larceny, the court, nevertheless, considered the offense "out of line with his known past reputation and character" and that the crime "would never have occurred but for the fact that at the time Lt. Senn had been drinking rather heavily." In view of the high standard of his past conduct, his excellent combat record, and the strong recommendation for clemency signed by every member of the court, I believe that clemency is justified. 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. Consideration has been given to a letter from the Honorable Emmet O'Neal, Member of Congress, the affidavit of Albert J. Senn, father of the accused, the letter of Attorney Neville Miller, and the statements of Sister Rebecca, Mrs. Gertrude Rasche, J. Evelyn Wells, and R. W. Murphy, recommending clemency.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

9 Incls
1 - Record of trial
2 - Form of action
3 - Ltr. fr. Hon. O'Neal
4 - Affidavit of Mr. A. J. Senn
5 - Ltr. fr. Mr. Neville Miller
6 - Statement of Sister Rebecca
7 - Statement of Mrs. Gertrude Rasche
8 - Statement of J. Evelyn Wells
9 - Statement of R. W. Murphy

(Sentence confirmed but forfeitures and confinement remitted. Sentence as modified ordered executed. GCMO 22, 25 Jan 1946).

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

SPJGQ - CM 292421

UNITED STATES v. First Lieutenant ALBERT M. BEATTY (0-1291764), Infantry.	FOURTH SERVICE COMMAND Trial by G.C.M., convened at Welch Convalescent Hospital, Daytona Beach, Florida, 16 October 1945. Dismissal and total forfeitures.

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OPINION of the BOARD OF REVIEW
PARTLOW, BIERER 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 Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant Albert M. Beatty, Infantry Unassigned, Attached Detachment of Patients, Welch Convalescent Hospital, Daytona Beach, Florida, did, at Daytona Beach, Florida, on or about 6 October 1945, wrongfully strike Private First Class Warren Brooks in the face with his fist.

He pleaded not guilty to and was found guilty of the Specification and the Charge. 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, recommended that the execution of the sentence be suspended during good behaviour and forwarded the record of trial for action under Article of War 48.

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

Private First Class Brooks testified that on the night of 6 October 1945 he had just stepped about four feet inside the doorway of the Log Cabin Bar and Grill, Daytona Beach, Florida, when he saw

the accused swing at him, was struck and went down (R. 5, 7, 8). The accused struck him twice with his fist, once on the neck and once on the chin (R. 6). He did not know the accused and had never seen him before this happening (R. 9, 10). After entering the Log Cabin he had no conversation with anyone prior to being struck (R. 7, 9). At the time that Private First Class Brooks was struck he did not know that the accused was a lieutenant (R. 8). As he got up he heard the accused say that "he didn't know why he did it" (R. 8). Prior to coming to the Log Cabin Private First Class Brooks had been at the Piggie Wiggie Bar on the "Mainland" and had had five or six beers earlier in the evening (R. 6, 7). At the time he was struck he was wearing a garrison cap (R. 9). Private First Class Bridges, who was behind Private First Class Brooks when he entered the Log Cabin, corroborated the testimony of the latter as to the manner in which the accused struck him as he stepped inside the door (R. 10, 11), that there was no conversation before the accused struck him (R. 12), and that the accused said that he did not know why he hit Private First Class Brooks (R. 12). He further testified that the accused struck Private First Class Brooks twice, first with his left and then with his right fist (R. 12).

At about 2200 hours on the night of 6 October 1945 Corporal Gordon and Private First Class Fiorvante, military policemen on town patrol, entered the Log Cabin Bar and Grill for the purpose of checking it (R. 13, 15). When they entered the accused, First Lieutenant Beatty, spoke to Private First Class Fiorvante near the entrance (R. 15, 28). Corporal Gordon testified that when Private First Class Brooks came through the door wearing a garrison cap without a grommet the accused said to him,"'Where is the grommet for your hat?', and the soldier said, 'What?' or something to that effect as if he didn't know what he meant" (R. 13, 14, 28). The accused then said, "As your superior officer I give you a direct order to tell me where your grommet is" (R. 13). The accused then struck the enlisted man on the chin with his right fist and he fell to the floor (R. 13, 14, 27). If a blow had been struck by the accused with his left hand he might not have seen it because of the way the soldier fell (R. 27). The enlisted man did not strike nor make any move to strike the accused, and he would have seen him if he had attempted to strike the accused (R. 27). At the time he was struck, Private First Class Brooks had his arms folded (R. 28), Private First Class Fiorvante, who was talking to the accused, testified that when Private First Class Brooks came through the doorway the accused took his (Brooks') hat off and asked where the grommet was and said, "As your superior officer I demand to know where it is at" (R. 16). The soldier was leaning against the wall with his arms folded and made no attempt to strike the accused (R. 16, 29, 30). The accused struck Private First Class Brooks in the face with his right fist and then with his left fist (R. 16).

The accused voluntarily made a sworn statement to Second Lieutenant Hutchins, the Investigating Officer (R. 18; Pros. Ex. 1). He is a patient at the Welch Convalescent Hospital. On the evening of 6 October 1945 he had gone into the Log Cabin Bar and Grill to speak with the bartender whom he had previously met while on military police duty. He had two or three beers and was calling a cab for some enlisted men and himself to return to camp. At the exit he met Military Policemen Gordon and Fiorvante and was talking to Fiorvante when an enlisted man entered. The accused asked the enlisted man whether he had a grommet because the lack of a grommet was a violation of uniform regulations. It was his duty as an officer to notice uniform violations. He did not take the cap from the man's head nor did he use abusive language. The enlisted man appeared to have been drinking but was not drunk. The enlisted man raised his hand as if to strike a blow and the accused blocked the blow with his left hand and followed through with his right striking the man once, although the parry with his left "may have seemed to be a blow but was not". The accused was placed under arrest by the military police, was not drunk or disorderly and did not act in any manner to bring discredit to the service. Due to the fact that he is very nervous he felt that he was acting in self-defense (Pros. Ex. 1).

4. Private Savelle was a witness for the accused. On the night of 6 October 1945 he was in the Log Cabin off duty but he had not been drinking (R. 23). The accused came into the bar room from the dance hall and he stopped at the door with the soldier in front of him (R. 23, 24). He did not hear any argument but "everybody started walking that way and I noticed them" (R. 26). The soldier swung at the accused with his right hand but the accused "knocked it off with his left and hit him with his right", hitting him in the jaw (R. 23, 25). Private Savelle was about 10 or 12 feet away and had an unobstructed view of the accused and the soldier (R. 26). He saw the two military policemen standing about "two yards away" from the accused (R. 24) but he did not notice whether the soldier was wearing a cap (R. 25). He could tell from the accused's uniform that he was a first lieutenant (R. 26).

The accused testified (R. 18). He entered the Army on 19 February 1942 and had Infantry basic training at Camp Roberts (R. 18, 19). In June 1942 he went to Officer Candidate School at Fort Benning where stress was placed on hand to hand combat (R. 19). He was taught to make use of reflexes "without ever stopping to think so it would become automatic" (R. 19). While he was at Camp Butner with the 78th Division he took a two weeks course in hand to hand combat at the University of North Carolina in which automatic reflex was stressed (R. 19). Upon his return to Camp Butner he taught hand to hand combat and judo for a month, after which he was sent to the Parachute School at Fort Benning (R. 20). Here again he was taught hand to hand combat and automatic reflex-action (R. 20). In North Africa the accused was

injured in a parachute jump and returned to a hospital in the United States (R. 20). Upon his recovery he went to Parachute School at Fort Benning where he taught "co-ordination exercises, some hand to hand combat and judo to prepare men for their future jumps" (R. 20). He volunteered for overseas duty and joined the 503d Parachute Regiment in the South Pacific (R. 20). After being severely wounded on Negros Island he was again returned to the United States (R. 20). On the night of 6 October 1945 he had gone to the Log Cabin bar to visit the bartender and his wife whom he had met while on military police duty (R. 21, 22). While he was drinking a bottle of beer an enlisted man asked him to call a cab and on his way back the accused stopped to talk to Fiorvante. A soldier came in with a garrison style cap without a wire in the top and the accused said, "Soldier, where is the wire for your cap?" (R. 21). The soldier "acted as though he didn't know and I tried to explain to him to the best of my ability just what I meant and all of a sudden he swung at me and I blocked his blow with my left and automatically followed with my right" striking him on the chin (R. 21, 22). The accused's "nerves are pretty badly shot" (R. 21). He had never seen the enlisted man before and no remarks had been directed to him by the enlisted man (R. 21).

5. The accused was tried for and found guilty of wrongfully striking an enlisted man in the face with his fist in violation of Article of War 96. It is clear from the testimony of the witnesses and admitted by the accused that he struck the blow, but the events leading up to the striking are disputed. According to Private First Class Brooks, the victim, and his companion, Private First Class Bridges, the accused struck Brooks twice, just as Brooks had entered the Log Cabin Bar and before there was any conversation between Brooks and the accused. The two military policemen, Gordon and Fiorvante, and the accused, testified that the accused questioned Brooks about the absence of a grommet from his garrison cap before striking him. The military policemen, however, testified that Private First Class Brooks had his arms folded when the accused struck him. The accused's defense of self-defense was based on the fact that Brooks raised his hand as if to strike the accused, and the accused because of his training in hand to hand combat and judo automatically warded off the blow with his left hand and struck Brooks with his right. Private Savelle testified that Brooks swung at the accused. The prosecution's witnesses testified that after the accused had struck Brooks he said he did not know why he did it but the accused denied making the statement. Where, as in this case, there is a conflict in the testimony, the findings of the trial court, while not conclusive on the Board of Review, are entitled to great weight because it had the opportunity to see and hear the witnesses (CM 243466, Calder, 27 BR 367, 382, 3 Bull. JAG 231). The trial court accepted the testimony of the prosecution's witnesses and rejected that of the accused and his witness, and there is no compelling reason to disturb these findings. An assault and battery committed by a member of the military establishment is conduct of a nature to bring discredit upon the military service, and when committed by an officer upon the person

of an enlisted man is a disorder to the prejudice of good order and military discipline. In both instances it is a violation of Article of War 96.

6. War Department records show that the accused is 32 years of age and married. He has three children by his first wife. He is a native of Texas and a resident of San Antonio, Texas. He is a graduate of the San Antonio Fire College. In civilian life he was employed as a painter, for 18 months he was engaged in business as a general contractor, and from June 1941 to February 1942 he was employed by the City of San Antonio, Texas, as a fireman. He served in enlisted status in the Regular Army from 31 August 1935 to 30 August 1938, attaining the grade of private first class, in the Texas National Guard from 1 September 1938 to 10 November 1940, and in the Army of the United States from 19 February 1942 to 27 August 1942. On 28 August 1942 he was appointed a second lieutenant in the Army of the United States upon graduation from Infantry Officer Candidate School, The Infantry School, Fort Benning, Georgia, and ordered to active duty in the Infantry. He was promoted to the grade of first lieutenant on 4 January 1943. He has served in commissioned status as a platoon officer, platoon leader, assistant platoon leader, company officer, battalion supply officer and assistant training officer. He has received two performance ratings of "Very Satisfactory" and four of "Satisfactory" to 8 December 1944. He served overseas in North Africa and the Southwest Pacific. On 25 April 1945 he was wounded on Negros Island, Philippine Islands, and was awarded the Purple Heart.

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

W. Parlow Jr., Judge Advocate

A. E. Pierce, Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 292421 1st Ind

Hq ASF, JAGO, Washington 25, D. C. NOV 28 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 Albert M. Beatty (0-1291764), Infantry (Parachute).

2. Upon trial by general court-martial this officer was found guilty of wrongfully striking an enlisted man in the face with his fist, 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, recommended that the execution of the sentence be suspended during good behavior and forwarded the record of trial for action under Article of War 48.

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

The accused officer was in the Log Cabin Bar and Grill, Daytona Beach, Florida, on the night of 6 October 1945. It is undisputed that the accused struck Private First Class Brooks in the face with his fists. According to Private First Class Brooks and his companion the accused struck him just as he entered the Log Cabin Bar and Grill before there was any conversation between them. Two military policemen who were present testified that the accused questioned Private First Class Brooks about the absence of a grommet from his service cap and that the enlisted man had his arms folded when he was struck. According to the accused he was questioning Private First Class Brooks about the absence of the grommet from his service cap when the enlisted man raised his hand as if to strike him, and the accused automatically warded off the blow with his left hand and struck the enlisted man with his right. One witness testified that Private First Class Brooks swung at the accused.

This is a case of a misunderstanding in a bar in which the participants, although not drunk, had been drinking. The conflicting testimony shows definitely that there was no ill feeling between the accused and the enlisted man, who were unacquainted. The accused is a returned combat officer, trained in hand to hand combat, who claimed that he reacted automatically to what he thought was an attempt by the enlisted man to strike him. The court resolved the conflicting testimony against the accused. He has served as a paratrooper in the North African and Southwest Pacific Theaters, and was returned to the United States as a result of an injury in a jump in the former theater,

and a wound received in the latter theater. I recommend that the sentence be confirmed, but in view of the combat record of the accused and all the surrounding circumstances, that it be commuted to a reprimand and a forfeiture of $100, and that the sentence as thus commuted be carried into execution.

4. Consideration has been given to the attached letter from the Honorable Paul J. Kilday, Member of Congress, dated 2 November 1945, addressed to The Judge Advocate General.

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. Army
Acting The Judge Advocate General

3 Incls
1 - Record of trial
2 - Form of action
3 - Ltr fr Cong. Kilday dated 2 Nov 45

(Sentence confirmed, but commuted to a reprimand and forfeiture of $100. Sentence as commuted ordered executed. GCMO 500, 5 Dec 1945).

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

SPJGK - CM 292432

19 NOV 1945

UNITED STATES	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	)	
First Lieutenant JOHN L. SWAN (0-819207), Air Corps.	)	Trial by G.C.M., convened at Randolph Field, Texas, 18 October 1945. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
MOYSE, KUDER and WINGO, 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 First Lieutenant John L. Swan, Air Corps, did, at Waco, Texas, on or about 27 August 1945, wrongfully take and use, without the consent of the owner, a certain automobile, to-wit: a Pontiac Sedan, the property of George Barber, of a value of more than $50.00.

He pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence was introduced of two previous convictions by general court-martial, one on 13 January 1945 of being drunk and disorderly on 25 December 1944 in a public place in violation of Article of War 96, for which he was sentenced to forfeit $75 of his pay per month for six months, and the other on 24 April 1945 of being drunk in station and of making a false official statement on 29 March 1945, for which he was sentenced to dismissal and total forfeitures. The latter sentence was commuted by the confirming authority to forfeiture of $75 of his pay per month for six months. In the present 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. Seven of the nine members of the court joined the defense counsel, assistant defense counsel, trial judge advocate, and assistant trial judge advocate in recommending clemency. 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.

It was stipulated that at all times since being commissioned on 5 December 1943 accused has been and is now a member of the armed forces of the United States and as such a person subject to military law and disciplinary action under the Articles of War (Pros. Ex. 1).

It was further stipulated that if certain designated witnesses were present they would testify in substance as follows (R. 7, Pros. Ex. 1):

On 27 August 1945 Mr. George Barber of Waco, Texas, was the owner of a 1937 black Pontiac four-door sedan bearing Texas license EH-3457 which had a market value of more than $50.00. At approximately 9 P.M. on that date he parked this automobile on 11th Street near Austin Avenue in Waco while he went into a grocery store with his wife and child. He had authorized no one to use or take the car, but on emerging from the store about ten minutes later he discovered that it was missing. He immediately telephoned one of his neighbors, Mr. Irvin O. Olsen, about his loss and requested Mr. Olsen to pick up him and his family. At about 9 o'clock that night Miss Alma Smith and Mr. A. Connell were seated at the corner of 20th and Morrow Streets, Waco, waiting for a bus when accused drove up in a 1937 Pontiac four-door sedan and stopped near them. After accused had been there for about a minute, on Miss Smith's suggestion Mr. Connell asked accused what he wanted. Accused thereupon asked if they were going to town. They entered the car and drove off with accused, whereupon accused stated that he would drop them off at 18th and Austin Avenue inasmuch as he was going to the Avalon Night Club. He then drove to a filling station at "the Circle" and requested Mr. Connell to buy him some gas. Mr. Connell agreed to buy two gallons for him, but after this had been placed in the car accused had difficulty in getting the car started. In the meanwhile Mr. Olsen, who was responding to Mr. Barber's request, had seen accused drive into the station in a car which he recognized as that of Mr. Barber, pulled up behind him and told the attendant to call the police. On the pretext that he could not get his own car started, Mr. Olsen, who as a part of his plan to obtain a little time had offered to push accused's car, stalled a sufficiently long time to permit police officers to reach the filling station. Upon their arrival they placed the accused and the two civilian occupants of the car under arrest. Mr. Barber's car was driven by the police to the police station where it was identified by and turned over to Mr. Barber.

4. For the defense.

The defense offered no evidence, but after an explanation of his rights accused elected to make an unsworn written statement which was read to the court by one of the defense counsel (Def. Ex. 1, R. 7,8). There were attached to this statement and received as a part thereof without objection by the prosecution reports from two psychiatrists, neither of whom, however, was called as a witness by the defense. Accused gave what purported to be a sketch of his life and a part of his family history. Accused's father,

who after years of hard work for a comparatively low remuneration had become unexpectedly wealthy, late in life married an English immigrant girl, much younger than he, employed by him to keep house and to care for the sick daughter of a friend whom he had taken into his household. Four children were born of this marriage, two boys and two girls. One of the latter died in infancy. Accused was born in 1922 when his father was about 60 years of age. His father was overindulgent with him, but he felt that his mother, who severely punished him as a child even for "insignificant misdeeds," was "unjust and unreasonable" and he grew to dislike her. To relieve his mother of the burden of caring for him, he was sent to a military school when he was about 12 years of age, but ran away from the school after a short period of time. He was later placed in the Kemper School in Missouri where he "constantly got into trouble and would run away." After he quit this school his mother placed him with "a psychiatrist in Florida to live with him." He remained with this "psychiatrist" for a year and a half and then being unable "to get along" with him went "into the magazine selling," traveling with a "crew." "This crew taught me all the bad tricks of a slick magazine salesman operating from office to office. I got into trouble quite frequently." Accused stated that he got married in 1941 and having become estranged from his parents went to live in Akron, Ohio, where "he struggled along until drafted in 1943." Two children have been born of this marriage. A psychiatrist whom he consulted told him that he had an "acute inferiority complex" and would never get along in the Army but "would be court-martialed often." Three months after being drafted accused went into pilot training and after eleven months was commissioned. He thereafter went "overseas with a feeling that it would be best for all if I were killed while fighting." He was pilot or co-pilot on 31 bombing missions and received the Distinguished Flying Cross and the Air Medal with Three Clusters and Two Battle Stars. While in England he drank heavily and misappropriated jeeps for his own use. Since his return to the United States and assignment to camps in Texas, he had had little or no work and too much idle time. He got drunk last Christmas, "struck an M.P." and "was court-martialed and fined." On a subsequent occasion while drunk he went into a "WAC barrack at Waco with another officer" where "they did nothing improper." However, the "M.P's were called," and accused was "sentenced to dismissal for this prank, and that was remitted to a fine on review." Recently he "was in the escapade," out of which grew the present charge.

Accused further stated that his father's father went "crazy" at about age 40 and quit his job as a mechanic; that one of his father's brothers was "crazy" from early childhood, never worked, and at the age of 78 was receiving an old age pension from the state; and that another brother of his father had repeated the actions of accused's grandfather and had been supported by his wife since he was 40 years of age. Accused ascribed no abnormality to his father, who died in February 1944 at the age of 81, but indicated that in his opinion his mother had decided peculiarities. His mother had inherited all of his father's estate and since the latter's death "would have nothing to do" with accused. Accused himself had been "suspected of not being normal

and had been examined by Army psychiatrists." At the suggestion of his counsel he had been examined by civilian psychiatrists whose reports and conclusions were attached to his unsworn statement.

After charges had been filed against accused, at the suggestion of his counsel, he was examined by Dr. Titus H. Harris, Professor of Neuro-psychiatry at the Medical Branch of the University of Texas, Galveston, Texas, who appears likewise to be engaged in the practice of neurology and psychiatry as a member of a firm of doctors, and by Dr. James P. Malloy, described by accused in his unsworn statement as "a psychiatrist of Houston, Texas." Based on their examination of accused and information furnished them by accused and his cousin, Mr. Eldridge, both diagnosed accused's condition as that of "constitutional psychopathic inferiority." In a written report dated 28 December 1944 Dr. Harris made the following comment:

> "It is very apparent from the above history and Rorschach interpretation that this patient has a personality structure that should be classified as a constitutional psychopathic inferior. The history would imply, too, that there are ample reasons for an inherited inferior constitution and, certainly, the setting in which this young man grew up was very unsatisfactory and greatly contributed to his present very inadequate personality."

On 4 October 1945, in reply to a telegram from Mr. John S. Eldridge, civilian counsel for, and a cousin of accused, Dr. Harris expressed views as follows:

> "In my examination of Lt. John L. Swan, I diagnosed his condition as that of a constitutional psychopathic inferior. This would imply to me, from the medical standpoint, that the behavior of this individual is motivated by unconscious drives over which the patient has no control, and, therefore, the individual would be unable to resist irregular activities. From a strictly legal standpoint, however, the patient does know right from wrong and I believe, therefore, is held to be legally responsible."

Pertinent to the offense with which he is charged, Dr. Harris reported that the following statement was made to him by accused:

> "Since coming back to the States, he has been in various instructor schools, was in Waco for about five months and then was sent to San Antonio. He and a friend, finding nothing to do in San Antonio one week-end, decided to go to Waco. They picked up their girl friends and went to the hotel for a couple of days. He says that they drank very heavily during this time. Finally, for some reason, his girl friend got angry and went home. The other boy got angry and accused the patient of breaking up the party, so the patient decided to go over to his girl friend's house and see her. She lived some distance from the hotel and, while walking down a

sidestreet, the patient saw a car and casually noted the keys were in it. Then, he said, he got that 'strange feeling like you get when you're startled.' He says that he has this every time he has stolen a car. He says he never thinks of consequences at the time he does the deed. He got into the car and drove to the girl's house but she was gone. He knew of a honky-tonk where she usually hung around and he started there. On the way, he stopped to get gas and picked up a couple of hitch-hikers, one of whom recognized the car and when they reached the honkytonk called the police. The patient was arrested shortly thereafter and turned over to the M.P."

In his original report on 24 September 1945, Dr. Malloy reached these conclusions with regard to accused:

"He strikes me as a young man who has been rather torn by inconsistent training and by discontent with himself, and by periodic spells of moodiness especially in recent months. In view of this, I feel that if it is at all possible, he should either be placed in an army psychiatric hospital for treatment of his personality disorder, or he should be returned to civilian life with the least possible stigma attached to him. I do not know how successful treatments might prove to be or how protracted, but to some extent I share his cousin's feeling that unless he can build a better personality structure, his return to civilian life might continue some of his poor adjustment."

This was supplemented by the following letter to Mr. Eldridge dated October 3, 1945:

"Your telegram arrived today.

"Your question about Lieut. Swans' capacity to keep from doing wrong on August 27, 1945 and on the date I examined him is a very difficult question to answer.

"In the abstract, so far as intellectual perception is concerned I feel that we may assume that he had capacity to know what he was doing (unless he was intoxicated at the time) and to know if the thing he was doing was right or wrong. This would answer the usual legal question about 'insanity.' In the concrete, however, I think that such questions are not answered by 'yes' or 'no.' I think that these matters are not 'all or none', 'black or white,' matters but that they involve degrees of awareness and degrees of strength of various impulses (often with subconscious elements) and degress of self-control. Thus, I feel that there are degrees of responsibility for actions. I believe that Lieut. Swan, during the last eight or ten months, has been under various inner strains which have increased the strength of his impulses and lowered the strength of his self-control. The result is a lessened capacity to avoid some wrong acts.

"He is not insane in the legal sense but he is not properly considered as fully responsible for some wrong acts as would be a stable person, little affected by subconscious elements, who calmly considers and plans his actions."

5. For the prosecution in rebuttal.

Lieutenant Colonel Robert C. Anderson, Medical Corps, School of Aviation Medicine, whose qualification as an expert in the field of neuro-psychiatry was admitted by the defense (R. 9), testified that he had recently examined the accused and that his diagnosis was "psychopathic personality" (R. 9-10). In his opinion, while the accused does not learn from or through experience and has defective judgment "as guaged by recognized standards" (R. 14), accused is an individual of average intelligence and has the mental capacity to know the difference between right and wrong, to adhere to the right, and to cooperate in his defense (R. 9-10).

6. The record conclusively establishes that, as charged, accused did, at Waco, Texas, on 27 August 1945, wrongfully take and use a Pontiac sedan, the property of Mr. George Barber, of a value of more than $50.00, without Mr. Barber's consent. His action, therefore, is an offense under Article of War 96 (CM 239778, Aquino, 25 B.R. 267).

The defense sought to avoid punishment on the suggested theory that accused was not mentally responsible for his misconduct. No evidence was offered in support of this contention, the defense relying solely on an unsworn statement by accused, read to the court by one of his counsel, to which were attached reports made by two psychiatrists whose conclusions were to a large extent dependent upon information furnished them, of which they had no personal knowledge. An unsworn statement is not evidence, but is to be given such consideration as the court deems warranted (par. 76, MCM 1928). Certainly statements by third persons attached to such an unsworn statement, even under a strained interpretation of the liberal rules allowing an unsworn statement to be made by an accused, do not attain the dignity of evidence. The court was not required to give any more weight to the reports attached to the unsworn statement than to the statement itself. Neither psychiatrist was called as a witness by the defense, and, consequently, no opportunity was afforded the prosecution or the court to inquire into the accuracy of their conclusions. But even if the reports are given evidentiary weight, there is nothing in them which induces the belief and certainly nothing which compels a finding that accused is mentally incapable of distinguishing between right and wrong and of adhering to the right. Opposed to the guarded views as to accused's mental responsibility from a legal viewpoint, contained in these reports, is the positive testimony in rebuttal of Lieutenant Colonel Anderson, whose qualifications as an expert in psychiatric fields were admitted by the defense, that accused, although possessed of a psychopathic personality, could distinguish between right and wrong and could adhere to the right. Even accepting as evidence the statements offered by the accused, the picture, as presented, is that of a young man of psychopathic personality but of average

intelligence, who, not learning from experience, does not hesitate to indulge in illegal activities in order to gratify his momentary whims or to accomplish his immediate purposes, regardless of the consequences of his acts or the danger of punishment entailed by their commission. Such a state of mind does not constitute a psychosis nor does it render the offender unamenable to law or immune to punishment (par. 4d, TB MED 201, 1 Oct 1945). By its findings the court concluded that the defense failed to overcome the presumption of sanity which exists until a reasonable doubt has been raised by the defense or the prosecution (par. 63, MCM, 1928, par. 2b, TB MED 201, supra). The Board of Review concurs in that conclusion and holds that the record of trial is legally sufficient to show that accused was mentally responsible for the offense of which he was found guilty.

7. A combined recommendation and plea for clemency was made to the reviewing authority by the personnel of the prosecution and the defense and by seven of the nine members of the court. This plea or recommendation was based on accused's excellent combat record, the failure of the military authorities to give him an appropriate duty assignment, the conclusion of the psychiatrists that he is a constitutional psychopath who cannot learn by experience, even when punishment results from his actions, and by the lack of knowledge by the signers of the provisions of TB MED 201, issued by the War Department shortly before the trial, which empowers a court-martial in fixing a sentence to take into consideration any mental defect from which the accused may be suffering (par. 2d). The reviewing authority, in approving the sentence, remitted the confinement.

8. Consideration has been given to oral argument made to the Board of Review by Mr. John S. Eldridge, civilian counsel for accused, at a special hearing on 6 November 1945.

9. War Department records show that this officer is 23 years and 3 months of age, is married and has one child. (In his unsworn statement he declared that he now has two children.) He attended high school for three years and was employed in an airplane factory during the summer of 1942. He entered the military service on 22 October 1942 as an enlisted man, later transferred to the aviation cadet program, completed his pilot training, and was commissioned a second lieutenant on 8 December 1943. In April 1944 he was transferred to the European Theater of Operations and served in combat until August 1944. Upon his return to the United States he was assigned to the Eastern Flying Training Command, from which he was later transferred to the Central Instructor School, Randolph Field, Texas. On 6 January 1945 he was eliminated from the Basic Single Engine Instructors Course for failure to maintain normal progress. He was awarded the Distinguished Flying Cross and the Air Medal with three Oak Leaf Clusters. He was promoted to first lieutenant, 10 July 1944. He was twice tried and convicted by a general court-martial, as detailed in paragraph two of this opinion.

10. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed 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 96.

Thomas Moyse, Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 292432 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JAN 15 1946

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 John L. Swan (O-819207), Air Corps.

2. Upon trial by general court-martial this officer pleaded not guilty to and was found guilty of wrongfully taking and using an automobile without the consent of the owner at Waco, Texas, on or about 27 August 1945, in violation of Article of War 96. Evidence was introduced of two prior convictions by general court-martial, one on 13 January 1945 of being drunk and disorderly on 25 December 1944 in a public place in violation of Article of War 96, for which he was sentenced to forfeit $75 of his pay per month for six months, and the other on 24 April 1945 of being drunk in station and of making a false official statement on 29 March 1945, for which he was sentenced to dismissal and total forfeitures. The latter sentence was commuted by the confirming authority to forfeiture of $75 of his pay per month for six months. In the present 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. Seven of the nine members of the court joined the defense counsel, assistant defense counsel, trial judge advocate, and assistant trial judge advocate in recommending clemency. 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 as approved by the reviewing authority and to warrant confirmation of the sentence.

On 27 August 1945, the owner of a Pontiac sedan, of a value of more than fifty dollars, left it on a street in Waco, Texas, while he went into a grocery store. Upon emerging a few minutes later he found the car missing. A neighbor of the owner, to whom the owner had reported the loss, recognized the car as it was being driven into a filling station by the accused and had the police notified. Accused was arrested and the car was returned to its owner within a half hour after he discovered its loss. No permission had been given accused to use the car. Accused offered no evidence to offset this convincing proof of his guilt, but elected to have

one of his counsel read an unsworn statement signed by him. This statement purported to contain a sketch of accused's life and a part of his family history, apparently for the purpose of laying the basis for a defense of mental irresponsibility. Attached to this unsworn statement were reports from two civilian psychiatrists, who classified accused as a constitutional psychopath, and, without contending that a psychosis existed, expressed some uncertainty as to his responsibility for his criminal activities from a medical viewpoint. Neither psychiatrist was offered as a witness. In rebuttal an officer of the Medical Corps, assigned to the Aviation School of Medicine, whose qualifications in the field of psychiatry were admitted by the defense, testified that while he classified accused as a constitutional psychopath, accused was able to distinguish between right and wrong and to adhere to the right.

This is the third time within less than a year that accused has been tried and convicted by a general court-martial. In addition the Staff Judge Advocate in his review stated that on 30 June 1945 he received punishment under Article of War 104 for "attempting to hitch-hike and throwing rocks at passing automobiles," and that as a result on 14 August 1945 he "met" a Reclassification Board, which recommended that he be separated from the service "by discharge without specification as to the character thereof." Not only is there no proof that accused is suffering from any mental illness which excuses his misconduct, but the report of his physical examination on 27 October 1943, which forms a part of his official 201 file in the Office of The Adjutant General, shows that, contrary to the intimations in his unsworn statement, he denied on that date the existence of "*** phobias, anxiety trends, irritability, apathy, elation, depression, sensory disturbances ***," and declared that his family history was negative. In addition, at the request of civilian counsel for the accused, Mr. John S. Eldridge, to whom I gave a special hearing on 28 November 1945, the record of trial and a booklet containing accused's unsworn statement and the reports from the two civilian psychiatrists who examined accused were submitted to the Neuropsychiatry Division, Surgeon General's Office. The conclusion reached by that Division, as will appear from the report which has been attached to the record, is that while accused is "an individual with defective judgment, who is impulsive, acts spontaneously with impaired judgment and without thought of consequence," he is "not different from many who although defective are required to carry the burden of responsibility for their acts, nor from the majority of offenders," and "it would be difficult to conclude that he had an irrestible impulse which caused him to do the act with which he is charged." Accused has clearly demonstrated that he has no appreciation of his obligations and is not worthy of continuing as an officer in the Army of the United States. Within three months after having been afforded a second chance by the action of the confirming authority in commuting a sentence of dismissal and total forfeitures to forfeiture of $75 of his pay per month for six months, he committed the offense of which he was convicted in the present case. Accused participated in 31 combat missions and was awarded the Distinguished Flying Cross and Air Medal

with three clusters, but despite this excellent combat record, in view of his repeated misconduct, 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. Consideration has been given to a combined plea and recommendation for clemency to the reviewing authority by the personnel of the prosecution and the defense and seven of the nine members of the general court-martial, and to the oral argument made before the Board of Review by civilian counsel for the defense, Mr. John S. Eldridge, on 6 November 1945.

5. 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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed but the forfeitures are remitted. GCMO 24, 25 Jan 1946).

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

SPJGN-CM 292466

UNITED STATES	)	TWENTIETH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	APO #334, 26-27 September
First Lieutenant HARRY A.	)	1945. Dismissal.
YOUNG (0-570891), 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 96th Article of War.

Specification: In that First Lieutenant Harry A. Young, Headquarters, 19th Bombardment Group, did, at Guam, Marianas Islands, on or about 14 August 1945, wrongfully drink intoxicating liquor with Private First Class Ernest L. Stanley, an enlisted man.

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

Specification: In that First Lieutenant Harry A. Young, Headquarters, 19th Bombardment Group, did, in conjunction with Private First Class Ernest L. Stanley, 30th Bombardment Squadron, 19th Bombardment Group, at Guam, Marianas Islands, on or about 14 August 1945, feloniously take, steal, and carry away one Agfa camera, value about $25.00, one camera filter, value about $1.50, six quarts of whiskey, value about $9.00, one foot locker, of some value, one navigator stop watch and case, value about $14.25, and about $195.00, lawful money of the United States, the property of First Lieutenant Malcolm G. Wooldridge.

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, to forfeit all pay and allowances due or to become due, and to be confined at such place as the reviewing authority might direct for one year. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that, after arriving at APO 334, North Field, Guam, the accused and Private First Class Ernest L. Stanley became acquainted with one another. Soon their friendship transcended their respective duties at the motor pool and extended to social matters. After seeing the accused on the morning of 14 August 1945, Stanley, early on the afternoon of the same day, set out to purchase some whiskey. Stanley's first port of call was the quonset hut occupied by First Lieutenant Malcolm G. Wooldridge, who was about to depart on a mission. Lieutenant Wooldridge had several bottles of whiskey in his footlocker, all of which were clearly visible to Stanley, but, upon being solicited, refused to sell any. Persisting in his mission, Stanley proceeded to the officers club and inquired of another officer whether he knew where whiskey could be purchased. The officer replied that "he did but it would cost $25.00 a quart." The price being satisfactory to Stanley, a sale was consummated. Bearing his prize, he immediately joined the accused at the latter's quarters (R. 6-7, 18-19, 31; Pros. Ex. 1).

The period between 2:00 to 4:00 p.m. was spent by them in "drinking the whiskey and shooting the bull" (R. 8). About a third of the contents of the bottle were consumed by them on a "fifty-fifty" basis (R. 30-31). At the last hour Stanley went to the mess hall, obtained a sandwich, and returned to the accused's quarters. At about 5:00 or 5:15 p.m. the accused, after lending his jeep to Private (then Corporal) Ira C. Smith, said to Stanley, "Let's you and I get a truck out of the motor pool and go down on the island * * * you know some natives down there don't you?" Stanley's answer being in the affirmative, they boarded a truck and started their proposed journey but, as a preliminary thereto, they stopped at the officers club to buy four bottles of beer. Two of these were consumed by Stanley and one by the accused in the course of their drive. The accused also refreshed himself with one or two drinks from the bottle of whiskey (R. 8-9, 20, 28-30).

In about forty-five minutes he brought the truck to a halt before the home of "a lady by the name of Beatrice," who was Stanley's laundress. She happened to be out, having "gone down to put on a floor show". Continuing for another ten miles, the accused reached the house of another native woman who had once been Stanley's laundress. Stanley went inside alone, requested her to wash some clothes for himself and

the accused, and obtained written invitations for both from her for a party scheduled for the following day (R. 8-9, 20, 27).

Having thus disposed of their laundry problem, the accused and Stanley commenced their return trip to the motor pool. As they were riding along, the accused inquired whether Stanley "knew where we could get some whiskey." Stanley said, "Yes," and informed the accused about the contents of Lieutenant Wooldridge's footlocker (R. 9, 30). About 7:45 p.m., they returned to the motor pool and within the next five or ten minutes "exchanged the truck for a jeep." As they completed this maneuver, a gasoline truck passed by at an excessive rate of speed. The accused immediately declared, "We will follow him and see what his rush is" (R. 9). Setting out in pursuit, they, in another five or ten minutes, overtook the truck and compelled it to stop near the 93rd Bombardment Squadron Mess Hall. Addressing himself to the driver, the accused reprimanded him for speeding and warned him to "take better care of his equipment or it wouldn't last" (R. 10, 22).

At the conclusion of this admonition the accused permitted the gasoline truck to continue its way, and he and Stanley proceeded directly to Lieutenant Wooldridge's hut, arriving there about 8:00 or 8:15 p.m. Stanley went inside, examined the premises, and reported back to the accused that no one was present. The accused thereupon instructed Stanley to, "Go ahead, and get the footlocker." When Stanley expressed some doubt by stating that, "I don't know whether I should or not," the accused repeated his request. This time there was compliance. The footlocker was placed aboard, and the jeep was driven to Stanley's "shack in back of the motor pool." At the accused's direction the lock on the footlocker was removed by Stanley with an axe. The loot which was thus made available to them consisted of six quarts of whiskey, an Agfa camera, a camera filter, a hunting knife, some T-shirts, some handkerchiefs, a stop watch, and a wallet containing $195.00 in cash. The values of the whiskey, the camera, the filter, and the stop watch were respectively $9.00, $25.00, $1.50, and $14.25. The footlocker was of some value in an undetermined amount (R. 10-12, 23, 31; Pros. Exs. 1, 2, 3).

The accused at first suggested that "the stuff" be kept in the "shack," but, when Stanley objected, stated, "We will take it up to my quarters." After Stanley had laid claim to three quarts of whiskey, the footlocker was reloaded on the jeep and conveyed to the

accused's hut. There the loot was divided. The accused gave Stanley $100.00 and retained $95.00 and all of the remaining items. The T-shirts, handkerchiefs, and six quarts of whiskey were placed in the accused's clothes closet, and the camera and the hunting knife under the mattress of his bed. When the caching of the various articles had been completed, the accused announced that, "We will go get some beer [at the officers club] and then go dump the footlocker" (R. 11-13, 23).

Once at the club he stayed for "anywhere from thirty minutes to an hour." In the meantime Stanley, waiting outside, was approached by Smith who drove up in the accused's jeep. Smith immediately wanted to know what was in the other jeep. When Stanley said, "some hot stuff," Smith offered to help "get rid of it." Upon leaving the club the accused rode back to the motor pool with Smith in one jeep, and Stanley proceeded to the same destination in the other. When they were together again, the accused said to Stanley, "You go with Smith, he is going to burn the footlocker." Following instructions, Stanley rode with Smith to the bomb dump area and watched while the footlocker was "saturated" with gasoline, set afire, and pushed "off a cliff." Returning to the accused's hut, Stanley spent the rest of the night on the back porch (R. 13-14).

The next day Stanley was summoned to the orderly room for questioning. Before leaving he notified the accused of this new development and in anticipation of a "shakedown" turned over $90.00 to him for safekeeping (R. 14-15, 27). At the orderly room a Captain Oliveri, in the presence of Lieutenant Wooldridge and several others, asked Stanley where he had been the previous night, how much money he had, and whether he was willing to permit a search of his quarters. No objection being offered by Stanley, his "shack" was visited and examined. Of course none of the missing articles were found (R. 15).

On 16 August 1945 Stanley was again interrogated, this time by a Major Sullivan. Stanley was told that there was proof that he had the footlocker and was directed to return it at once. After deliberating briefly, he called Captain Oliveri and said, "I think I can get most of this stuff back if you will give me a chance." The opportunity requested was granted. Stanley immediately went to the accused, acquainted him with "what had happened," and expressed an intention to make restitution. The accused thereupon turned over $185 in cash and four quarts of whiskey and stated that the camera and the knife were in the truck. All of these items were delivered

to the orderly room. One quart of whiskey had been presented to Smith and another had been consumed by Stanley (R. 15-17, 27).

A full confession, implicating the accused, was made by Stanley on 26 August 1945 (R. 15, 17-18). Second Lieutenant William H. Moore, Assistant Legal Officer of the 314th Bombardment Wing, accompanied by two other officers, promptly searched the accused's quarters at about 2:00 p.m. Under the accused's mattress a camera filter was discovered (R. 32-33; Pros. Ex. 3). The accused admitted that this camera attachment was not his and "intimated he didn't know it was there" (R. 35).

4. All of the evidence adduced by the defense, including the testimony of the accused, was directed toward the establishment of an alibi. First Lieutenant Pickens C. Talley testified that he had been talking and drinking with the accused at the officers club on the night of 14 August 1945. The exact time could not be fixed by Lieutenant Talley, "except that it was after seven o'clock" (R. 36-37). Major Brooke S. Harper had also engaged the accused in conversation at the club that night and was "reasonably sure it was somewhere between 2030 and 2100 hours" (R. 37; Def. Ex. A). First Lieutenant Vincent J. Pellicani, the accused's roommate, had been in his quarters at between 4:30 and 5:15 p.m. on 14 August 1945 and did "not recall seeing him there." Stanley, too, was absent. Later that night at about 9:00 p.m. Lieutenant Pellicani had talked to the accused for a few minutes "about him going home and going to bed." When Lieutenant Pellicani returned to his quarters at about 4:00 a.m., the accused was in bed. No one was out on the porch (R. 37-42). While in the guardhouse, Stanley had sent word that he would like to see the accused. To Lieutenant Pellicani the accused remarked that "he didn't know whether it would be wise or not," because he "didn't know about the policy of an officer visiting and [sic] enlisted man in the guardhouse, or whether Stanley really wanted to see him" (R. 43-45).

The last witness for the defense, other than the accused, was Staff Sergeant Cecil O. Bell. At 6:30 p.m. on the evening of 14 August 1945 he had observed the accused entering his quarters. After returning from a "show" at approximately 9:25 p.m., Bell again visited the accused's room and saw him "asleep" in bed (R. 46-54). Bell remembered the incident because that same night a "shooting took place." When asked to give a brief summary of the movie which he had attended, he asserted that, "It was about a bunch of outlaws that robbed a train and bank. Roy Rogers and some lawmen

tried to catch them" (R. 53-55).

After being apprized of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. With reference to the charge that he had taken Lieutenant Wooldridge's footlocker and disposed of its contents he stated, "That is not the truth" (R. 58, 85, 99). He summarized his activities on 14 August 1945 as follows:

> "The afternoon was a routine afternoon. I am always at the motor pool. If I am not in the close vicinity where I can be called, I always leave word where I can be located. I had nothing to drink the afternoon of the 14th with Private Stanley. That will take care of the afternoon. The trip down the island was my own idea and not Private Stanley's. He wanted to go along so I let him ride. I went down to check on the laundry but as I passed by the house where I leave my laundry, I didn't see any lights on so I didn't even stop. As near as I can remember that was around five-fifteen or five-twenty, and it was a quick trip. I drove right at the speed limit, in fact, it was a little over the speed limit. I took the vehicle to test it out to find out what shape it was in. We rolled along right at 35 miles per hour. We were not gone one and a half or two hours. We were back at the motor pool around six-thirty. I was around the motor pool just a few minutes and then I went to the mess hall. I ate and then went to the officers club at approximately seven-fifteen. I did not leave the officers club until 9:05. I made the remark to Lieutenant Pellacani that I was going home to go to bed" (R. 58, 77-79, 95-97).

Stanley had accompanied the accused, because, "That is another one of his tricks to take a trip like that rather than work" (R. 63). Two stops had been made in the course of their trip, and on the second the accused had received a written invitation to a celebration to be held the following night. In accounting for the invitation the accused stated that, "I have never been to a native occasion with Private Stanley. The way he makes the other things up, I think he thought if he could involve me further he could get out of it" (R. 59, 64). The accused "had

no intentions" of attending the celebration (R. 65). After arriving at the officers club between 7:00 and 7:15 p.m., he had conversed with Lieutenant Talley, Lieutenant Pellicani, Major Harper, and a Captain Lofthouse (R. 60, 68-69). The accused did not leave the club until 9:05 p.m. He "didn't even go out to relieve [him] self." He was sound asleep by 9:25. His room had "never been very private," and it was possible for someone to enter and place the filter under his mattress. Prior to the search which revealed its presence he had never seen the filter (R. 61-63, 82, 94).

He and Stanley had halted a speeding gasoline truck near the "93rd Mess Hall," but the incident had occurred before 5:00 p.m. He was reasonably certain of the hour, for, after charges were brought against him, his "thoughts had dealt very strongly upon these points" (R. 67, 76-77, 84). Although he had not participated in the looting of Lieutenant Wooldridge's footlocker, the items removed from it had been shown to him by Stanley on 16 August before their delivery to the orderly room. Stanley had then admitted taking them and had added that "they had caught him and he was returning the stuff." The reason for this confession was the hope of procuring the accused's help (R. 70). Stanley "was a good worker but he couldn't be trusted" (R. 72). "Lieutenant Colonel Wilson knew of a case in Great Bend, Kansas between this Private Stanley and an officer, and Private Stanley felt that by involving an officer he could get out of it" (R. 86). After being implicated by Stanley, the accused, though initially "stunned," and hesitant, nevertheless visited him at the guardhouse and lent him two dollars. The accused explained that "I was requested by the man for enough money for a haircut and stamps. If you see a hungry dog, you very often feed them don't you. I do. I had no use for the man, but I am still human" (R. 92, 99-100). The accused had on occasion "taken a drink of beer with [Stanley] but not whiskey" (R. 89).

5. The prosecution called several witnesses in rebuttal. Technical Sergeant Earl A. Vogel and Corporal Louis J. Vincente, who were in the gasoline truck stopped by the accused and Stanley on 14 August 1945, fixed the time of the occurrence at between 7:45 and 8:30 p.m. (R. 102-104, 106, 113-116). First Lieutenant Ray H. Jones described the weather on 14 August 1945 at Base Weather Station, Number 7-42, as overcast and cloudy but not enough to affect visibility. He conceded, however, that conditions elsewhere on the island could have been materially different. Sunset on that day was at 6:43 p.m. (R. 110-111).

Corporal Sam J. Brocatto, the projectionist at the movie theater, did not remember whether there were one or two shows on the night of 14 August 1945. If there was only one, it began at 8:00 p.m. If there were two, the first commenced at 7:00 p.m. (R. 112-113).

Private First Class John R. Hook, who was on military police duty on 14 August 1945, had checked his records and found that Smith and Stanley had come through the "main MP gate" in a jeep at about 10:15 p.m. (R. 117-120). First Lieutenant Bernard Bugg, the last witness for the prosecution on rebuttal, had gone down to the motor pool section that night about 12:15 a.m. to investigate a shooting. While there he had seen Stanley standing by a jeep some thirty feet from the accused's quarters (R. 120-123).

6. Two witnesses were called by the court. The first, who was Smith, testified that he was drunk on 14 August 1945 and could recall nothing that had happened after 8:00 p.m. (R. 124-129). The memory of the second witness, Private First Class George C. Ard, a dispatcher at the motor pool, was also hazy as to the events of that night. He did recall, however, that Staff Sergeant Bell visited the accused's quarters at about 7:00 p.m. Bell had returned in a minute or two and remarked to Ard that the accused was asleep (R. 130-136).

7. The Specification of Charge I alleges that the accused did, "on or about 14 August 1945, wrongfully drink intoxicating liquor with Private First Class Ernest L. Stanley, an enlisted man." This offense was laid under Article of War 96. The Specification of Charge II alleges that the accused did, "in conjunction with Private First Class Ernest L. Stanley" on the same day "feloniously take, steal, and carry away one Agfa camera, value about $25.00, one camera filter, value about $1.50, six quarts of whiskey, value about $9.00, one foot locker, of some value, one navigator stop watch and case, value about $14.25, and about $195.00, lawful money of the United States, the property of First Lieutenant Malcolm G. Wooldridge." This was set forth as a violation of Article of War 93.

The evidence adduced by the prosecution consists largely of the testimony of Private First Class Ernest L. Stanley, the accused's alleged accomplice. Indeed, without Stanley the prosecution could not possibly have made out even a prima facie case. Since his

story was sharply at variance with that of the accused, the issue before the trial court was almost entirely one of credibility, as modified by the admonition contained in the Manual for Courts-Martial, 1928, paragraph 124, that:

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

The trial court having observed and heard the witnesses, its findings are of course entitled to great weight and should not be lightly disturbed. A meticulous examination of the record not only fails to reveal any sound reason for overturning the considered determination of the trial court but yields ample and convincing support for the judgment rendered. The story narrated by Stanley was free from contradiction and inconsistency, and it was corroborated in some degree by the discovery of the camera filter under the accused's mattress and by the testimony of Private First Class John R. Hook to the effect that a jeep bearing Stanley and Smith had passed through the "main MP gate" at 10:15 p.m. on the night of 14 August 1945.

The accused's account, on the other hand, has been demonstrated by impartial witnesses to be false in substantial part. His defense was one of alibi and rested upon the contention that he was continuously at the officers club from approximately 7:00 to 9:05 p.m. This version ran squarely afoul of Stanley's testimony that the accused had not gone to the club until after stopping a speeding gasoline truck at about 8:00 p.m. and immediately thereafter stealing Lieutenant Woolridge's footlocker. To avoid the obvious inconsistency between these two divergent stories the accused insisted that the truck had been halted before 5:00 p.m. If this were indeed the fact, he might well have been at the club between 7:00 and 9:05 p.m., and his alibi would be impregnable. But unfortunately for him the clearly unprejudiced and objective testimony of Technical Sergeant Vogel and Corporal Vincente, who were riding in the truck in question, set the time of their encounter with him at between 7:45 and 8:30 p.m. and thus fully corroborated Stanley. Since there is no reason to doubt the veracity of Vogel and Vincente, the conclusion follows that the accused has falsified the facts. The accused's visit and loan of money to Stanley after being implicated by him was also conduct of a questionable nature hardly consistent with innocence. The contention of the accused that "I had no use for the man, but I am still human" sounds more specious than sincere. Both Specifications and Charges have been sustained beyond a reasonable doubt.

8. The accused, who is divorced, is about 38 years old. After completing two years of high school, he attended Goodyear Extension College and Denver University Commercial School for periods of one year each. Between March, 1935, and February, 1942, he was employed by various firms as a clerk, a serviceman, a salesman, a shop foreman, and a warehouseman. He entered the Army as an enlisted man on 4 April 1942 and continued in that capacity until 9 December 1942 when he was commissioned a second lieutenant. After serving overseas in North Africa, he was promoted to first lieutenant on 1 May 1944. At the time of the offenses discussed above he was stationed in Guam.

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 sustain the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of either Article of War 93 or Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Robert Blumer, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN -CM 292466 1st Ind. JAN 11 1946
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 Harry A. Young (O-570891), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully drinking intoxicating liquor with an enlisted man, in violation of Article of War 96; and of feloniously taking, stealing, and carrying away one camera, one camera filter, six quarts of whiskey, one footlocker, one navigator stop watch and case, and about $195 in currency, 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 such place as the reviewing authority might direct for one year. 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 spent several hours on the afternoon of 14 August 1945 drinking whiskey with an enlisted man named Ernest L. Stanley. After they had jointly consumed about one-third of a quart, they drove several miles to visit two "laundresses." Upon returning from this expedition the accused instigated and induced Stanley to remove a footlocker from the hut occupied by First Lieutenant Malcolm G. Wooldridge. The contents, consisting of six quarts of whiskey, an Agfa camera, a camera filter, a hunting knife, some T-shirts, some handkerchiefs, a stop watch, a wallet, and $195 in cash, were equally divided between the two confederates. These two serious offenses demonstrate the accused to be absolutely unworthy of further retention in the service. I accordingly recommend that the sentence as approved by the reviewing authority be confirmed and ordered executed.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(Sentence as approved by reviewing authority confirmed and ordered executed. GCMO 27, 25 Jan 1946).

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

SPJGH - CM 292526

28 NOV 1945

UNITED STATES v. Second Lieutenant ALVAR C. OQUIST (0-887107), Air Corps.	WESTERN FLYING TRAINING COMMAND ARMY AIR FORCES SANTA ANA, CALIFORNIA Trial by G.C.M., convened at Minster Field, California, 17 October 1945. Dismissal, total forfeitures and confinement for three (3) 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 61st Article of War.

Specification: In that Second Lieutenant Alvar C. Oquist, Air Corps, 3008th Army Air Forces Base Unit, did, without proper leave, absent himself from Birmingham General Hospital, Van Nuys, California, while a patient there, attached unassigned, from about 20 August 1945 until apprehended at Reno, Nevada, about 12 September 1945.

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

Specification 1: In that Second Lieutenant Alvar C. Oquist, * * *, did, at Las Vegas, Nevada, on or about 8 June 1945, with intent to defraud, wrongfully and unlawfully make and utter to Monte Carlo, Incorporated, a certain check in words and figures as follows, to wit:

94-65 Las Vegas Office 94-65 No.
BANK OF NEVADA
Las Vegas, Nevada, June 8, 1945

Pay to the Order of MONTE CARLO, INCORPORATED 1 $ 25 00/
94-65
Twenty Five and no/100 4 DOLLARS

Unable to locate at Las Vegas Office 94-65
LVAAF
2nd Lt 0887107 Alvar C. Oquist
Alvar C. Oquist

and by means thereof, did, fraudulently obtain from Monte Carlo, Incorporated, Las Vegas, Nevada, the sum of Twenty-five ($25.00) Dollars, in lawful money of the United States of America, he, the said Second Lieutenant Alvar C. Oquist, then well knowing that he did not have and not intending that he should have any account with the Bank of Nevada, Las Vegas, Nevada.

NOTE: Specifications 2 through 7, inclusive, are identical in form with Specification 1 except as to date, amount, drawee bank and person or organization defrauded. The variations are as follows:

Spec.	Date	Am't	Person or Organization Defrauded	Drawee Bank
2	10 Jun 45	$15.00	El Cortez Hotel Co, Las Vegas, Nev.	Bank of Nevada, Las Vegas, Nev.
3	11 Jun 45	25.00	Hotel Last Frontier, Las Vegas, Nev.	"
4	15 Jun 45	50.00	Frontier Club Partnership, Las Vegas, Nev.	"
5	15 Jun 45	25.00	Pioneer Club, Las Vegas, Nevada	"
6	8 Aug 45	25.00	Hollywood Knickerbocker Hotel, Hollywood, California.	Bank of America Van Nuys, Calif.
7	16 Aug 45	25.00	J.W. Robinson Co., Los Angeles, California.	"

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 may direct for three years. No evidence was introduced of any previous conviction. Six of eight members of the court recommended that the accused be sent to a General Hospital for observation and any necessary treatment before execution of the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Following the accused's plea of guilty he was advised as to its meaning and effect and he stated that he desired said plea of guilty to stand. Thereupon the prosecution rested (R. 10, 11).

4. For the defense it was stipulated that if Major Robert J. Stein, Medical Corps, were present he would testify that he was the president of a duly constituted Board of Medical Officers convened at the Army Air Forces Regional Hospital at Davis-Monthan Field, Tucson, Arizona, for the purpose of inquiring into the mental competency of the accused; that on 28 June 1945 said Board of Officers found that accused, was, at the time of the commission of the offenses, able to distinguish between right and wrong and to adhere to the right, but that he "is not mentally capable of conducting his defense intelligently because of his emotional state," which was diagnosed as "anxiety state, chronic, severe, with secondary asocial conduct and depressive components, precipitated by stress of combat in a moderately predisposed individual" (R. 11; Def. Ex. A).

Defense counsel stated that said stipulation was offered solely in mitigation of the offenses and not for the purpose of raising the issue of insanity. He further stated in response to an inquiry by the law member that the defense was not raising the issue of accused's ability to intelligently conduct or cooperate in his defense (R. 11). Accused stated in open court that he fully understood the statement of defense counsel concerning the stipulation and that he consented to it (R. 12).

Accused, whose rights with reference to becoming a witness were explained to him, elected to testify under oath with respect to Charge I and the Specification thereof. His testimony was to the following effect:

> He served in the European Theater of Operations as a co-pilot with the Eighth Air Force and participated in thirty-five missions. He is authorized to wear the Distinguished Flying Cross, Air Medal with four clusters, European Theater of Operations Medal with two battle stars and the Presidential Unit citation. The eighth mission was extremely hazardous and he lost many friends on the flight. Thereafter he was required to obtain medical treatment because of sleeplessness and a general nervous condition. He experienced nightmares and dreamed of falling into space. Because of the shortage of flight crews, he was unable to obtain rest leave and to relieve the strain he indulged in intoxicants. Upon his return to the United States, he had no duties to perform for about three months and was sent to the Birmingham Hospital for psychiatric observation and treatment. When he went absent without leave, he intended to commit suicide. He continues to have nightmares and feels that he has nothing to live for. He was a patient at the Davis-Monthan Regional Hospital for about twenty-four days and at the Birmingham General Hospital for approximately two months. At the latter place he "had one five-minute consultation with a psychiatrist."

There was received in evidence a copy of a letter issued by Headquarters, 95th Bombardment Group (H), APO 559, which corroborated accused's testimony as to his combat record and awards received and disclosed a rating of "excellent" in performance of duty (R. 13-15; Def. Ex. B).

Accused admitted that he left Birmingham General Hospital at Van Nuys, California, without permission, on about 20 August 1945 and went to Chicago where he stayed about two weeks. Thereafter he visited several cities while returning to the hospital at Van Nuys, California, and was apprehended by the military police while in Reno, Nevada. He was returned to the Birmingham General Hospital and on 19 September was given a psychiatric examination (R. 16-18).

In rebuttal it was stipulated by the prosecution, the defense and the accused, that if Major Irving N. Baer and Captain Charles G. Inghan, both of the Medical Corps, were present, they would testify that on 19 September 1945 they conducted a psychiatric examination of accused at the Birmingham General Hospital, Van Nuys, California, and their findings were that accused was able to distinguish right from wrong and was able to adhere to the right at the time of the alleged offenses and that he was mentally competent to conduct his own defense. Accused stated to the court that he understood the stipulation and consented to it (R. 19; Pros. Ex. 1).

5. The Specification of Charge I alleges that the accused absented himself without leave from Birmingham General Hospital, Van Nuys, California, on about 20 August 1945, at which time he was a patient, attached unassigned, and remained in that status until his apprehension at Reno,, Nevada, about 12 September 1945. The accused's plea of guilty reaffirmed after he was advised as to its meaning and effect and supported by his sworn testimony, shows beyond a reasonable doubt that he was absent without leave during the time alleged and that said absence was terminated at the place and in the manner alleged and is legally sufficient to sustain the findings of guilty of Charge I and its Specification. The accused by his plea also admitted his guilt of fraudulently cashing seven checks totalling $190.00, drawn by him on banks in which he had no accounts and not intending that he should have accounts for their payment.

The prosecution adduced no proof whatsoever to establish the commission of the offenses and was not obliged to do so in view of accused's persistence in his plea of guilty.

While there is evidence that on 28 June 1945 accused was "not mentally capable of conducting his defense intelligently because of his emotional state," both the defense counsel and the accused stated that the accused's mental competency was not an issue in the case and that the evidence was offered solely as a matter of mitigation. If there was any doubt raised by this evidence as to accused's ability to intelligently conduct his defense, it was conclusively overcome by the evidence of the medical officers who examined him at a later date (19 September 1945) and found that at the time of the commission of the offenses and on the date of examination accused was able to distinguish right from wrong, was able to adhere to the right and was mentally capable of conducting his defense. This view finds support in the testimony of the accused, an

examination of which reveals his answers to questions propounded, both on direct and cross-examination, to be responsive, lucid and without trace of emotion.

Attached to the record of trial is a letter, dated as of the date of the trial, signed by six of the eight members requesting the reviewing authority to commit the accused to a general hospital for observation and any necessary treatment prior to the execution of the sentence. We can only speculate as to what the court's purpose may have been in making this recommendation, but we are convinced that the court entertained no doubt as to accused's sanity. In the first place, the court exercised extreme caution in assuring itself of accused's ability to conduct his defense at the outset. Secondly, it had the opportunity to observe and hear the accused on the witness stand. It is true that it did not have the benefit of direct psychiatric testimony, but the defense stated unequivocally that mental competency was not in issue and accordingly the prosecution presented only testimony by stipulation of two medical witnesses showing that accused was sane. The sole purpose of this was to overcome any doubt which might arise in the minds of the members of the court as to accused's ability to intelligently conduct or participate in his defense as a result of the evidence as to his anxiety state at an earlier date. The court went to unusual length to assure itself that the accused was able to conduct his trial and having thereafter convicted him, it is inconceivable that on the same day following the trial, there was doubt in the minds of the members as to his sanity. The logical conclusion is that the recommendation was made solely out of a sympathetic regard for his former anxiety state and the desire that he receive appropriate treatment to avoid a recurrence as a result of the punishment imposed.

Related papers disclose that accused was admitted to the Birmingham General Hospital on 27 July 1945 and was placed under the observation of Major Irving N. Baer, Acting Chief of the Neuropsychiatric Branch. He remained under Major Baer's observation until 20 August 1945, the date of accused's initial unauthorized absence, and again came under the attention of Major Baer on 15 September 1945. The diagnosis indicates the existence of only a mild anxiety state, in fact, "so mild that there was a question whether it existed at all," and complete mental competency.

6. War Department records disclose that accused is 28 years and 9 months of age, is single and is a high school graduate. He entered the military service as an enlisted man on 12 September 1942 and after completion of training as an aviation cadet (pilot) was appointed a flight officer in the Air Corps of the Army of the United States on 3 November 1943. He served overseas in the European Theater of Operations as a co-pilot and was awarded the Air Medal with four Oak Leaf Clusters and the Distinguished Flying Cross. In addition, he is authorized to wear the European Theater of Operations ribbon with two bronze stars. On 25 July 1944 he was appointed a second lieutenant in the Army of the United States.

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

Thomas H. Tappy, Judge Advocate.

W. J. Bierce Jr., Judge Advocate.

Joseph J. Stern, Judge Advocate.

Robert E. Trevethan, Judge Advocate.

SPJGH - CM 292526 1st Ind

Hq ASF, JAGO, Washington 25, D. C. DEC 14 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 Alvar C. Oquist (0-887107), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absenting himself without leave from his station from 20 August 1945 to 12 September 1945, in violation of Article of War 61. He also pleaded guilty to and was found guilty of issuing seven worthless checks, totalling $190.00 in exchange for cash with intent to defraud, 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. Six of the eight members of the court subsequently recommended that the reviewing authority cause accused to be hospitalized for observation and appropriate treatment prior to execution of the sentence. 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 the accused pleaded guilty to all Charges and Specifications. He took the stand and admitted his unauthorized absence as alleged, stating that he was apprehended at Reno, Nevada, while returning to his station, General Hospital, Van Nuys, California, where he was a patient. He remained silent concerning the worthless check offenses, seven in number, which were drawn on banks in which he had no accounts.

Accused served overseas for six months in the European Theater of Operations as a co-pilot aboard a bomber type aircraft, participating in thirty-five combat missions over enemy occupied continental Europe. For meritorious achievement while on these missions he was awarded the Distinguished Flying Cross and the Air Medal and four oak-leaf clusters. He was returned to the United States in August 1944, and since then has been hospitalized the greater part of the time due to nervous disorders induced by his combat experience. Psychiatric examination revealed that at the time of commission of these offenses, he was still suffering somewhat from a nervous disorder, attributable in great part to his combat experience.

In view of the foregoing, I recommend that the sentence be confirmed, but that the confinement and forfeitures be remitted and that the sentence as thus modified be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence confirmed but confinement and forfeitures remitted. Sentence as modified ordered executed. GCMO 20, 25 Jan 1946).

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

SPJGQ - CM 292529

UNITED STATES v. First Lieutenant ROBERT M. VALBY (0-796917), Air Corps	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Williams Field, Chandler, Arizona, on 10-25 September 1945. Dismissal.

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

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

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

CHARGE I: Violation of the 92nd Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification: In that First Lieutenant Robert M. Valby, Squadron B, 3010th Army Air Forces Base Unit, did, at Phoenix, Arizona, on or about 15 July 1945, with intent to commit rape, commit an assault upon Francis Virgil, by seizing her body.

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and the Specification thereunder, and guilty of the Specification of Charge II, except the words "with intent to commit rape", substituting therefor the word "wrongfully", of the excepted words not guilty, and of the substituted word, guilty, and not guilty of Charge II, but guilty of a violation of Article of War 96. 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 six months. The reviewing authority approved only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48.

3. The evidence with regard to the Specification and Charge as to which findings of guilty were returned is as follows:

Miss Frances Virgil, secretary to the Chief of Police of Phoenix, Arizona, received a telephone call about seven o'clock Saturday evening, 14 July 1945, from a person who gave the name "Lieutenant Valby" and who asked to see her, saying he had been given her name by a Mrs. Johnson (R. 167, 168, 180, 187). Arrangements were concluded that he should join Miss Virgil and her two friends, Mrs. Snelling and Miss Bleuel at the Club Royal, a night club outside Phoenix, during the evening (R. 168, 210). Miss Virgil had not met the accused theretofore but had been told by her friend, Mrs. Johnson, earlier in the day that her name had been given to an officer (R. 201, 202). Sometime around 9:00 or 10:00 o'clock that evening, the accused joined this party of three women at the Club Royal (R. 168, 204, 301, 302). During the next two or three hours the party had one or two rounds of drinks and Miss Virgil danced with the accused (R. 168, 209, 303, 304). About midnight the accused stated that he wanted to get a check cashed and would like to go to a place where he was known to do so (R. 169, 204, 235, 236, 304). The four then left the club and the accused took Mrs. Snelling and Miss Bleuel to their respective homes (R. 169, 207, 305). Neither the accused nor Miss Virgil were intoxicated at this time (R. 307).

The accused and Miss Virgil then went to a tavern known as Shorty Brown's where the accused cashed a check and the two of them had several drinks (R. 169, 211, 212). Miss Virgil had two straight drinks of whiskey and part of a Tom Collins while there (R. 169, 212, 215). Around one o'clock the couple left the tavern (R. 170, 214). Thus far during the evening the accused had acted very pleasantly and "as a gentleman", having made no advances or improper suggestions "in any way or form" (R. 169, 170, 208, 213, 307). As they were leaving Shorty Brown's, the accused said he had to use the bathroom and asked if she would mind if he stopped at his apartment (R. 170, 214). They drove to the apartment and stopped. The accused got out of the car and started in and then asked Miss Virgil if she would care to see his apartment. She hesitated just a moment and then followed him and went into the apartment with him (R. 170, 171, 172). The accused turned on a light and, as he was using the bathroom, Miss Virgil looked over the other rooms of the apartment (R. 172). The accused then mixed some drinks and she sat on the divan and he on a chair opposite and they conversed for some time (R. 173). She sipped a part of one drink (R. 223). During the course of the conversation, which lasted some 15 or 20 minutes, he asked her how old she was and when she replied "thirty-three", he asked, "Are you still a virgin?" (R. 173, 224). She said "yes" and changed the subject (R. 174). A few minutes later the accused said he wanted to kiss her but could not do so in the living room because there were not any blinds and took her by the wrists and

brought her into the bedroom (R. 174, 227). She then tried to think of some way to get out of there and asked to use the bathroom, which she did (R. 174, 175, 223).

When she came out of the bathroom, the door into the living room was closed and the bedroom was in complete darkness (R. 175, 227). She attempted to move toward another door but the accused took her by the wrists and pulled her down on the bed (R. 175, 249). She resisted and tried to get away from him but was unable to get up (R. 175). He raised her dress and attempted to pull down her underclothes but was prevented from doing so by her struggles (R.176, 252). He was lying "right on" her and she could feel that he had exposed himself (R. 176, 258). During the course of the struggle, the accused discovered that Miss Virgil was in her menstrual period, whereupon he swore under his breath and got up (R. 176, 251).

She went into the living room to straighten her hair and was preparing to leave when the accused came up behind her, picked her up bodily and carried her into the bedroom, and threw her onto the bed, saying he was going to have her in spite of the fact she was sick (R. 176, 177, 252). She asked if he did not have any respect for anyone's morals and he said he did not, that he did not give a damn if she did report him to the military for rape (R. 176, 177). Again he got on top of her, exposed himself, and tried to get her in position to satisfy his wishes and she continued to struggle (R. 177, 178, 258). Finally she told him that his mother must have dragged him up; that he had no upbringing whatever. Immediately thereafter he let her up and as she ran out of the apartment, he was fastening up his trousers (R. 178, 252, 256, 257). When she had proceeded part way up the block, the accused drove up behind her, stopped, got out and told her he was going to take her home. She was mad and crying at the time and she refused to go with him, but he took her by the wrists, put her in the car and took her home (R. 178, 216, 217).

As a result of the struggles with the accused, Miss Virgil suffered numerous bruises about her body and became very nervous. Her left knee was swollen, her left shoulder became very sore, she had large bruises upon her upper thighs, and several "skin spots" on her legs (R. 179, 279, 292, 293, 296, 297).

Two pre-trial statements, signed and sworn to by the accused, were received in evidence without objection (R. 288, 290, 291; Pros. Exs. 4, 6). In the first of these statements, executed 25 July 1945, the accused admitted that he tried "to make love" to Miss Virgil but "she resisted my advances", that her resistance consisted mainly of talking, that he did not recall using any force on her which would have caused her to have black and blue places on her arms and legs, although as drunk as they both were, this may have happened (R. 288; Pros. Ex. 4).

In the statement executed on 4 August 1945, the accused detailed the circumstances of meeting Miss Virgil and the events that transpired at the Club Royal and Shorty Brown's in substantially the same manner as described by Miss Virgil in her testimony as set forth above (R. 290, 291; Pros. Ex. 6). Further, he stated, that when the two of them drove to his apartment at about ten or fifteen minutes after one o'clock that both of them went into the apartment immediately (Pros. Ex. 6, p. 17). He then mixed whiskey drinks for each of them and they went into the living room where she sat on the sofa and he sat on a chair. Up to this time he had not touched or kissed her or made any effort to make love to her. They each had one or two drinks and were both "pretty drunk". They talked quite awhile. She said that she was thirty-three years old and still a virgin (Pros. Ex. 6, p. 18). He did not bring up the subject. He expressed his surprise at this. He did not recall what excuse he made to get into the bedroom but he recalls lying on the bed with her, it being his intention to make love to her and "find out how far I could go". "She said she was 33 years old and still a virgin. I knew the gal had lied to me and I wanted to find out". "I kissed her two or three or four times and tried to lie on top of her which was very quickly repulsed". At this point the statement contains the following colloquy:

"Q: Were you able to get on top of her?
A: No. That one was really a wildcat!
Q: Did you make any effort to get her dress off?
A: I couldn't get that far.
Q: Did you get your hand under her dress?
A: No, she struggled too violently.
Q: Did you make any effort to spread her legs?
A: I couldn't get that far."

* * * * * *

"Q: Did you get any information any time during that night while you were with her that she was menstruating?
A: I am not sure. Seems that I recall that's how it ended the whole argument. She mentioned that, I gave up right then.
Q: Did you verify that knowledge?
A: Not with that wildcat. I couldn't get close enough.
Q: Would you say you applied any force to her that would leave bruises?
A: I suspect that with the trouble we had, she may have had some bruises..... (on) probably the lower part of her legs and maybe the upper part of her thighs..... I suspect my knee made any bruises if there were any."

* * * * * * *

"Q: Would you say this Miss Virgil put up quite an active resistance there in your apartment?
A: Yes, I would."

* * * * * *

"Q: Did she at any time get her hand on your hair and pull it?
A: She could have. We were struggling pretty hard."
(Pros. Ex. 6; pp. 19, 20, 22, 23).

The accused's statement further revealed that they were in his apartment for about an hour, around fifteen or twenty minutes of which time they were in the bedroom, that Miss Virgil was very small, "about five feet two" and weighed about 105 pounds, that he was five feet ten inches in height and weighed from 145 to 148 pounds (Pros. Ex. 6, pp. 13, 21, 22). The accused is 29 years of age, married, but separated from his wife on 3 July 1945. His father is a construction man, his mother an ex-college music professor, his three younger brothers are in the service (Pros. Ex. 6, pp. 11, 27). The accused was overseas 15 months, flew 67 combat missions in B-25 type aircraft with 268 combat hours, and has been awarded the Air Medal with ten Oak Leaf Clusters (Pros. Ex. 6, p. 27).

4. In behalf of the accused, Major Barlow, who had been his squadron commander in overseas service for about six months, testified that the accused's reputation for truth and veracity was very good, that he was an outstanding flyer always ready to undertake any mission and could be depended upon to get to a target, hit it and get back (R. 127, 128, 129). The accused had completed over 50 missions in B-25 planes doing medium bombing and low level strafing at the time the witness was transferred out of the organization (R. 131).

A medical officer testified that the accused came on sick call on 2 July 1945 complaining of loss of appetite, loss of weight, and inability to sleep (R. 231). A complete physical check-up was accomplished which was negative, except for some "increased nervous tension" for which a mild sedative, phenobarbital, was prescribed. The medical officers considered grounding the accused temporarily on account of his nervous system, which they considered to be the basis of residual operational fatigue (R. 232), or nervous symptoms acquired as the result of combat operations and which persist for some time after termination of combat activities (R. 233). Excessive use of alcohol has a deleterious effect on the nervous system and such nervous symptoms might develop from drinking too much (R. 234).

The manager of Shorty Brown's testified that she saw the accused and a young lady, whom she later learned was Miss Virgil, in that liquor dispensing establishment around midnight on Saturday, 14 July 1945, and into Sunday morning, the 15th, that the lady had at least four or five

drinks of straight whiskey while she was there, that she was intoxicated and would not have been served had she not been with the accused who frequented the place and was a "perfect gentleman", as usual (R. 346, 347, 348, 355). The accused was not sober but he was not drunk (R. 354). The bartender at Shorty Brown's thought that the accused and his lady companion on this occasion had four or five drinks and also believed he served them two drinks (R. 358, 359). In his opinion, Miss Virgil "wasn't entirely intoxicated, but she was showing the effects of liquor quite a bit" (R. 359, 362). A waitress at Shorty Brown's testified that the accused was drinking straight whiskey, that Miss Virgil was drinking a Tom Collins, and was intoxicated, that the couple left the place at about one o'clock, that as they left the accused "was about as tight as I have seen him" and Miss Virgil was "pretty drunk" (R. 363, 364, 365).

At the request of the defense the members of the court viewed the interior and exterior premises at 1106½ West McDowell Road, Phoenix, Arizona, the apartment of the accused (R. 308).

After an explanation of his rights as a witness, the accused elected to remain silent and did not testify (R. 374).

5. The accused was found not guilty of assault with intent to commit rape, in violation of Article of War 93, as charged, and by appropriate exceptions and substitutions he was found guilty of assault and battery, in violation of Article of War 96, in that he committed an assault upon one Frances Virgil by seizing her body. The testimony of Miss Virgil and the admissions of the accused amply sustain the findings of guilty, indeed there is no substantial dispute between them as to the actual commission of the assault and battery.

Through the agency of a mutual acquaintance, the accused, a combat returnee, and Miss Virgil, an unmarried woman thirty-three years of age, met for the first time at a night club in Phoenix, Arizona, about nine o'clock on Saturday evening, 14 July 1945. During the next four hours, the couple engaged in drinking, dancing and general conversation, which eventually brought them to his apartment around one o'clock the following morning. It was there that the accused undertook to make love to Miss Virgil, twice throwing or pulling her onto the bed and lying on top of her. He desisted only because of her vigorous and incessant resistance and upon his discovery that she was menstruating. The evidence was in conflict as to whether they were drunk, the accused stating that they were both "pretty drunk", Miss Virgil insisting she was not drunk, and other witnesses being about equally divided in their opinions as to the sobriety of the two a short time earlier in the evening. Under all the testimony, they had been drinking intoxicants at intervals over a period of four hours and were feeling the effects of such indulgence. Even if the accused were drunk, voluntary drunkenness is not an excuse for crime committed while in that condition (MCM 1928, par. 126a, p. 136). However, indiscreet Miss Virgil may have been in voluntarily entering the apartment of the accused at one o'clock in the

morning, after a long evening of drinking and with a man whom she had known for only a few hours, her conduct did not operate to vest in the accused the license to invade the privacy of her physical person, as he admittedly undertook to do. That his touching of her body was without her consent and was violently resisted is vigorously asserted by her and clearly and repeatedly conceded by him. A battery is an assault in which force is applied, by material agencies, to the person of another, either mediately or immediately. So it is a battery for a man to fondle, against her will, a woman not his wife (MCM 1928, par. 149e, p. 178). The offense of which the accused was convicted was conclusively proved.

Objection was made by the defense to the jurisdiction of the court for the alleged failure to comply with the requirements of Article of War 70, in that the accused was afforded no opportunity to be present at the investigation, nor to be confronted with the available witnesses, nor to cross-examine them (R. 18, 19). The plea was properly denied (R. 36). It is well established that the provisions of Article of War 70 pertaining to pre-trial investigation are directory only in all respects and that failure to comply therewith is not ipso facto fatal error (CM 229477, Floyd, 17 BR 149; CM 288951, Burton, Board of Review, 1 November 1945). In this case the accused himself testified that two pre-trial investigations were made, one at his specific request and the other by an investigating officer appointed pursuant to Article of War 70, that he was shown and furnished copies of all statements taken from the various witnesses, that he was asked if he wished other witnesses called and that he replied he did not, and that the trial was delayed two weeks at his request for more time in which to prepare his defense (R. 26, 27, 30, 31). Moreover, the record of trial reveals that continuances of two days and a week, respectively, were granted at the request of the defense during the course of the trial in order that defense counsel might interview witnesses for the prosecution and contact additional witnesses (R. 37, 43, 44, 47, 49). Thus it appears that not only was substantial compliance made with provisions of Article of War 70 but, in addition, every reasonable opportunity was afforded the accused to prepare and present all available evidence in his defense, the vigorous and lengthy character of which is attested to in part by the 417 pages constituting the record of trial. Clearly no prejudice to the substantial rights of the accused resulted from any irregularity in pre-trial investigation.

After arraignment had been made and pleas to the general issue received, an adjournment for a period of approximately a week was taken at the request of the defense. During such period, the convening authority detailed two additional members to the court and excused an original member of the court from further participation in the trial (R. 50). When the court reconvened, the prosecution stated it was not aware of the reasons which prompted the convening authority to make such changes except that a TWX message had been received directing that the member so

excused was to proceed to school (R. 52). The defense objected to the two additional members sitting on the court and to the action in excusing the original member (R. 51). Such objections were overruled (R. 51, 52). Two members of the court, who were absent at all previous sessions, were also present. Counsel for the accused thereupon interrogated all of the new and additional members at length as to their qualifications to sit upon the court, announced they had no challenges for cause, and expressed a desire to challenge one of the new members peremptorily, which request was denied (R. 60), the defense having previously exercised one peremptory challenge (R. 15). However, the member whose release was desired by the accused was excused upon peremptory challenge exercised by the prosecution "pursuant to the request of the defense" (R. 60). All new and additional members were thereupon duly sworn and acquainted with the previous proceedings in the trial (R. 61).

It is within the discretion of the appointing authority to make changes in the personnel appointed or detailed by him, including relieving old and detailing new members (MCM, 1928, par. 37, p. 27; CM 191695 Johnson, 1 BR 273, 288). There is no indication in the record of trial or elsewhere that these changes were motivated by any desire on the part of the convening authority or anyone else to remove a member of the original court who was friendly to the accused or to place upon the court officers who were unfriendly to him or who were otherwise disqualified for duty upon the court. As suggested by the staff judge advocate in his review, these changes in personnel were made for proper administrative reasons, particularly to guard against the contingency that the membership of the court might be reduced below the required minimum prior to completion of the trial. There is nothing to show that any unfairness or prejudice resulted to the accused by reason of such action. The ruling of the law member in denying an additional peremptory challenge to the accused clearly had no adverse effect upon his substantial rights because the prospective member to whom he objected was excused. In the opinion of the Board of Review, the entire record of trial reflects every effort on the part of the court and the prosecution to accord to the accused a fair and impartial hearing which he received.

6. War Department records show that the accused is 29 years of age. He is a high school graduate. In civil life he was engaged in construction work, being employed by the Merritt-Chapman and Scott Corporation, New York, from 1934 to 1942. He entered the military service as an aviation cadet on 16 March 1942. On 14 January 1943, he was commissioned a second lieutenant, Army of the United States. He was promoted to first lieutenant on 20 March 1944. For participation in numerous aerial combat missions in the South Pacific Area he has been awarded the Air Medal with ten oak leaf clusters. The Staff Judge Advocate states that the accused received punishment under Article of War 104 in February 1945, for the offense of disorderly conduct, resulting from a fight in a saloon in Rocky Ford, Colorado. The accused was given a reprimand and forfeiture of pay in the sum of $75.00.

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 thereof. Dismissal is authorized under Article of War 96.

W. D. Partlow, Jr., Judge Advocate

[illegible], Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 292529 1st Ind

DEC 14 1945

Hq ASF, JACO, 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 M. Valby (0-796917), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of assault and battery 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 six months. The reviewing authority approved only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48.

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

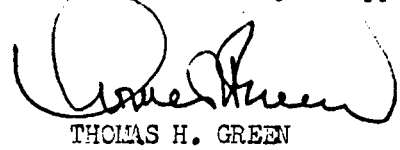
Through the agency of a mutual acquaintance, the accused, a combat returnee, and Miss Virgil, an unmarried woman thirty-three years of age, met for the first time at a night club in Phoenix, Arizona, about nine o'clock on Saturday evening, 14 July 1945. During the next three hours they engaged in drinking and dancing at this club. Around midnight the accused stated that he desired to go elsewhere in order to cash a check and asked Miss Virgil to accompany him, to which suggestion she assented. The accused and Miss Virgil then took two women friends of Miss Virgil, who had been with her throughout the evening, to their respective homes and the accused and Miss Virgil thereafter went to another night club. They remained here for about an hour, both drinking liquor during that time. They left the club about one o'clock in the morning and went to the accused's apartment upon his assertion that he had to use the bathroom and upon his invitation to her to look over his apartment. After they had engaged in general conversation for some fifteen or twenty minutes and had consumed some liquor, the accused determined to "find out" if she were a virgin as she stated. All of his advances were quickly and vigorously resisted. However, he seized her body and twice threw or pulled her onto a bed and lay on top of her. He desisted in his efforts only because of her incessant

resistance and upon his discovery that she was menstruating. Upon being released the second time, she fled from the apartment. As a result of her struggles with the accused, Miss Virgil suffered numerous bruises about her body and became very nervous.

The accused participated in numerous combat missions as pilot and co-pilot of B-25 type aircraft in the South Pacific Area. He has been awarded the Air Medal with ten oak leaf clusters. The Staff Judge Advocate states that the accused was reprimanded and ordered to forfeit $75.00 of his pay under Article of War 104 in February 1945, for disorderly conduct arising out of an affray in a saloon.

Considering the circumstances under which this assault occurred and in view of the splendid combat record of the accused, it is my opinion that his conduct does not justify his separation from the service. Accordingly, I recommend that the sentence, as approved by the reviewing authority, be confirmed but commuted to a reprimand and forfeiture of $100.00 pay per month for a period of three months, and that the sentence as thus commuted 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
1 - Record of trial
2 - Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed but commuted to a reprimand and forfeitures of $100 pay per month for three months. Sentence as commuted ordered executed. GCMO 519, 18 Dec 1945).

WAR DEPARTMENT
ARMY SERVICE FORCES
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK - CM 292561

16 NOV 1945

UNITED STATES v. First Lieutenant MALCOLM C. BAILEY (O-798561), Air Corps.	FERRYING DIVISION AIR TRANSPORT COMMAND Trial by G.C.M., convened at Municipal Airport, Memphis, Tennessee, 4 October 1945. Dismissal, total forfeitures, and confinement for six (6) months.

OPINION of the BOARD OF REVIEW
MOYSE, KUDER and WINGO, 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 93rd Article of War.

Specification 1: In that 1st Lieutenant Malcolm C. Bailey, Administrative Squadron B, 554th Army Air Forces Base Unit (4th Ferrying Group), did, at Municipal Airport, Memphis, Tennessee, on or about 10 July 1945, feloniously take, steal and carry away about $27.00, lawful currency of the United States, the property of 1st Lieutenant Carmen F. Capone.

NOTE: Specifications 2 to 9 inclusive are identical in form with Specification 1, but vary as to date, amount and person whose money was stolen, as follows:

Spec.	Date	Amount	Money stolen from:
2	10 July 1945	$130.00	F/O Jose Oliveros
3	13 July 1945	80.00	1st Lt. John C. Grim
4	13 July 1945	60.00	Capt. Charles J. Mueth
5	13 July 1945	35.00	1st Lt. John F. Leary
6	14 July 1945	45.00	F/O T. A. Paulisson
7	15 July 1945	30.00	2nd Lt. Russell Dashifsky
8	15 July 1945	30.00	F/O Edward L. Pultz
9	16 July 1945	27.00	1st Lt. Thomas F. Flemming

He pleaded guilty to and was found guilty of the Charge and all Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due

or to become due, and to be confined at hard labor for six months. The reviewing authority approved "only so much of the finding of guilty of Specification 4 of the Charge as involves a finding that at the time and place alleged the accused did take, steal and carry away about $50, lawful money of the United States, the property of Captain Charles J. Mueth"; approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

Lieutenant Carmen F. Capone testified that at 1330 hours 10 July 1945 at Municipal Airport, Memphis, Tennessee, he concealed his wallet, containing $27.00, under the "white sheet collar of my bed, by the pillow," and left his quarters. When he returned about 1530 hours he secured the wallet and did not examine it at that time (R. 9-10). In answer to the question, "What did you do with the wallet?" he stated, "Around 11:00 o'clock I had occasion to buy a couple of beers. I looked for my money and there wasn't any there" (R. 10).

Captain Charles J. Mueth testified that at 1330 hours 13 July 1945, at Municipal Airport, Memphis, Tennessee, he left his wallet, containing about $50.00, in the room of another officer, and departed. The money was "not there" when Captain Mueth returned about 1530 hours. He "reported the loss to the BOQ Office" (R. 7,8).

It was stipulated between the prosecution, defense and accused that if the witnesses hereinafter named were present they would testify that they had lost sums of money at Municipal Airport, Memphis, Tennessee, under the circumstances shown below. Flight Officer Jose Oliveros left his wallet, containing approximately $130.00, beneath his underclothes in his room on 10 July 1945. He left the room for about five minutes, then returned and "started to dress and picked up my wallet, opened it, and found all the money was gone" (Pros. Ex. 1). First Lieutenant John F. Leary placed his wallet, containing $53.00, in his trousers on a chair in his room about 1315 hours 13 July 1945. He then fell asleep until 1530 hours when he awakened, left the room, and returned at 1700 hours. "At approximately 1800 when I went to the Mess Hall to eat supper I looked into my wallet and the $53.00 was missing" (Pros. Ex. 2). First Lieutenant John C. Grim had his wallet, containing $82.00, in his "pants," which he left "lying across the bunk" in his room at approximately 1300 hours 13 July 1945. He went out and returned at approximately 1500 hours, dressed and "proceeded to town. At about 1800 after I had eaten at the Skillet Restaurant in the City of Memphis, I started to pay my bill, at which time I discovered that the four $20.00 bills were missing from my wallet, although the two $1.00 bills were still there" (Pros. Ex. 4). Flight Officer Theodore A. Paulissen left his "wallet," containing about $55.00 in his "pants" in his room for approximately one hour and forty-five minutes 14 July 1945. When he returned, together with one Lieutenant Otto, "the purse was sort of protruding from the rear pocket. I told Lt. Otto to

take the purse and get a dollar out of it. After opening the purse Lt. Otto advised me that there was no money in said purse" (Pros. Ex. 3). Second Lieutenant Russell Dashifsky left his room about 1200 hours 15 July 1945. He had hung his "trousers on a hook outside the closet and had my wallet which contained approximately $32.00 in my left hip pocket." He returned in about twenty minutes, dressed, and "then went to the Post Exchange, reached into my pocket for my wallet, opened it, and saw that the money was gone." (Pros. Ex. 5) Flight Officer Edward L. Pultz was absent from his room about twenty minutes 15 July 1945. "My clothes were laying on the bed. My wallet, which contained approximately $33.00, was in my left hip pocket." When he returned he "dressed and went to the Cafeteria for something to eat. While at the Cafeteria I pulled out my wallet and noticed that all my money was gone" (Pros. Ex. 7). First Lieutenant Thomas F. Flemming hung his trousers, containing a "billfold," in the "visible portion" of which he had "between $27.00 and $30.00," on a chair in his room, on the afternoon of 16 July 1945, and left the room for approximately fifteen minutes. On his return he "noticed a baggage check lying on the seat of the chair." Since this check had been in his "purse," he became suspicious, looked in the "purse," and "discovered that all the money which I had in the visible portion of the purse was missing" (Pros. Ex. 6).

On the afternoon of 16 July 1945 the Base Billeting Officer was in one of the Bachelor Officers' Quarters "looking for possible thefts in the BOQ" (R. 17). He saw accused and "followed him through several barracks. I noticed he walked very slowly and stopped and looked in each door of the rooms. He would go from one barracks, skip one and go down to the next" (R. 17). Accused was ordered into arrest by the Billeting Officer (R. 18), who subsequently made a search of accused's room about 2230 hours 16 July and discovered $25.00 in currency in a shoe belonging to accused (R. 18). About 2330 hours, after the Base Legal Officer had read and explained the 24th Article of War to accused, accused made and later signed a confession (R. 20,21), in which he stated that between the twelfth and sixteenth of July he had stolen sums of money on eight occasions from various Bachelor Officers' Quarters at the "airport." During this period he lost in several poker games all the money he had stolen except $27.00, of which he had concealed $25.00 in his shoe under his bed immediately before his arrest (Pros. Ex. 8). The confession did not purport to be precisely accurate; in it accused stated, "The above account is approximately correct. I can't remember the exact amount in each case nor can I be sure of the rooms without going back to see them" (Pros. Ex. 8). He accompanied the Assistant Provost Marshal and others to the Bachelor Officers' Quarters Area on the "base" (R. 25) 17 July, where, after reference to a list of thefts reported to the Provost Marshal during the week 10 to 17 July, he "freely" confessed to stealing money in the amounts, from the rooms, and on the dates indicated by all the complaining witnesses except Captain Mueth, who claimed the loss of $50.00 whereas accused stated he took $60.00 (R. 24-27; Pros. Ex. 10).

4. Evidence for the defense.

Accused, after being apprised of his rights as a witness, elected to take the stand and testify under oath (R. 39). He testified substantially as follows: His mother died when he was seven years old and his father suffered several mental breakdowns. As a result of the disruption of their home, accused and his brother were placed under the guardianship of a family named Summerlin (R. 40,41). Accused lived with this family until he went into the Army. From the time he completed high school until he enlisted in the Army he worked in a hotel, first as a night clerk and then as a bell boy and "front office clerk," at an average salary of $25.00 a week (R. 41). He enlisted as an aviation cadet at the age of twenty and, after the usual course of training, received his "pilot's rating and commission" in March 1943 (R. 41). He was married in August 1942 and has as dependents a wife and one child (R. 42). From May 1944 to October 1944 he served in India, where he sustained a back injury "from flak" (R. 42). He was then returned to the United States and hospitalized until April 1945, when he was discharged from the Army Air Forces Convalescent Hospital at Miami Beach, Florida (R. 43). He arrived at his present station 20 May 1945. He began playing poker at the Officers' Club and continued until he found himself in debt (R. 43). Worried by and with "the idea of recouping" his losses, he committed the series of thefts involved herein (R. 43,44). He has repaid the money he took (R. 43,48).

The testimony of accused that restitution had been made was corroborated by testimony of Captain Mueth and Lieutenant Capone (R. 10, 13), by their receipts (Def. Exs. 1,2), and by stipulation (R. 48).

5. All elements of the larcenies charged were admitted by the plea of guilty and adequately proved by the evidence.

Separate offenses were committed. Since each occurred in a different room at a different hour, this series of thefts cannot be considered as substantially one transaction.

Restitution is no defense and could only be considered in mitigation (MCM 1928, par. 149g, p. 171; CM 233148, Swanson, 19 B.R. 335).

The action of the reviewing authority, while clear as to intent, is inept in that it omits the word "feloniously" from its approval of the finding of guilty of Specification 4 of the Charge. In view of the Staff Judge Advocate's review and recommendation as to final action it is obvious that the reviewing authority intended to disapprove only the finding that the amount stolen was in excess of $50.00. Since the verb "steal" implies wrongdoing and was included in the action, it sufficiently approves the finding. The error is procedural only and in no way affects any substantial right of accused (A.W. 37; CM 202928, Cooley, C., 6 B.R. 374; CM 235461, Ronemous, 22 B.R. 82).

6. War Department records disclose that this officer is 24 years of age, is married, and is a high school graduate. He was employed in "Front office work, bookkeeping" in a hotel from November 1939 until June 1942 at a starting salary of $60.00 per month and a final salary of $80.00 per month. He entered the service 3 March 1942 (according to his statement he was given a ninety day furlough and was called back to duty as an aviation cadet 16 June 1942), and upon completion of training as an aviation cadet was commissioned Second Lieutenant, Air-Reserve, in the Officers' Reserve Corps of the Army of the United States 25 March 1943 and placed on duty the same day. He was promoted to first lieutenant 17 November 1943. He was classified for temporary limited service for a period of six months 31 March 1945 by an Army Disposition Board convened at Army Air Forces Regional and Convalescent Hospital, Miami District, Miami Beach, Florida, after a finding by the Board that he had a diagnosis of healed fractured lumbar vertebra, "accidentally incurred when thrown to floor when C-47 was caught in a down-draft on 29 September (1944) over desert in N.W. India."

7. The court was legally constituted and had jurisdiction of accused and the offenses. No errors injuriously affecting the substantial rights of 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 as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93.

Norman Mayoe, Judge Advocate

William P. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

(238)

SPJGK - CM 292561 1st Ind

NOV 20 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 First Lieutenant Malcolm C. Bailey (O-798561), Air Corps.

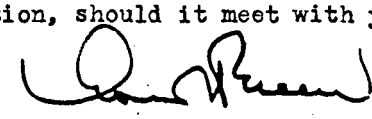
2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of nine separate larcenies of money in the total sum of $437.00, in violation of Article of War 93 (Specifications 1 to 9 of the Charge). No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved "only so much of the finding of guilty of Specification 4 of the Charge as involves a finding that at the time and place alleged the accused did take, steal and carry away about $50, lawful money of the United States, the property of Captain Charles J. Mueth"; 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 and sentence as approved by the reviewing authority and to warrant confirmation of the sentence.

The accused took nine sums of money, ranging from $27 to $130, in the total amount of $437, from the rooms of nine fellow officers during the period 10 July 1945 to 16 July 1945. He admitted taking the money and said he did so for the purpose of playing poker during the period in which the thefts occurred. He made full restitution before trial.

Accused's performance ratings since being commissioned have been "Excellent" except one rating of "Unknown." He went overseas in April 1944 and served in the India-China Division of the Air Transport Command until 29 December 1944 when he was injured while in an airplane. He was hospitalized and returned to the United States. Despite accused's previous good record, his action in deliberately committing nine separate larcenies demonstrates clearly that he is not worthy of his commission. I therefore recommend that the sentence be confirmed but that the forfeitures be remitted, that the sentence as thus modified be ordered executed, and that a post guardhouse 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.



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

THOMAS H. GREEN
Brigadier General, U.S.A.
Acting The Judge Advocate General

(Sentence confirmed but forfeitures remitted. GCMO 499, 5 Dec 1945).

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

SPJGN-CM 292563

UNITED STATES	)	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Napier Field, Dothan, Alabama, 10 October 1945. Dismissal, total forfeitures, and confinement for one (1) year.
First Lieutenant GEORGE R. ANDERSEN (0-824345), 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 93rd Article of War.

Specification: In that First Lieutenant George R. Andersen, Air Corps, Squadron "H", 2116th AAF Base Unit, did, on or about 20 September 1945 on Alabama State Highway No. 231, between Cottondale, Florida, and Dothan, Alabama, feloniously and unlawfully kill Flight Officer Alan J. Kuntze, Napier Field, Dothan, Alabama, by driving and operating an automobile in such a negligent and reckless manner, while said Flight Officer Alan J. Kuntze was a passenger therein, as to cause it to overturn.

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

Specification: In that First Lieutenant George Andersen, Air Corps, Squadron "H", 2116th AAF Base Unit, did, on or about 20 September 1945, wrongfully operate a motor vehicle upon Alabama State Highway No. 231 between Cottondale,

Florida, and Dothan, Alabama, in a negligent and reckless manner in willful and wanton disregard of the rights and safety of others.

The accused pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. He was found guilty of both Charges and Specifications and sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: On the early morning of 20 September 1945, the accused, accompanied by Second Lieutenant Harry B. Walsh and Flight Officer Alan J. Kuntze, all of whom were stationed at Napier Field, Dothan, Alabama, visited the Kokomo Club located on the highway between Dothan and Cottondale, Florida (R. 6k, 6r; Pros. Exs. 4, 5). In another party at the night club at the time were Second Lieutenants Everett L. Parrish and Gerald R. Otteson, and Flight Officer Duane L. Budner, members of the Provost Marshal's Department at Napier Field (R. 6b, 6c, 6j; Pros. Ex. 3). Accused and his companions wished to escort a female entertainer to her home and when she decided to go with Lieutenant Parrish's party, angry words were uttered, particularly by Flight Officer Kuntze, who was considerably under the influence of liquor (R. 6k).

It was about 1:45 a.m. when Lieutenant Parrish drove his Chevrolet car with his friends from the club. They stopped a short distance away because of tire trouble and were soon overtaken by a Buick Sport Coupe driven by accused accompanied by Kuntze and Walsh (R. 6c, 6g; Pros. Ex. 3). The latter offered their help but were told it was not needed whereupon they parked and stood around (R. 6c, 6k; Pros. Ex. 3). When Kuntze was told that he was in the way, he became belligerent and expressed a determination to fight (R. 6d, 6k). Lieutenant Parrish informed him that they were military policemen and advised him to return to his station before he got in trouble (R. 6d; Pros. Ex. 3). Completing the tire change, Lieutenant Parrish drove away followed by accused who maneuvered his car around in front, slowed down to a crawl, and, by driving from one side of the road to the other, prevented Lieutenant Parrish from passing (R. 6d, 6k). Apparently tiring of this sport accused drove away at high speed, but he soon turned around and came back. By driving on the wrong side of the road he forced Lieutenant Parrish to stop (R. 6d, 6e). The military police officers donned their brassards and side-arms and walked over to where accused had pulled up (R. 6d; Pros. Ex. 3). Their warnings to accused concerning his tactics received only vilification and the military police officers finally returned to their car and

continued toward Napier Field. Accused followed and, driving at a speed estimated at 50 miles per hour, rammed into the rear of Lieutenant Parrish's car and commenced pushing it at a high rate of speed. Lieutenant Parrish almost lost control of his car but succeeded in driving out of accused's path and off the road while accused sped by. After firing three warning shots into the air Lieutenant Parrish drove on and came to accused's car parked in a side road and facing the highway at an angle. Passing by, Lieutenant Parrish drove the remainder of the way into Dothan at a speed of from 80 to 85 miles per hour, slowing down only for turns. Accused followed closely behind for a while but disappeared after Lieutenant Parrish had traversed a curve in the road (R. 6a-6e, 6l-6n, 6o; Pros. Ex. 3).

A road block was set up at Dothan to halt accused but a report of a wreck on the highway sent the military police officers back to where the accused's car had last been seen. Two miles from town the demolished car of accused was found in a cotton patch thirty feet from the road. It had left the highway trying to make a turn, swerved back across the road, side-swiped a tree, and turned over several times. The lifeless body of Flight Officer Kuntze was found about 80 feet from the car (R. 6a, 6e, 6m; Pros. Exs. 2, 2a, 2b, 3). Death had resulted instantly from "a fracture of the cervical vertebrae with resulting spinal cord injury (traumatic)". Accused and Lieutenant Walsh escaped with less serious injuries (R. 6a; Pros. Ex. 1).

In a statement made to the investigating officer, accused asserted that the car went off the road when he applied his brakes on a curve while traveling at a speed of approximately seventy-five miles an hour. He stated that the events of the evening were not entirely clear in his mind as he had been drinking beer for an hour and a half before going to the Kokomo Club and had consumed another drink there (R. 6r; Pros. Ex. 5).

4. Evidence for the defense: Accused testified in his own behalf, narrating events immediately preceding the accident (R. 6u). He asserted that the effect of the alcohol he had consumed earlier in the evening had worn off and that he was fully capable of handling an automobile at a high speed. There was no other travel on the road and he concentrated all his attention on his driving in an effort to keep Lieutenant Parrish in sight. Flight Officer Kuntze urged him to drive faster and inquired if "this was as fast as this car" would go (R. 6u-6w). According to accused the sole cause of the accident was fast driving. In his own words,

> "We came upon this curve at nearly 75 to 80 miles an hour. I saw the curve and attempted to slow down. I applied a little brake and turned sharp in an attempt to keep the car on the road. The car ran off the road -- the left front and rear wheels ran off the road onto the shoulder and there was some grass there. I had to cramp the wheel over to

turn pretty sharp. The grass was wet from a little dew. When it did get back on the road, and hit the hard surface, the car started directly across the road headed for a tree. I saw the tree but I couldn't turn back the other way in time" (R. 6y).

Lieutenant Walsh corroborated accused's testimony that he was sober at the time of the accident. Accused drove skillfully, not recklessly, from the last time Lieutenant Parrish passed them. Accused was on the right hand side of the road, "wasn't swerving or cutting any monkeyshines", and slowed down for curves. Flight Officer Kuntze was "more or less leading the group" that evening. He asked, "Is this as fast as this old wreck will go" and stated, "you can't drive too fast for me" (R. 6t, 6u). Lieutenant Walsh asserted that there was no speed limit in the state of Alabama (R. 6t).

A medical examination of accused at the station hospital at 4:30 a.m. on 20 September 1945, disclosed that he was "apparently sober" at that time (R. 6s; Def. Ex. A).

5. The Specification of Charge I alleges that on 20 September 1945, on Alabama State Highway No. 231, between Cottondale, Florida, and Dothan, Alabama, accused did "feloniously and unlawfully kill" Flight Officer Alan J. Kuntze "by driving and operating an automobile in such a negligent and reckless manner, while said Flight Officer Alan J. Kuntze was a passenger therein, as to cause it to overturn", in violation of Article of War 93. The Specification of Charge II alleges that at the same time and place accused did "wrongfully operate a motor vehicle * * * in a negligent and reckless manner in wilful and wanton disregard of the rights and safety of others", in violation of Article of War 96.

By the wording of these Specifications accused is charged with involuntary manslaughter and reckless driving. Involuntary manslaughter is defined by the Manual for Courts-Martial (par. 149a), as:

> "homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law".

The antics of accused during the drive from the night club toward Dothan plainly reveal that he was under the influence of alcohol. His driving all over the road, striking the rear of Lieutenant Parrish's car, and racing down the highway at such an accelerated speed that he was unable to safely traverse a curve present a pattern of driving aptly characterized as negligent and reckless and in wanton disregard of the rights and safety of others. Accused's plea of guilty to reckless driving is amply supported by the evidence, and accordingly, the findings of guilty of Charge II and its Specification alleging this offense, are clearly sustained.

The erratic and reckless behavior of accused continued up to the time of the accident and contradicts his testimony that the effects of his earlier drinking had worn off. Although the precise extent to which accused was under the influence of liquor may be disputable it is apparent that it was of such degree as to cloud his judgment and impair his skill in the operation of his automobile. The evidence shows, and accused admits, that the immediate cause of this tragic mishap was his approaching a curve at such excessive speed that he was unable to control the car and negotiate the curve in safety. Even though the local state law imposed no limit of speed, he was charged with the duty of driving at such a prudent rate as would enable him to have the car under control at all times. The evidence shows a gross deviation from the standard of care requisite under the circumstances. His manner of reckless driving was the direct cause of his car overturning and of the death of Flight Officer Kuntze. It is no defense that the deceased eagerly acquiesced in the reckless driving or even helped to induce accused's attitude of recklessness. The criminality of the act of operating a motor vehicle in such a wanton manner as to cause a homicide is not extinguished by such factors. The evidence is legally sufficient to sustain Charge I and its Specification alleging involuntary manslaughter in violation of Article of War 93.

6. The accused is about 22 years and 4 months of age, having been born 29 July 1923. He was born in Montana and later resided in Idaho where he graduated from high school and attended a junior college for one year. After being employed as a car dispatcher at the Boise, Idaho, Quartermaster Sub-Depot from September 1942 to February 1943, he entered the military service. In June 1943, he commenced training as an aviation cadet, and, having completed the prescribed course, was commissioned a second lieutenant in the Army of the United States on 8 February 1944, entering on active duty on that date. On 17 September 1945, he was promoted to the rank of first lieutenant.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 93rd or the 96th Article of War.

Abner E. Lipscomb, Judge Advocate.

Robert J. Glanor, Judge Advocate.

(Sick in Hospital), Judge Advocate.

SPJGN-CM 292563 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 George R. Andersen (O-824345), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of involuntary manslaughter, in violation of Article of War 93; and of operating an automobile recklessly, in violation of Article of War 96. He had pleaded guilty to the latter offense only. 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 that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof.

On the early morning of 20 September 1945, accused, accompanied by Flight Officer Alan J. Kuntze and another officer, was driving his car to their station at Napier Field, Dothan, Alabama, after visiting a rural night club. They had all been drinking and Kuntze was considerably under the influence of liquor. Accused overtook another car filled with military police officers with whom Kuntze had previously exchanged angry words at the club. Accused stopped and Kuntze offered to fight. The military police officers went on, but accused maneuvered his car in front of them and by swerving from side to side prevented them from passing. When the military police officers finally succeeded in getting by, accused drove his car into the rear of their car and pushed it down the road at a high rate of speed. The military police broke away and sped down the road accused following close behind. Kuntze repeatedly urged accused to drive faster and the car attained a speed of 80 miles per hour. Accused lost control in traversing a turn in the road and the car overturned, Kuntze being thrown from the car and instantly killed.

Accused's gross negligence and recklessness in the operation of his automobile imperiled the lives and safety of others

lawfully proceeding upon the public highway and caused the death of a companion. I recommend that the sentence be confirmed, but that the forfeitures be remitted, 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. 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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. GCMO 513, 18 Dec 1945).

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

SPJGN-CM 292616

UNITED STATES	)	FIRST SERVICE COMMAND ARMY SERVICE FORCES
v.	)	Trial by G.C.M., convened at Camp Edwards, Massachusetts, 3 and 19 October 1945. Dishonorable discharge (suspended) and confinement for one (1) year and six (6) months. Rehabilitation Center, Fort Slocum, New York.
Private WALTER T. RICHEY (38050484), East Coast Processing Center.	)	

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

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1. The record of trial of the above named soldier, having been examined in the Office of the Judge Advocate General and there found legally insufficient, has been examined by the Board of Review.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Walter T. Richey, East Coast Processing Center, Camp Edwards, Massachusetts did, at Camp Bowie, Texas, on or about 8 December 1941 desert the service of the United States and did remain in desertion until he was apprehended at Hays, Kansas on or about 13 July 1945.

The accused pleaded not guilty to, and was found guilty of, the Charge and the Specification, except the word "apprehended," substituting therefor the words "returned to military control"; of the excepted word not guilty, of the substituted words guilty. 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 one year and six months. The reviewing authority approved the sentence; ordered its execution, but suspended the dishonorable discharge until the soldier's release from confinement; and designated the Rehabilitation Center, Fort Slocum, New York, as the place of confinement. The result of his trial was published in General Court-Martial Orders No. 1067, Headquarters First Service Command, Army Service Forces, Boston 15, Massachusetts, 25 October 1945.

3. The accused, who sought to establish that his offense was barred by the Statute of Limitations as set forth in Article of War 39, testified that he left his organization on 2 December 1941 under the authority of a three-day pass which expired at midnight, 5 December 1941. He further testified that he failed to return to his organization and that he became absent therefrom without authority on 6 December 1941 (R. 7-8). He sought to support his testimony by two unsworn written statements and by an affidavit executed by his wife (Def. Exs. A, B, C). The evidence for the prosecution, however, consisting of duly authenticated extract copies of the morning reports of the accused's organization, establishes that he absented himself from a duty status with his organization at 6:00 a.m. on 8 December 1941, and that he remained absent without leave until 13 July 1945 (Pros. Exs. 1, 2).

Concerning the Statute of Limitations as pleaded by the accused Article of War 39 provides, as follows:

> "Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: Provided, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitations upon trial and punishment by court-martial shall be three years: * * *" (MCM, 1928, p. 211).

In explanation of the operative effect of the Statute of Limitations upon the offense of desertion, the Manual for Courts-Martial states:

> "The period of limitation begins to run on the date of the commission of the offense. Absence without leave (AW 61); desertion (AW 58); and fraudulent enlistment (AW 54) are not continuing offenses and are committed, respectively, on the date the person so absents himself, or deserts, or first receives pay or allowances under the enlistment" (MCM, 1928, par. 67).

In view of the provisions of Article of War 39 and the above statements in the Manual the offense of desertion is barred from prosecution three years after its inception, except when the inception of such desertion occurred "in time of war". The controlling question in the present case is, therefore, whether the desertion of the accused which had its inception on the morning of 8 December 1941 occurred "in time of war".

Official reports, of which we may take judicial notice, show that, at 7:55 a.m. on the morning of 7 December 1941, a large air force of the Imperial Japanese Navy swarmed over the American airbase at Hickam Field and the Naval Air Station at Ford Island. At about the same time Japanese torpedo planes and dive bombers made a concentrated attack on our naval ships at Pearl Harbor and destroyed eighty naval craft of various types and ninety-seven army planes at Hickam and Wheeler fields. Of our Naval and Marine Corps personnel 2117 officers and enlisted men were killed, 876 wounded, and 960 reported as missing. The Army lost 226 officers and enlisted men killed or fatally wounded and 396 wounded. Our military resistance to the attacks resulted in the destruction of twenty-eight enemy aircraft and three submarines. It is common knowledge now, and was general knowledge then, that our naval disaster at Pearl Harbor imperiled the very life of this nation.

On the day following this attack the President addressed the Congress in part, as follows:

> "Yesterday, December 7, 1941 -- a date which will live in infamy -- the United States of America was suddenly and deliberately attacked by naval and air forces of the Empire of Japan. * * *
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> * * *
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> As Commander in Chief of the Army and Navy I have directed that all measures be taken for our defense.
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> * * *
>
> "Hostilities exist. There is no blinking at the fact that our people, our territory, and our interests are in grave danger.
>
> * * *
>
> "I ask that the Congress declare that, <u>since the unprovoked and dastardly attack by Japan on Sunday, December 7, a state of war has existed between the United States and the Japanese Empire</u>" (Underscoring supplied, Cong. Record, 77th Cong., vol. 87, pp. 9504-9505).

Immediately following this message the following resolution was passed by both the House and the Senate:

> "Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people

of the United States of America: Therefore be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States" (Underscoring supplied. Public Law 328 — 77th Congress — chap. 561, 1st Sess., 50 U.S.C.A. Appendix, note preceding section 1).

A few hours later, at 4:15 p.m., this formal declaration was approved by the President. From the language underscored it is apparent that Congress recognized that it was not commencing a war, but rather that it was acknowledging the existence of a war which had already begun. Both the message of the President and the response of Congress express a clear recognition that this nation was at war from the hour of the infamous Japanese attack upon Pearl Harbor.

It is equally clear that our Government's concept of War as expressed in its declaration on 8 December 1941 was the same concept as that expounded by the Supreme Court of the United States in the Prize Cases in 1862. 2 Black 635, 67 U.S. 635, 17 L. Ed. 459. In those cases the Supreme Court was called upon to determine whether the United States was in the legal status of war in 1861 following the beginning of hostilities with the Confederate States of America; for only a legal status of war could justify and legalize the capture of neutral vessels violating the blockade imposed on the Southern states by President Lincoln. Since war against the Confederate States of America was never declared, and since hostilities were begun by the attack upon Fort Sumter, the Supreme Court was confronted with the question whether a legal status of war automatically followed an organized attack upon our nation, or whether, under the Constitution, Congressional action was required. Although Mr. Justice Grier, in expounding the legal concept of war, stated that, "By the Constitution, Congress alone has the power to declare a national or foreign war", he explained further:

"If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legis-

> lative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be 'unilateral'".

In pointing out that a legal status of war may exist without a declaration on either side and that a unilateral attack by one nation upon another creates such a legal status of war, Mr. Justice Grier quoted Lord Stowell with approval, as follows:

> "A declaration of war by one country only is not a mere challenge to be accepted or refused at the pleasure of another."

Following the same line of reasoning the attack by Japan upon this nation on 7 December 1941 transformed our legal and international relationship with that country from one of peace to one of war.

Another judicial recognition of the existence of a state of war which was never formally declared by Congress is presented in the case of Hamilton v. McLaughry, 136 Fed. 445, in which a Federal District Court was called upon to decide whether a "time of war" existed, within the purview of the Articles of War, during the Boxer Uprising in 1900. Although the facts of that case are very different from those which existed in the Prize Cases and in our present case, the decision serves further to illustrate the principle that this nation may be legally at war without a formal declaration. The court expressed its opinion, in part, as follows:

> "In the present case, at no time was there any formal declaration of war by the political department of this government against either the government of China or the 'Boxer' element of that government. A formal declaration of war, however, is unnecessary to constitute a condition of war. Adopting the definition of war above quoted with approval by the Supreme Court, the question here is whether this government was, at the time of the commission of the homicide by petitioner, prosecuting its right in Chinese territory by force of arms.
>
> * * *
>
> "Yet I am constrained to hold that by reason of the occupation of Chinese territory by the large military force of this government, under authority of the Department of War, the many conflicts between the forces of this government and the armed Chinese troops, and the recognition of a condition of war by the Congress of the United States in making payment to the officers and men of this government there engaged on a war basis and all the other facts and circumstances

> in this case, at the time the homicide in question was committed there prevailed in China a condition of war, within the spirit and intent of the fifty-eighth article of war."

It should be observed that in the above decision the court justified its conclusion that this nation was at war in 1900 largely on the ground that Congress impliedly approved the use of military force against the Boxers in China whereas in the Prize Cases the Supreme Court justified the conclusion that this nation wat at war in 1861 on the ground that it had been attacked.

Opposed to the legal concept of war as above explained are three recent decisions involving litigation over life insurance policies. The first was rendered by the Supreme Court of South Carolina in the case of West v. Palmetto State Life Insurance Company, 25 S.E. 2nd 475 (27 Apr. 1943). The insured, an enlisted man in the United States Navy, was killed by Japanese bombs at Pearl Harbor on 7 December 1941. The policy upon his life provided for double indemnity in the event of accidental death, but provided further that the double indemnity feature would not be applicable in the event his death should occur while he was "engaged in military or naval service in time of war". The sole issue, as stated by the court, was, "Did the insured's death occur in time of war?" The court, without citing the Prize Cases or Hamilton v. McLaughry, supra, or considering the concept of war as it has been explained by the Supreme Court, reached the conclusion that:

> "* * * the declaration by Congress of War on Japan on December 8th was the only legal way in which this country could be placed in a state of war with that aggressor nation."

The opinion in the second of the insurance cases was rendered by the Supreme Court of Idaho, in Rosenau et al. v. Idaho Mutual Benefit Association, 145 P. (2nd) 227, with two justices dissenting. The facts were similar to those in the first insurance case and the sole issue, as stated in the dissenting opinion, was, "Was the United States at 'war' December 7, 1941?" The court reasoned that, since the Constitution gave to Congress the sole power to declare a national or foreign war, a declaration by Congress was necessary to place this country at war with Japan. The court sought to draw a parallel between the international incident of 1930 in which our gunboat Panay was sunk by hostile military action of the Japanese forces, and the attack upon Pearl Harbor. The court argued that, since the Panay incident was "atoned" for, the Pearl Harbor attack might have been "atoned" for and war prevented. This argument overlooks, however, the significant fact that the Panay incident was repudiated by the Government of Japan as an error, whereas the attack upon Pearl Harbor was of such

magnitude as unmistakably to reveal the deliberate and premeditated design and purpose of the Japanese Government. That design and purpose were made further manifest by the events immediately following. The reasoning of this opinion also loses sight of the authoritative statement by the Supreme Court of the United States that our Congress does not require a declaration of war in order for that status to be created when our nation becomes the victim of a unilateral attack.

The third of these insurance cases was Savage v. Sun Life Assurance Company of Canada, 57 F. Suppl. 620. The District Court for the Western District of Louisiana stated that, "The issue, under the agreed statement of facts is: Did death result 'from war or any incident thereto'?" The District judge then cited the two preceding cases and stated that there was a third case by the Circuit Court of the Territory of Hawaii, No. 17,175, in which liability on the insurance policy in issue had been denied. The opinion in that case has not been available to us. Without further citations and without reference to the body of our Federal law on the subject of war, he concluded that the policy in question contemplated a condition where "both we and the nation attacking us would first have to know and understand that we were engaged in a conflict of arms?" How "we" could have failed, in light of the events at Pearl Harbor, to have such an "understanding" is a mystery beyond the compass of our comprehension.

The dissenting opinion of Justice Ailshie in Rosenau et al. v. Idaho Mutual Benefit Association, supra, in considering whether the attack on Pearl Harbor created a legal status of war said:

> "I think the average citizen, who might apply for and procure a life insurance policy, containing the war clause here in question, would undoubtedly think and believe that such a national military status was war; and he would not believe himself insured against such a casualty."

Among the well considered authorities presented by him, he cites the persuasive statement by Professor Tomlinson on war in 67 Corpus Juris, Sec. 4, p. 338, as follows:

> "War may be commenced, or its existence formally recognized, by declaration of one or both of the parties thereto; but, except as otherwise provided by the Hague Convention of 1907, a declaration is unnecessary, and war may commence with the outbreak of actual hostilities, and may exist without a declaration on either side, or prior to a declaration, which, when made, may declare the previous existence of war and fix the date on which it commenced." (Underscoring supplied)

In light of the facts and reasons herein presented we are compelled to the conclusion that the present case clearly comes within the concept of "war" as described by Justice Grier in the Prize Cases and accordingly conclude that this Nation was in a legal state of war on 7 December 1941. To contend otherwise is to place form above substance and fiction above stark reality.

Since the proof in our present case shows that the accused deserted the service of the United States at 6:00 o'clock on the morning of 8 December 1941, it only remains to be determined whether his knowledge of the existence of a state of war at that time is necessary to the legality of his conviction. Although it is true that a war time desertion is more base in quality than a peace time desertion, the Articles of War make no distinction in the elements of the offense or the proof required. Our question is not, therefore, whether the accused knew he was deserting in time of war, but whether, as a matter of law, the Statute of Limitations was made inapplicable to his offense because it had its inception subsequent to the existence of a state of war.

4. For the reasons stated the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty and the sentence.

Abner E. Lipscomb, Judge Advocate.

Robert J. O'Connor, Judge Advocate.

(Sick in hospital), Judge Advocate.

1st Ind DEC 4 1945

SPJGN-CM 292616
TO: The Judge Advocate General

For his information.

Abner E. Lipscomb
ABNER E. LIPSCOMB
Colonel, JAGD
Chairman, Board of Review #3

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

SPJGQ - CM 292656

UNITED STATES v. First Lieutenant HARRY U. FERTICK (O-1304365), Infantry.	PANAMA CANAL DEPARTMENT Trial by G. C. M., convened at Post of Corozal, Canal Zone, 18 October 1945. Dismissal, total forfeitures and confinement for one (1) year.

OPINION of the BOARD OF REVIEW
PARTLOW, 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 Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant Harry U. Fertick, Infantry, Headquarters and Headquarters Company, Corozal General Depot, Post of Corozal, Canal Zone, did, at the Post of Corozal, Canal Zone, between 12 June 1945 and 25 September 1945, feloniously embezzle by fraudulently converting to his own use about thirteen hundred eighty-four dollars and forty-nine cents ($1384.49), lawful money of the United States of America, property of the Panama Canal Department Motion Picture Service, entrusted to him in his capacity as Theatre Officer, Post of Corozal, Canal Zone.

He pleaded not guilty to and was found guilty of the Specification and the Charge. 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, to pay the United States a fine of $1000, to be confined at hard labor at such place as the reviewing authority might direct for two (2) years, and to further be confined at hard labor until said fine is paid but not for more than one (1) year

in addition to the two years hereinbefore adjudged. The reviewing authority approved the sentence, remitted so much of the sentence as is in excess of dismissal from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one (1) year, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 48.

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

By special orders of Headquarters Post of Corozal, Canal Zone, dated 12 June 1945 as amended by special orders dated 28 June 1945, the accused was detailed inter alia to the additional duty of Theater Officer vice First Lieutenant Wendt, who was relieved (R. 1, 2; Pros. Exs. 1, 2). By special orders dated 30 July 1945 confirming verbal orders of the Commanding Officer of 28 July 1945, the accused was detailed to the additional duty of Theater Officer for the Post and General Depot, Post of Corozal (R. 2; Pros. Ex. 3). He was relieved from the additional duty of Theater Officer and First Lieutenant Kittle was detailed as Theater Officer by special orders dated 24 September 1945 (R. 2; Pros. Ex. 4).

The Post Theater at the Post of Corozal is a unit of the Panama Canal Department Motion Picture Service but the Theater Officer is appointed by the Post Commander (R. 14). Mrs. Hunt, who is employed by the Panama Canal Department Motion Picture Service as manager and cashier of the Post Theater at Corozal, sells tickets to the patrons and balances the daily receipts of cash by checking the cash with the number of tickets sold (R. 6). The amount of tickets sold during the day is determined by subtracting the number of the first ticket sold from the number of the last ticket sold (R. 6). Mrs. Jones, the assistant cashier, accounts for her tickets sold in the same manner and then turns over the money and the reading of the tickets to Mrs. Hunt (R. 7). The cash is then put in a safe for which Mrs. Hunt alone has the combination and she makes out a daily receipt according to the number of tickets sold (R. 4, 6, 10). A daily voucher is made out by Mrs. Hunt and is signed by the Theater Officer when he receives the cash receipts (R. 6). The Theater Officer places the cash receipts in a safe in the theater until such time as they can be deposited in the bank (R. 4, 5). The deposit in the bank is made by the Theater Officer to the credit of the "Post of Corozal, Central Post Fund", of which Major Dickerson is the custodian (R. 7). In making the deposit the Theater Officer secures a duplicate deposit

slip which he presents to the custodian of the Central Post Fund and receives from him a regular receipt voucher for the amount of money deposited (R. 4, 7). Theater receipts are withdrawn from the fund in the form of a check payable to the order of the Post Theater Officer, who then indorses the check to the Panama Canal Department Motion Picture Service (R. 7, 8, 10). The custodian acts as banker and has never been instructed to check the theater receipts (R. 8). The receipts and a weekly report compiled by the Theater Officer from the daily report of tickets sold are required by a memorandum letter to be turned in to the office of the Department Motion Picture Service on the Monday following the close of business on Saturday (R. 10, 15). Remittance can be made either in cash or by check (R. 10). The Theater Officer has no occasion to spend any money for telephone or the payment of help and all money received from the sale of tickets should be turned in to the office of the Department Motion Picture Service (R. 5, 11, 15).

First Lieutenant Kittle took over the duties of Theater Officer from the accused on 24 September 1945 (R. 4; Pros. Ex. 4). When the transfer of property was made to him in the presence of Major Beavers on 30 September 1945, the receipts for the weeks ending 15 September and 22 September 1945 had not been turned in by the accused (R. 4, 5). During the course of an investigation by Major Beavers the amount of credit with the Central Post Fund was checked. According to two previous weekly reports and daily receipts for 23, 24 and 25 September there was a total obligation of $2456.90. Cash on hand of $830.21 and cash receipts from the theater cashier of $242.20 made the total assets $1072.41 and resulted in a deficit of $1384.49. This was shown by the Statement of the Theater Officer's Account at the close of business on 25 September 1945 (R. 4, 5; Pros. Ex. 5). First Lieutenant Kittle did not remember the accused making any comments about the combination of the safe in the theater being changed or that it was the same combination as when Lieutenant Wendt was Theater Officer (R. 5).

Major Dickerson, the custodian of the Central Post Fund, testified that it was a common practice and the practice while accused was Theater Officer for Theater Officers to draw amounts over the credit to their accounts (R. 9). A former Commanding Officer of the Post had authorized the issuance of checks for the amount to be deposited, provided the Theater Officer gave a receipt that the money would be deposited prior to the time the check was used (R. 8). This was done where it was impracticable for the Theater Officer to go to the bank, return to Corozal for a check and then go to Quarry Heights with the

check (R. 8). On 28 September 1945 Major Dickerson had prepared a certificate showing the balance that was due the Theater Officer following the last transaction with Lieutenant Wendt and a statement of all deposits received from and amounts paid out to the accused as Theater Officer to 20 September 1945. This statement showed a balance of $412.80 due to the Theater Officer at the close of business with the accused (R. 8; Pros. Ex. 6). The conduct of the accused was no different from that of other persons in the same circumstances and it was not an uncommon practice for Post Theater Officers to be late in making deposits (R. 9). Major Dickerson had no knowledge of the embezzlement or misappropriation of funds of the Post Theater (R. 9).

Mr. Krehl was the chief clerk of the Panama Canal Department Motion Picture Service and civilian assistant to the Department Motion Picture Officer (R. 14). He testified that irregularities had occurred at the Post Theater at Corozal during the last two or three months while the accused was Theater Officer. These consisted of the late transmittal of receipts and the nontransmittal of receipts (R. 14). The receipts were late practically every week and the receipts for the weeks ending 15 and 22 September 1945 were not received (R. 14). No explanation was made of the delay in turning in the receipts (R. 15).

Major Burton of the Panama Canal Department Motion Picture Service testified that reports from the Post of Corozal arrived late (R. 10, 11). They were due on Mondays, though the location of the theater might make some difference (R. 10). There was delay during July and August, and during the latter part of the period the accused served as Theater Officer the reports did not reach the office until Friday or Saturday. The longest delay was until Monday of the week following the day the report was due (R. 11). He spoke to the accused on the telephone concerning the delay sometime between 10 and 15 September (R. 11, 13). He notified the Adjutant, the Executive Officer and the Post Commander of the delay (R. 11, 13). The accused said that he was unable to get the remittance to the office on time because he had too many things to do (R. 11). At the time of the trial a shortage of $1155.99 existed (R. 11). Under cross-examination Major Burton stated that there have been delays in the receipt of reports from other theaters. The amounts turned in are required to balance, but if the balance did not tally the remittance would be accepted and an explanation would be demanded (R. 12). The amount of accounting involved does not require much time (R. 12). Before the accused became Theater Officer the receipts from Corozal had not been late (R. 12).

Mrs. Hunt, the cashier, did not know of any misuse or embezzlement of money from the Post Theater Fund (R. 7). Captain Salaga, Adjutant of the Post of Corozal from 17 July 1945, testified that prior to being relieved as Post Theater Officer the accused carried out his duties in an exemplary manner (R. 3).

4. The accused testified (R. 19). When he received money from the cashier he kept it in a safe at the Post Theater (R. 20). He had received the combination to the safe from Lieutenant Wendt, his predecessor as Theater Officer, and it was not changed (R. 20). He did not know whether anyone else knew the combination (R. 20). During the past three months he had been picking up his pay at the Finance Office and cashing it there (R. 20). He kept some of it for his personal use and the remainder he placed in the safe in the theater (R. 20). No record was kept of the money in the safe but the daily receipts were kept there and a deposit was made in the bank every two or three days (R. 20). Whenever the accused needed money he took some out of the safe but he could not remember when this practice began (R. 20). When he found that there was a shortage he tried to secure money to replace it by writing to the United States for funds but he never received any (R. 20, 21). He received a letter from the Post Commander concerning the delay in transmitting the receipts for the week ending 16 September and replied by a first indorsement that he had not had time to make his bank deposits and asked to be relieved as Theater Officer (R. 21; Def. Ex. 9). He wanted to be relieved in order to straighten out the funds by making reimbursement (R. 21). Some of the money has been paid back and he intends to pay back the rest (R. 21). He cannot account for the shortage in detail because it amounts to about $25 per day and he does not know how he could have spent that much (R. 21, 27). The accused does not consider himself guilty of embezzlement because he intends to pay back the money (R. 21). It was possible for a substantial amount to be taken from the safe in such a way as not to arouse his suspicions (R. 26, 27).

On cross-examination the accused testified that he took over his duties as Post Theater Officer on 12 June 1945 (R. 21). He found out "within a few days or the second week" that the receipts were to be at Quarry Heights on Monday (R. 22). For the first two weeks he was able to deposit the receipts except when he could not get to the bank on time (R. 22). Sometime in August he first discovered a discrepancy between the cash on hand and the amount due to the Panama Canal Department Motion Picture Service (R. 22). When he checked he found that there was a shortage of less than $1000 due to his using the money and not putting it back (R. 22). No other shortage occurred after this

because he would pick up the receipts for several nights from the cashier and place them with the other receipts for the week (R. 22). He would then take out enough money for the deposit for the week and if there was enough left he would deposit it later (R. 23). In August he used his pay check of $298, except for a small amount which he kept for himself, to make up the shortage but there was still a shortage of about $200 (R. 23). He was unable to explain why there was a shortage of over $1000 on 24 September when the shortage in August was only about $400 and he had repaid about $300 (R. 23). He continued to place his own money in the safe after he discovered the shortage because he could not think of a better place for it (R. 23). The theater receipts were in cigar boxes and he placed his money on top. He would then use his money first and then take money from the cigar boxes (R. 23). He took the theater money and did not make an error but he kept no record of the amounts which he took (R. 23). The accused was not familiar with the procedure for changing the combination on safes but he thought that he would call the Post Quartermaster (R. 23, 26). He was aware on 24 September 1945 that he was short about $1300 and had discovered this shortage about 12 September when he did not have enough money to make a deposit of the receipts for the week (R. 26). There was never $1000 in the safe at one time (R. 26). When the accused took money for his personal use it was always less than $100 (R. 26). No funds disappeared after he discovered the shortage in August (R. 26).

Upon being examined by the court the accused testified that he did not have the combination to Mrs. Hunt's safe and that he had never found any discrepancy in her accounts (R. 27). After he knew of the discrepancy he continued to withdraw money from the safe (R. 27). No audit was made when he took over his duties (R. 27). The door to the theater office was locked at night and the guard only watches parked cars during the show (R. 27). He did not have enough of his own money in the safe to cover what he drew out because he only used the theater funds when his own were exhausted (R. 27). He does not suspect anyone of taking the money (R. 27).

First Lieutenant Lowman testified that he was associated with the accused as a member of the Staff on the Post of Corozal and as his roommate for four months (R. 16). The accused was congenial and they were friends but not closely associated (R. 17). During this time he noticed nothing unusual in the accused's actions. The accused had no more vices than average and he did not know of the accused gambling, spending large sums of money or making large purchases or investments (R. 17). The

accused always conducted himself as an officer and a gentleman in a military manner (R. 17). In his opinion the accused's character is "excellent" (R. 17). He noticed no change in the actions or character of the accused within the few weeks immediately prior to 24 September or thereafter (R. 17).

First Lieutenant Kittle was recalled as a witness for the accused (R. 17). On 5 October 1945, after he had relieved the accused as Theater Officer, he received $228.50 from the accused to apply on the deficit, thus reducing the deficit to $1155.99 (R. 18; Def. Ex. 7). When he assumed his duties he did not know that there was a shortage but he discovered it when the credit shown on the last two weekly reports of the accused failed to equal the amount due the Motion Picture Service (R. 18). By a verbal order of the Commanding Officer he was ordered to take the last two weekly reports and deposit the money, and then take the checks to the Panama Canal Department Motion Picture Service with a letter to Major Beavers, who had asked for complete details (R. 18). He also brought the shortage to the attention of the accused (R. 18).

It was orally stipulated by and between the prosecution, the defense and the accused that on 17 October the accused had given $125 to Captain Kelly, the Theater Officer, to apply on the shortage of $1155.99 and reduce the net shortage to $1030.99 (R. 19). It was stipulated in writing by and between the prosecution, the defense and the accused that if George Watts, Hotel New Yorker, New York, New York, were present he would testify that during the latter part of September he had received a letter from the accused, dated 21 September 1945, requesting a loan of $1000 which the accused needed to make up a shortage in a fund for which he was pecuniarily responsible. Mr. Watts had not answered the letter or complied with the request (R. 19; Def. Ex. 8).

5. First Lieutenant Kittle was recalled by the court and testified concerning the operating procedure of the Post Theater (R. 28, 29, 30). After a ten minute recess, during which time apparently arrangements were made for Lieutenant Kittle's further testimony, the court reconvened, but the record fails to show affirmatively that the accused was then present (R. 28). However, inasmuch as his presence is shown a few minutes later in answer to a question by the prosecution, it is considered fair to presume that he was present when the court reconvened after the recess and during the complete testimony of Lieutenant Kittle.

6. The accused was found guilty of a Specification charging him with feloniously embezzling by fraudulently converting to his own use about $1384.49, the property of the Panama Canal Department Motion Picture Service, entrusted to him as Theater Officer, Post of Corozal, Canal Zone, in violation of Article of War 93. He was detailed as Theater Officer, Post of Corozal, from 12 June to 24 September 1945. In his capacity as Theater Officer he received the proceeds of the sale of tickets from the cashier of the theater. These receipts were placed by him in a combination safe in the office of the theater until such time as he could deposit them in the bank to the credit of the Post Central Fund. Deposits were usually made every two or three days. Upon his presenting a duplicate deposit slip to the custodian of the Central Post Fund the latter gave the accused a check to his order as Theater Officer, which the accused was required to indorse and transmit to the Panama Canal Department Motion Picture Service each Monday with a report of the receipts for the week ending the previous Saturday. During the months of July and August the accused was late in making his reports and transmitting the receipts, as much as a week on one occasion. He failed to transmit the receipts for the weeks ending 15 and 22 September and when he was relieved as Theater Officer on 24 September his successor discovered a shortage of $1384.49. The accused admitted that he had taken Post Theater funds for his personal use but insisted that he intended to pay back the money. At the time of trial he had made payments which reduced the deficit to $1030.99.

Embezzlement is defined in the Manual for Courts-Martial, 1928, paragraph 149h, as follows:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. (Moore v. U.S., 160 U.S. 268.)
>
> "The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship."

The owner of the receipts from the operation of the Post Theater, Post of Corozal, Canal Zone, was the Panama Canal Department Motion Picture

Service. A fiduciary relationship existed between the Panama Canal Department Motion Picture Service and the accused when he was detailed as Theater Officer by the Commanding Officer of the Post of Corozal. The receipts from the Post Theater were turned over to the accused for the express purpose of safekeeping and transmission to the Panama Canal Department Motion Picture Service and at all times remained its property. The admitted use by the accused of these receipts for his own benefit was a conversion amounting to a breach of trust and constitutes the offense of embezzlement (CM 192530, Dig. Op. JAG, 1912-40, sec. 451 (18); CM 244621, Morrison, 28 BR 355, 362, 3 Bull. JAG 99).

The accused testified that he intended to return the money and the evidence shows that he did return some of it. Neither the intent to return the money nor its actual return is a defense.

> "The fact that accused may have intended to return the money, or even that he did return the amount of the fund, after the offense was complete, is no defense" (CM 244621, Morrison, supra).

> "The return of the money post litem motam proves only that he was responsible for it, and does not negative nor excuse the offense" (CM 269772, Romp).

7. By letter to the reviewing authority, attached to the record of trial, all members of the court which tried the accused recommended that all of the sentence imposed by the "court be remitted with the exception of that portion of the sentence which provides for dismissal from the service." This recommendation was made in view of the fact that the accused had made full restitution prior to the completion of the record of trial. The receipt of Captain Kelly, Theater Officer, Post of Corozal, Canal Zone, for the restitution of the balance of the shortage is attached to the record of trial.

8. War Department records show that the accused is 38 years of age and married. He is a native of Pennsylvania and a resident of Auburndale, New York. He attended Drexel Institute of Technology for two years but did not graduate. In civilian life he was employed for five years by Elizabeth Arden, Inc., as a clerk and for four and a half years by the Philadelphia Storage Battery Company as a production supervisor. He served in enlisted status from 6 May 1941 to 11 October 1941 and on 12 October 1941 he was transferred to the Enlisted Reserve Corps. On 22 January 1942 he was recalled to active duty and served in enlisted

status until 16 December 1942, attaining the grade of corporal. On 17 December 1942 he was appointed a second lieutenant in the Army of the United States upon graduation from Officer Candidate School, The Infantry School, Fort Benning, Georgia, and assigned to duty in the Infantry. He was promoted to first lieutenant on 17 September 1943. He graduated from the School for Bakers and Cooks, 1566th Service Unit, Fort Benjamin Harrison, Indiana. He was serving overseas in the Panama Canal Department at the time of the commission of the offense charged.

9. The court was legally constituted and had jurisdiction of the accused and the offense charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized for violation of Article of War 93 by an officer.

W. H. Pardow Jr., Judge Advocate.

A. G. Piccard, Judge Advocate.

Donald D. Hickman, Judge Advocate.

SPJGQ - CM 292656 1st Ind

NOV 28 1945

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Harry U. Fertick (0-1304365), Infantry.

2. Upon trial by general court-martial this officer was found guilty of feloniously embezzling by fraudulently converting to his own use $1384.49, the property of the Panama Canal Department Motion Picture Service, which had been intrusted to him as Theater Officer, Post of Corozal, Canal Zone, 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, to pay the United States a fine of $1000, to be confined at hard labor at such place as the reviewing authority might direct for two (2) years, and "to further be confined at hard labor until said fine is so paid but not for more than one (1) year in addition to the two years hereifore adjudged." The reviewing authority approved the sentence, remitted so much of the sentence as was in excess of dismissal from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one (1) year, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 48.

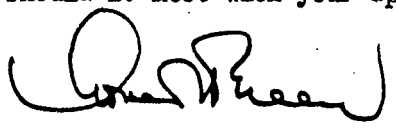
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I concur in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

The accused officer was detailed as Theater Officer, Post of Corozal, Canal Zone, from 12 June 1945 to 24 September 1945. The theater was a unit of the Panama Canal Department Motion Picture Service. It was the duty of the accused to receive the cash receipts from the cashier of the theater and transmit them to the Panama Canal Department Motion Picture Service at Quarry Heights, Canal Zone. After the accused received the cash receipts from the cashier he placed them in a combination safe in the Post Theater, pending their deposit in bank and remittance to the owner. In the same safe he kept his personal funds. When his money was exhausted he would supplement it by tapping the theater money in amounts less than $100 at a time. His reports and remittances began running several days late. The accused failed to transmit the reports and the receipts for the weeks ending 15 and 22 September 1945. When the accused was relieved as Theater Officer on

24 September 1945 his successor discovered a shortage of $1384.49 in the Post Theater account. The accused admitted that he had used the Post Theater funds for his own purposes but did not know how he could have taken the full amount of the shortage although he kept no record of the amounts which he took. He testified that he always intended to pay back the money. Prior to trial the accused had made partial restitution and reduced the amount of the shortage to $1030.99, and he subsequently made full restitution.

This is a case of an officer who could not resist the temptation to augment his income by converting to his own use funds which were intrusted to his care. Despite his avowed intention of repaying the money he did not do so until after the shortage was discovered. Attached to the record of trial is a receipt from the Theater Officer, Post of Corozal, Canal Zone, acknowledging full restitution by the accused. The accused officer has been found guilty of a serious offense of a civil nature and has demonstrated his unfitness to be an officer. 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 executed and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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



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

THOMAS H. GREEN
Brigadier General, U. S. Army
Acting The Judge Advocate General

(Sentence as approved by reviewing authority confirmed, but forfeitures remitted. Sentence as modified ordered executed. GCMO 2 , 14 Jan 1946).

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

SPJGH - CM 292689

UNITED STATES v. Private First Class RAMON FLORES-GALARZA (30421141), Battery B, 346th AAA Searchlight Battalion.	PANAMA COAST ARTILLERY COMMAND FORT AMADOR, CANAL ZONE Trial by G.C.M., convened at Fort Clayton, Canal Zone, 28 and 29 September 1945. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by 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 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 Ramon Flores-Galarza, Battery B, 346th AAA Searchlight Battalion, did, at Paitilla Point, Canal Zone, on or about 18 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Pastora Cornejo de Riggs.

Accused did not reply when asked how he pleaded to the Charge and Specification and, by direction of the court, pleas of not guilty to the Charge and Specification were entered for him. He was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeiture and confinement for life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. After accused had been arraigned, defense counsel moved that the proceedings be dismissed on the grounds that (a) the charges were

never legally served on accused, and (b) he did not understand the nature of the charges or the nature of the proceedings and was unable intelligently to conduct or cooperate in his defense (R. 8). In opposition to this motion the prosecution first presented the following evidence.

On the afternoon of 14 September 1945 the trial judge advocate and defense counsel originally detailed to try the instant case proceeded to the Fort Clayton General Hospital where the trial judge advocate placed the charge sheet in accused's hands and advised him in English what the document was and the nature of the charges against him. Accused reacted violently, ripping the charge sheet to pieces and attempting to assault his two visitors. He did not indicate any comprehension of the reason why the document had been delivered to him (R. 9, 10). At the conclusion of this evidence the law member, without objection by any member of the court, denied defense's motion so far as service of the charges was concerned.

Accused was a member of the 346th Antiaircraft Artillery Searchlight Battalion and Captain Benjamin S. Wathen of that organization had known accused since 30 March 1944. He had visited accused's military position on the average of three times a week and had talked to accused approximately twenty times. Accused was assigned to radar work. He had been a little troublesome during the year 1944, but his conduct improved and was thereafter considered good (R. 13-16). Staff Sergeant Joaquin Gonzalez-Cajiao had been accused's chief of section for about a year and for the six months thereafter up to 18 May 1945, the date of the present offense, he had been accused's platoon sergeant. As chief of section he saw accused every day and as platoon sergeant observed him every other day. He never saw accused violent or emotionally upset. Although accused would argue about some duties assigned to him, he would always perform them (R. 18, 19).

About 1 a.m., 19 May 1945, several hours after commission of the present offense, accused was questioned by Captain Hughes A. Carnes, but refused to make a statement after his rights had been explained to him. Although he appeared nervous his conversation and his actions were normal (R. 22-25). On the morning of 20 May 1945, however, accused became aggressive when a member of G-2 sought to question him and handcuffs were used to restrain him.

On 28 May 1945, ten days after commission of this offense, a board of officers was convened at the 262nd General Hospital to

consider and report upon accused's condition (R. 26). No member of the board was a psychiatrist but the board had before it, as a part of the evidence considered by it, the opinion of Major Howard Swire, a psychiatrist. That opinion was given substantial weight by the board in arriving at its conclusions (R. 30, 35). After considering all evidence before it the Board made the following findings, viz (R. 27, 28):

> "Diagnosis: Anxiety state, severe, precipitated by maladjustment to military service, nostalgia, unwillingness to serve and poor attitude. Moderate predisposition to anxiety. Line of Duty: Yes - not fit for further military duty."

The recommendations of the board were as follows (R. 28):

> "(A) Further treatment in a General Hospital in Puerto Rico is recommended". "(B) Pending return to Puerto Rico, Patient should remain in hospital". "(C) Patient should be returned: Security Class - Closed Ward".

On 29 June 1945 the board reconvened, apparently because it had been directed to consider the matter of accused's behavior just prior to the rape and until admitted to the hospital (R. 29, 33). At that meeting the board's diagnosis was (R. 29):

> "Anxiety state, severe, precipitated by his awareness that he was facing serious court-martial charges in regard to the commission of rape. Predisposition unknown. Line of Duty not yet determined. Temporarily not fit for further military duty";

and its findings were (R. 29):

> "(1) (a) It is the opinion of the Medical Disposition Board that there is no evidence that this enlisted man showed any signs of mental disease prior to the committing of the alleged crime; and further that his behavior was normal for approximately forty eight hours following the alleged crime. (b) It is further believed, on the basis of the evidence at

hand, that this man was responsible for his acts at the time of the alleged crime. (2) The Medical Disposition Board is of the opinion that the present mental disease of this enlisted man is such that it would prevent him from properly conducting his own defense, and that a further period of observation is necessary before he can participate in his own defense. (3) Recommend that military guard be suspended but security be maintained by the available civilian personnel at Corozal Hospital."

Lieutenant Colonel Wilfred I. Carney, a member of the above-mentioned board of officers, did not see accused again after the meeting held 28 May 1945 until the day before the first day of trial when he observed him run from a hospital room into the hall and sit on the floor before a screened partition which he shook (R. 33, 34).

Accused was eventually removed to Corozal Hospital where he remained for seventy-eight days under the observation of two psychiatrists, Colonel George E. Hesner and Major Robert P. Hargreaves. During that period Colonel Hesner observed accused on the average of two or three times a week while Major Hargreaves observed him at least twice daily (R. 36, 50). Major Hargreaves testified that while he had accused under observation he was uncooperative, sullen and evasive during questioning (R. 36). He made two or three attempts at suicide but always while someone was present to prevent successful completion thereof. He was noisy, would rattle and shake the bars of his room, used a threatening manner toward smaller members of hospital staff and tried to strike both Major Hargreaves and a nurse. On occasions he ripped his clothing to shreds, stripped himself naked and threw his clothing through the door of his room, destroyed bed clothing and one time tied a knot in his pajamas and struck at people with the garment. If a nurse was present while he was tearing off his clothes he always managed to keep himself partly covered (R. 37, 38). Although he threatened to kill smaller members of the hospital staff he would cringe if someone his size entered his room. His attempts at suicide were not furtive but were always commenced in the daytime and when someone was watching him. Accused's belligerent periods were transitory while, according to Major Hargreaves, in a true psychosis they would be of prolonged duration. Furthermore, a true psychotic is willing to talk and reveal his thoughts while accused was evasive and refused to answer

questions. He had seen accused behave many times as he was behaving during the trial and in his opinion accused knew what was transpiring about him. Major Hargreaves' opinion was that accused was not suffering from a true psychosis since he did not exhibit any typical symptoms characteristic of the accepted types of psychosis. He concluded that accused was putting on an ostentatious show in order to give a false impression of his mental condition in an effort to extricate himself from a bad situation (R. 38, 39, 43, 44, 46, 47). He was further of the opinion that accused knew right from wrong, could adhere to the right and possessed sufficient mental capacity to appreciate the nature of the court-martial proceedings and assist in his own defense (R. 38, 39). At the conclusion of direct examination of Major Hargreaves, accused was asked if he wished to question him, to which accused mumbled what sounded like "no sir" to assistant defense counsel (R. 49).

While observing accused Colonel Hesner noticed, among other things, that in some conferences he would answer questions until the matter of his offense was brought into discussion when he would answer that he did not know or did not remember (R. 51). While having alleged hallucinations about his mother, accused would curse, threaten and pound upon the door of his room. According to Colonel Hesner, under such hallucinations a true psychotic does not fly into a tantrum but becomes quite emotional and commences to sob. Accused answered questions concerning his civil and military life so long as they did not concern the instant offense. Usually a psychotic who is destructive of clothing has no shame or modesty but accused showed a normal embarrassment in not having any clothes if a nurse approached his room and he would call for a pair of pants. Accused's suicide attempts were ostentatious while a suicidal psychotic is very cunning and never attempts suicide when there is a chance of being observed (R. 52). True psychotics do not give any warning or make any threats, as did accused, before making a personal attack. In Colonel Hesner's opinion accused was simulating insanity in a crude and exaggerated manner. During the period of his observation of accused, the latter knew right from wrong and had sufficient mental capacity to understand the nature of court-martial proceedings and assist in his own defense (R. 53, 54).

Captain Ephraim Horland, a psychiatrist, had accused under his care at the 262nd General Hospital from 2 September 1945 until apparently the day of trial. Accused did not eat or sleep well and

would spend his time walking about the ward. He did not express my hallucinations or delusions but he was in an anxiety state and showed much agitation when the subject of his court-martial was mentioned. In his opinion accused could distinguish right from wrong and could understand the nature of the present proceedings and cooperate in his own defense. He attributed accused's present attitude to his anxiety over the future which to him seemed gloomy and threatening (R. 57-61).

4. After presentation of the prosecution's evidence to establish accused's sanity, the defense introduced the following evidence to support its motion for a dismissal of the case.

Major Howard Swire, the psychiatrist who had submitted his opinion to the board of officers convened at the 262nd General Hospital, testified that he had observed accused at that hospital on an average of five to eight times daily from 20 May 1945 to 7 June 1945 and interviewed him periodically every third or fourth day (R. 63, 67). He diagnosed accused's condition as an anxiety state and was of the opinion he was experiencing a severe mental disorder. He did not believe accused was bluffing. He further believed accused was incapable of differentiating between right and wrong and of participating intelligently in his own defense (R. 64, 65).

Staff Sergeant John M. Rakusin, Assistant Psychologist in the Psychiatric Section of the 262nd General Hospital, observed accused occasionally during his stay there from 20 May 1945 to 7 June 1945, and after his readmission on 2 September 1945, following his confinement at Corozal Hospital. During his first stay at the hospital accused would tear his clothes off, refuse to wear pajamas and would talk excitedly in Spanish. After his return from Corozal he was more docile and depressed but would get very excited and refuse to talk when his pending court-martial was mentioned or when defense counsel would visit him. In the Sergeant's opinion accused understood most of the time what was transpiring around him but did not respond appropriately to his understanding (R. 68-70).

Although assistant defense counsel visited the hospital and attempted to talk to accused about his case some four or five times, he was never able to hold any intelligent conversation with him. When he approached accused the first time the latter arose from his bed and ran from the room. When defense counsel followed him, accused became highly excited and had to be confined (R. 74, 75).

On the morning of the trial accused had been calm until the military police conducted him to the hospital elevator. Once inside it he lunged at two of his guards and sought to obtain the pistol carried by the third. On the ground floor he dragged his feet as if he would not walk but finally moved off when informed he had better commence to walk (R. 70-72). For the first hour of accused's trial one of his guards was forced to restrain him almost continuously (R. 72). During the lunch hour after the first forenoon of trial, accused tore all his clothes to shreds and ripped all the leather from his shoes until he had but bare soles and heels left (R. 73).

5. After hearing all of the foregoing evidence the law member denied defense's motion and ruled, without objection from any member of the court, that at the time of his offense and at the time of trial accused did not suffer from any mental ailment, could distinguish right from wrong and adhereto the right, and was capable of aiding in the conduct of his defense (R. 78).

6. On its case in chief the prosecution introduced evidence to show that sometime after 4 p.m., 18 May 1945, James W. Riggs and his wife, Pastora Cornejo de Riggs, went to the mouth of a river between Bella Vista and Paitillo Point Military Reservation, Republic of Panama, for a swim. As they sat fully clothed on the beach waiting for the tide to rise, accused approached them bearing a rifle and in broken English told them they were his prisoners and marched them to an old guard shack nearby. In response to accused's question, Riggs informed him that the lady with him was his wife. Accused replied that he lied and that she was an employee of a cabaret. Thereafter accused marched the two of them along a road for a half or three-quarters of a mile and then back to the guard shack where he held them until after nightfall. Stating that he was going to conduct them to Headquarters, accused marched them to a fork in the road and there telling Riggs that his wife was a prisoner he ordered Riggs to move along. Hearing a sound similar to the cocking of a rifle, Riggs left and hurried to the Panamanian Police Station at Paitilla Airport (R. 81-84).

Accused then marched Mrs. Riggs to a shack but finding it padlocked, ordered her to proceed to the beach. There accused informed her she must have sexual intercourse with him to which she replied she would not. Accused then grabbed her, held her hands with one of his and, as she stood before him, with the other hand he worked her underpants down to her knees. Mrs. Riggs unsuccessfully tried to prevent lowering of her underclothing by moving her body (R. 91, 99, 100, 102, 111, 112). Taking her by an arm and a leg he pushed her to the ground and taking hold of his rifle he pressed it tightly against her arm holding it flat to her side (R. 100, 101). As he was forcing her to

the ground she screamed "Jimmie" thinking her husband had followed them and screamed his name again after accused had her on the ground but received no answer (R. 118). She screamed no more thereafter because no one was around and, furthermore, accused threatened to break her face with his rifle if she did so (R. 92, 96). Accused got on top of her, took out his penis, pulled up her dress with one hand as he held her with the other and removed her pants completely. Using his legs he forced hers apart and although she tried to twist away from him as he held her in a firm grasp, nevertheless he penetrated her private parts with his penis and affected a completed act of sexual intercourse within a few minutes (R. 92, 101-104, 112, 113, 115, 117).

Following this act which lasted "some minutes, not very long" accused remained on prosecutrix kissing and embracing her as she kicked at accused, twisted and moved her shoulders and arms about and shuffled from side to side in an effort to get from beneath him. During this time accused still held his rifle pressed close to her side (R. 105, 106, 113). About a half hour after the first act of intercourse accused proceeded again to have relations with prosecutrix, the second act consuming about 30 minutes (R. 95, 105, 113).

Prosecutrix was not affectionate with accused at any time during the attacks but continuously resisted and opposed his acts (R. 95, 97). Once she managed to escape from accused but he caught her after a short chase and threatened to kill her. As prosecutrix expressed her emotions during the attacks, she was "afraid of his rifle very much, very greatly afraid" (R. 111). Her clothing had not been torn by accused nor did she suffer any cuts or bruises to her body except for a "light inflammation of her privates" (R. 95, 110, 114).

After the second act of intercourse had been performed, accused released prosecutrix and picking up her pants and her bathing suit she ran to find her husband (R. 114, 120). Mr. Riggs in the meanwhile had obtained assistance from the Panamanian Police and the military police. They searched for prosecutrix but could not find her. Thereafter Mr. Riggs was driven to his home to see if she had returned and on the way back to police headquarters he instructed the driver to turn down a side road. Soon he saw his wife walking along the road, sobbing. It was then about 9 p.m., approximately two hours since he had been separated from his wife (R. 84, 85).

Later that night Mrs. Riggs was taken to Gorgas Hospital where Captain Lawrence M. Fairchild examined her. He found her vagina to be of normal size for a woman who has had a child, found no evidence of recent abrasions or contusions and nothing abnormal in the condition

of her vaginal tract. He also took some urine specimens as well as swabs from her vaginal tract. These were sent to Captain Earl S. Wedding for analysis (R. 119, 128-131). His examination revealed the presence of human spermatozoa in the specimens (R. 133).

About 8 p.m. that evening of 18 May 1945, accused entered his barracks and then visited the latrine. He was perspiring and appeared fatigued as he stood shaking sand from his clothing. In the presence of Privates First Class Claudio Alberta Torres and Rafael Rodriguez-Molina, accused stated that he had caught a man and a woman, had ordered the man to leave, had taken the woman to the cooks' shack and then to some other place where he twice had sexual relations with her. Accused indicated that these relations were, as Molina expressed it "forced, unwilling rather" (R. 137-142).

7. Upon completion of prosecution's case-in-chief, the defense counsel renewed its motion that the case be dismissed because accused was unable intelligently to cooperate in his own defense and offered the following evidence in support thereof. On the first day of the trial, from 6:15 p.m. to 1:15 a.m. of the next morning when the court adjourned, accused had been handcuffed and had remained with his head and arms laid on the counsel table before him except for the occasions when he would try to jump from his chair. At such times he tore his clothing and became so aggravated that considerable force was exercised by his attendant to restrain him (R. 143, 144). While being taken from the hospital to the second day of his trial, accused offered some resistance and refused to walk. In the court room he again rested his arms on the table and laid his head upon them. At times he offered "quite a bit of resistance, tried biting the (hand) cuffs, bit at his shirt, ripped his pants. Several times he tried to get up. He didn't seem to be concerned with anything that was going on." During the afternoon of the second day of trial accused wore fatigues over his pajamas because the clothing he had worn during the morning had become torn (R. 144-146). After receipt of this evidence the law member denied the motion made by defense and no member of the court objected thereto (R. 148).

Thereafter defense introduced evidence to show that accused had authority to place under arrest any person trespassing on the Paitilla Point Military Reservation and to detain any person not possessing the requisite identification (R. 149). Following that accused was warned of his rights by the law member but made no reply when asked what course he chose to follow. After a short recess, defense counsel informed the court he had been unable to discuss the case with accused who had become violent (R. 150).

8. It is basic law in trials by court-martial as it is in our civil criminal jurisprudence, that no person shall be tried for a crime if he then be insane. If sufficient evidence is introduced to raise a reasonable doubt as to accused's sanity, the presumption of sanity is thereby rebutted and the burden falls upon the prosecution to establish accused's sanity, as a fact, beyond a reasonable doubt (MCM, 1928, par. 63; Dig. Op. JAG 1912-40, sec. 395 (36); Davis v. United States, 160 US 469). Inasmuch as this case is not one requiring review or confirmation by the President or his authorized representative, it is not our function in passing upon this record of trial to weigh evidence, judge of the credibility of witnesses or determine controverted questions of fact. Our sole function is to determine if the record of trial contains any substantial evidence which, if true, is sufficient to support the findings of guilty (CM 152797 cited in MCM, 1928, p. 216, note to Article of War 50½).

There is in the record psychiatric evidence and also direct evidence of such abnormal conduct upon the part of accused as would indicate that, at the time of trial, he was not in sufficient possession of his rational faculties to permit him to cooperate in his own defense. On the other hand, there is most respectable psychiatric evidence establishing that accused was not insane or unable to cooperate in his own defense but that his abnormal conduct, not falling within the pattern of any known psychosis, was simulated and a sham. It was for the court to weigh all of this conflicting evidence and to conclude therefrom whether or not the sanity of accused had been established beyond a reasonable doubt. That question of fact it resolved against the accused. Since there is evidence from which the court could reasonably have so concluded, the finding on that question is valid and binding upon us. Accordingly, the record of trial supports the court's action in denying the motion of defense counsel, assuming without deciding that the motion sought action that the court had power to take.

Rape, the offense of which accused was found guilty, is unlawful carnal knowledge of a woman by force and without her consent. The force involved in the act of penetrating the woman's private parts is alone sufficient where there is in fact no consent. Insofar as consent is concerned it may be inferred that the woman consented if she fails to take such measures to frustrate the man's design as she is able to and as are called for by the circumstances. Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent (MCM, 1928, par. 149b). Even though reluctant consent negatives rape, nevertheless, where the woman ceases resistance under fear of death or other great harm (such fear being gauged by her own capacity) the consummated act is rape (CM 240674, Reinke, 26 BR 91; CM 236612,

Tyree, 23 BR 67; Wharton's Criminal Law, 12th Ed., p. 942). Here the accused was armed with a rifle and he handled it in such a meaningful manner that Mr. Riggs acceded to his order and left his wife alone with accused. During the perpetration of his attacks upon Mrs. Riggs, accused threatened to break her face in and also threatened to kill her if she resisted. His possession of a rifle was quite enough to demonstrate his ability to enforce his threats. Notwithstanding the weapon he possessed and the fears she had for her very life, Mrs. Riggs still sought to escape from accused and did struggle with her body to avoid his advances. She screamed twice for her husband but when he did not come to her rescue she screamed no more. Considering the lonely area to which accused had taken her and the unsuccessful results produced by her first screams, her failure to scream further is easily understandable. In addition to the foregoing accused indicated to the other soldiers, shortly after concluding his relations with Mrs. Riggs that she did not willingly submit to his contacts. Upon all the evidence in this record it is quite clear that Mrs. Riggs never consented, even reluctantly, to accused's acts but that she objected at all times thereto. Any lack of effective resistance, if not resulting from accused's superior strength, did result from her fear of death induced by the threats made by accused - threats which he was well equipped to put into execution at any moment. Under such circumstances accused's conduct constituted the crime of rape (CM 241745, Bruce, 26 BR 337). In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty.

9. According to the charge sheet, accused is 23 years of age and was inducted into military service at Fort Buchanan, Puerto Rico, on 30 August 1945.

10. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of the crime of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement under Section 22-2801, District of Columbia Code.

Thomas N. Dalby, Judge Advocate.

Wm T. Beeler, Judge Advocate.

Joseph J. Stern, Judge Advocate.

Robert C. Trenchard, Judge Advocate.

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

SPJGK - CM 292693

21 DEC 1945

UNITED STATES	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	Trial by G.C.M., convened at Douglas, Arizona, 8, 9, 10 and 11 October 1945. Dishonorable discharge and confinement for life. Penitentiary.
Private First Class LEROY WALKER, SR. (37730875), Squadron F, 3014th Army Air Forces Base Unit, Douglas, Arizona.	

REVIEW by the BOARD OF REVIEW
MOYSE, KUDER and WINGO, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Leroy Walker, Sr., Squadron F, 3014th Army Air Forces Base Unit, did, at Douglas Arizona, on or about 10 September 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Columbus Eanes, a human being by stabbing him with a knife.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence was introduced of any previous conviction. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, 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.

At approximately 2115 hours on 9 September 1945, the accused, accompanied by Eunice Gonsoulin, arrived at a dance which was being held at the 21 Club in Douglas, Arizona (R. 160,161). The 21 Club consisted of a large room in front where the dance was being held and two smaller rooms in the rear, one of which was used for gambling purposes and will

hereinafter be referred to as the "gambling room" and the other apparently used for storage and as an access to a latrine and will hereinafter be referred to as the "storage room."

At approximately 2300 hours on 9 September 1945 accused was at the Military Police Station in Douglas, Arizona, where, upon being directed to produce his possessions, he produced among other things a cigarette case, a billfold and a knife (R. 134,135). The knife, described as a "fisherman's knife" had a single blade longer than that of an ordinary pocket knife (R. 135). The accused was "released" and was seen to "take up" the knife but was not seen to put it in his pocket (R. 137). The accused at that time had a "cut just above the elbow on his left arm" which was bleeding a little (R. 137). The cut was not bandaged at that time, but instructions were given that he be taken to the "PRO station" (R. 137).

Accused returned to the 21 Club where he participated in a dice game in the gambling room with an undetermined number of persons. Among them were Columbus Eanes, hereinafter referred to as the deceased, Oscar E. Jordan and Sergeant Lindsay (R. 50,54). The deceased became embroiled in an argument with Sergeant Lindsay and "came around the table" and struck the sergeant with his fist (R. 55,56).

Subsequently, at approximately 0015 on 10 September 1945, and during the dice game, an argument occurred between accused and deceased as a result of "some misunderstandings about a bet, that Columbus Eanes was supposed to have taken some money from" accused (R. 50,51). During the argument accused had an open knife in his hands but made no verbal threats against deceased's life nor threatening or aggressive motions with the knife (R. 55). The deceased was heard to say he "wasn't afraid of" accused (R. 55). A witness estimated the blade of the knife in question to be about 5-1/2 inches in length (R. 56).

Shortly after the argument "was settled" Chancey Wilson entered the room "and made the announcement he didn't want any fight in there and was going to turn the lights out and for everybody to take the money off the table because he was going to break" up the game (R. 51). When accused left the gambling room he "stopped" and asked Oscar Jordan "didn't Columbus get his (accused's) money?" Jordan replied that he "didn't know" (R. 51).

A short time later J. D. Cooke, while standing in the doorway leading from the gambling room into the storage room, was approached by the accused, who stated that he (Cooke) knew who had his money (R. 60,61, 85). Cooke replied that he did not have it nor did he know who did have it (R. 85). Accused then proceeded out of the side door of the storage room into an alley (R. 62). As he did so Eunice Gonsoulin was heard to say to him, "You are not scared of none of these mother fuckers in there are you", and accused was heard to reply, "No, I'm not scared of no son of a bitch" (R. 62,101). The accused remained outside the room for

approximately thirty seconds and then returned by the same door through which he departed (R. 63). When accused reentered, the deceased, J. D. Cooke, Eunice Gonsoulin and Chancey Wilson were in the room (R. 63). At that time the deceased was holding an unbroken bottle in his hand (R. 65). As the accused entered the room he came between Eunice and Chancey Wilson, shoving the latter aside with his left hand (R. 65). Accused's right hand was down by his side with an open knife in it, the blade of which was estimated to be about 3 or 4 inches long (R. 66). Upon entering accused started towards J. D. Cooke but then changed directions and proceeded towards deceased (R. 66). At that time the deceased was "juggling" the bottle up and down (R. 66). When accused started towards the deceased the latter "backed up" and the bottle he had been holding was seen in the air (R. 68). Accused advanced towards the empty-handed deceased who put his hand up in front of himself (R. 68,69). The accused made a sweeping motion with his right hand and "it looked like dust (flew) from Columbus' clothes" (R. 69). The deceased then "broke and run" out of the side door, stumbling against the side of the door as he did so and trotted off towards the sidewalk, toward the front of the building (R. 69,103). Accused was heard by one witness to say, "He's got my knife in him" and by another to say, "That son of a bitch is well cut" (R. 70,92,103). Accused went down the alley towards the rear of the building but before doing so was seen to pull his hand out of his pocket and wave it up and down, "whether he was waving it or throwing something I don't know" (R. 103).

Between 0030 and 0130 hours on 10 September 1945 the deceased appeared at the door of the Phelps-Dodge Hospital, located about 1-1/2 blocks from the 21 Club, seeking medical assistance (R. 10,11,59). At that time he was "spitting up" blood, and was bleeding from a wound on the upper right chest and from a wide gap on the left hip (R. 12,13). A short time later he was transferred by ambulance to the Conchise County Hospital where he died at 1435 hours the same day, 10 September 1945 (R. 17,20).

A post-mortem examination of the body of deceased revealed a cut between the ninth and tenth ribs on the left side of the chest and a cut over the right sterno-clavicular joint (R. 27). In making a dissection of the body, the surgeon, who conducted the autopsy, discovered a broken knife blade which extended into the right upper lobe of the lung for about two and a half inches (R. 30). The end of the blade nearest the point of entry was embedded within the tissue one inch from the surface of the skin and had lacerated the right innominate vein (R. 30). The surgeon removed the broken blade (R. 30). In the opinion of the surgeon the blow of the knife was in a downward direction and from the deceased's left toward his right and the wound was made by a very strong blow (R. 33,34). The immediate cause of death was "hemorrhage from the laceration of the right innominate vein into the right upper lung" (R. 34).

Pursuant to information acquired at the Phelps-Dodge Hospital, and

after a short search by the police, the accused was apprehended at the home of Eunice Gonsoulin at approximately 0134 hours on 10 September 1945 and taken to the police station where he was questioned (R. 127-129). He denied having had in his possession "earlier in the evening" a long bladed pocket knife (R. 131), but was found at that time to be in possession of a small pearl-handled knife (R. 131,136).

On 11 September 1945, an investigator of the Provost Marshal's Office made a search of the roof of the 21 Club and there found a "knife handle with part of the stub of the blade still on it" (R. 139). At that time there was a stain on the stub which a subsequent laboratory analysis revealed to be blood (R. 140, Pros. Ex. 21). A visual examination indicated that the knife handle with stub matches the broken knife blade taken from the body of deceased (Pros. Ex. 19). A laboratory analysis of a stain in the right pocket of the trousers worn by accused during the night in question revealed that the stain was human blood (R. 124,125). On 11 September 1945 the accused, when confronted with the knife handle, admitted that it was a part of the knife he had had in his possession on the night of 9 September 1945 (R. 148).

The accused had been "drinking" during the evening prior to the altercation with deceased but was not drunk (R. 53,55,57,58,95,132,183,185, 202,214).

4. For the defense.

Eunice Gonsoulin testified that on the night of 9 September 1945 she and accused went to a dance at the 21 Club, arriving at approximately 2115 hours (R. 160). The accused did not remain on the dance floor with her but went back into the gambling room (R. 161). She attempted several times to get him to leave the gambling room (R. 161). After the dance "was over" she and accused were standing in the alley outside the doorway leading into the storage room (R. 164). At that time J. D. Cooke and deceased were inside the storage room and Chancey Wilson was outside (R. 165). The deceased had in his hand a Coca-Cola bottle which she had previously given him and from which he had been drinking (R. 166). The accused walked into the storage room and started towards J. D. Cooke and at that time the deceased struck the bottle against the side of the wall, advanced on accused and then "stabbed" at him with that part of the bottle which remained in his hand (R. 166,174). Previous to his entry accused had told her "they had taken his money and he wanted his money. He said he was going to talk to J.D." (R. 167). When accused started through the door she did not see anything in his hand (R. 167). Accused had made no threatening gestures or movement toward deceased prior to the latter's advance and in his conversation with her outside the doorway did not seem to have any ill feeling or malice toward anyone in the room (R. 168,169). When deceased broke the bottle she stepped back out of the doorway where she had been standing (R. 167).

She did see "them go together", however, and also heard a breaking of glass after "they were fighting" (R. 175,176). She saw deceased come out of the door and go up the street (R. 168). She and accused then went to a cafe and then to her home (R. 168). She did not see accused throw anything "away" when he came out of the building (R. 168).

She admitted that she had done considerable drinking on the night in question and that she had grasped accused's shirt as he was about to enter the storage room and asked him not to go back in (R. 171,176). She also admitted that she had been convicted of a crime involving a mutual cutting, "a lady cut me and I cut her back," and had forfeited a $25 bond (R. 179). She denied that at any time during the evening she had said to accused, "You act like you're afraid of those sons of bitches," or words of a similar nature (R. 218).

Mr. Leroy Irving testified that he was in the gambling room of the 21 Club on the night of 9 September 1945 (R. 182). He "noticed" that accused had been drinking, but thought he was sober enough to place his bets right and to know when he lost a bet (R. 183). Upon further questioning by the defense on the grounds of surprise, Mr. Irving testified that he had previously stated accused was "drunk enough to put money in the wrong places" and was too "drunk to know he had lost a bet" (R. 184). He further testified that he had not heard accused make any threats against the life of anyone in the room but did hear him say "that he would get him" and that "he would whip him; he said he wasn't a prize fighter but he could whip him" (R. 185,186). Mr. Irving also stated that the deceased was known in the community as one who would sometimes "pick" a fight, "always talked about fighting," and that "all the people were afraid of /deceased/ because he was quite a prize fighter" (R. 188).

The accused, after being apprised of his rights as a witness, elected to make an unsworn statement (R. 209). He stated that prior to 9 September 1945 he was aware of the deceased's general reputation in the community where the latter lived for being a "peaceful or troublesome man" and it was bad (R. 209).

Accused's commanding officer, his first sergeant and two noncommissioned officers of his squadron each testified that accused's efficiency and character ratings were excellent (R. 191,192,194,197). He had a reputation in the squadron of being a peaceable man (R. 193,195).

Mr. Robert E. Lewis of Douglas, Arizona, testified he was a bartender and had seen accused in his establishment once or twice a week for the "last year or so." The accused was peaceable at all times he was in there (R. 200).

Mrs. Trissie Walker, mother of accused, testified that during the years accused was living at home he never gave her any trouble and

that he had never experienced any difficulty with the civilian police (R. 211).

5. The record of trial fully supports the court's finding of guilty. That the deceased, Columbus Eanes, came to his death on 10 September 1945 as a result of wounds inflicted by a knife wielded by accused is so clearly established by the evidence as to render unnecessary any discussion upon this question. The cutting occurred subsequent to a dice game in which accused, deceased and several other persons were participating. During the game accused and deceased engaged in a verbal argument concerning some money involved and the accused displayed a knife, but made no threatening motions or gestures with it. Upon termination of the game accused left the gambling room and proceeded through a storage room to the outside of the building, where he remained for a short time. He then reentered the storage room holding an open knife in his hands and proceeded in the direction of deceased who backed against the wall. The deceased threw in the direction of accused a Coca Cola bottle which he was holding in his hand and from which he had been drinking. The accused continued to advance, and upon reaching the deceased struck him with the knife with such force as to break the blade. The deceased ran from the building and the accused was heard to say, "He's got my knife in him" and "That son of a bitch is well cut."

A homicide under such circumstances is murder in violation of Article of War 92. Murder is the unlawful killing of a human being with malice aforethought. Unlawful means without legal justification or excuse. If one kills in self-defense, the killing is legally excusable. However, the doctrine of self-defense is only applicable if the person doing the killing (a) was not the aggressor, (b) had reasonable grounds to believe he must kill to save his own life or that of another whom he was bound to protect, or to prevent great bodily harm to himself or such third person, and (c) retreated as far as safety permitted (MCM, 1928, par. 148a).

An application of the above doctrine to the facts established in this case clearly shows the accused was not acting in self-defense. He was in fact the aggressor and the throwing of the bottle by deceased was no more than a natural reaction of one threatened by serious bodily harm. The accused had no reason to believe that his own life or that of any third person was in danger or that there was any danger of great bodily harm being inflicted by deceased on him or any third person and that it was necessary for him to kill deceased in order to protect himself or some other person. Immediately prior to the fatal cutting the accused was on the outside of the building and had he believed himself in danger an avenue of retreat and safety was open to him.

The plea of self-defense is apparently predicated upon the testimony of one witness, accused's female companion, whose credibility is open to question because of her close personal relations with accused, her admission that she had done considerable drinking during the night in question, and her previous conviction of an offense involving moral turpitude. Her testimony was to the effect that deceased did not throw the bottle at accused but instead broke it, retained the broken part in his hand, and advanced upon

accused and "stabbed" at him with it. Were the Board of Review of the opinion the circumstances were as she described, it still remains that the avenue of retreat and safety was open to accused. It is incumbent upon one whenever attacked by another, except in his own home to give ground, or, as is often stated "retreat to the wall," if practicable, before taking the life of his assailant (CM 237641, Brackins, 24 B.R. 71).

Malice aforethought, an essential element of the offense of murder, is established by proof 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). The intent to inflict such bodily harm is conclusively established by accused's use of a lethal weapon in a manner which was likely to result in death or grievous bodily harm.

The Board of Review is not unmindful of the fact that, from the entire record, it appears that deceased was of a troublesome nature and would "pick" a fight, and that accused was apparently of good character. However, that is a matter to be considered by the appropriate authority in determining whether any mitigation of accused's sentence is warranted.

The Board of Review likewise has given consideration to the evidence which indicates that accused had been drinking on the evening the crime was committed. However, drunkenness does not appear to have been urged as a defense, nor does the record establish that accused was in fact drunk.

Viewing the record of trial in the light of all the evidence, the Board of Review is of the opinion that the court was fully justified in finding accused guilty of murder in violation of Article of War 92.

6. There is attached to the record of trial a recommendation for clemency signed by six of the nine members of the court who heard and decided this case. They recommend that the sentence be "substantially reduced," basing such recommendation "on the good civilian and military record of the * * * accused and the facts attendant in the case."

7. The charge sheet shows that the accused is 29 years of age, and that he was inducted into the military service of the United States on 12 January 1944 at Fort Leavenworth, Kansas.

8. The court was legally constituted and had jurisdiction over the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of

the Board of Review the record of trial is legally sufficient to support the finding of guilty and the sentence. A sentence either of death or imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452,454).

Hermann Mayer, Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

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

SPJGH-CM 292702

16 NOV 1945

UNITED STATES v. Lieutenant Colonel Robert E. Hambury (0-379989), Transportation Corps.	NEW ORLEANS PORT OF EMBARKATION Trial by G.C.M., convened at Camp Plauche, New Orleans, Louisiana, 19 October 1945. Dismissal.

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 Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Lieutenant Colonel Robert E. Hambury, TC Headquarters, New Orleans Port of Embarkation, New Orleans, Louisiana, did, at the Tulane Room, Jung Hotel, New Orleans, Louisiana, on or about 28 September 1945, in the presence of military personnel and their civilian guests, make the following insulting and defamatory remarks about Captain Sidney R. Eckman, a fellow officer, to-wit: "Any woman who goes out with Captain Eckman is a Whore," or words to that effect, thereby implying that Captain Eckman was a whore monger.

Specification 2: In that Lieutenant Colonel Robert E. Hambury, * * *, did, at the Tulane Room, Jung Hotel, New Orleans, Louisiana, on or about 28 September 1945, in the presence of Miss Mary Frances Haynes and other persons, both military and civilian, make the following insulting and defamatory remarks about Miss Mary Frances Haynes, whose escort then and there was Captain Sidney R. Eckman, to-wit: "Any woman who goes out with Captain Eckman is a whore," or words to that effect.

Specification 3: In that Lieutenant Colonel Robert E. Hambury, * * *, did, at the Tulane Room, Jung Hotel, New Orleans, Louisiana, on or about 28 September 1945, use the following insulting and defamatory language to

Captain Sidney R. Eckman, a fellow officer, to-wit: "Any woman who goes out with Captain Eckman is a whore," or words to that effect, thereby implying that Captain Eckman was a whore monger.

He pleaded not guilty to and was found guilty of the Charge and Specifications thereunder. 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. The evidence shows that on the date alleged accused, Industrial Personnel Officer at the New Orleans Port of Embarkation, attended a dance given by the Civilian Personnel Welfare Association of the Port at the Jung Hotel in the city of New Orleans (R. 7). At a table located on the edge of the dance floor was a party of twelve - six officers and their wives and dates. Included in this party was Captain Sidney R. Eckman and his guest, Miss Mary Frances Haynes, a civilian employee of the New Orleans Port of Embarkation (R. 6, 20, 21, 34, 39, 45). Accused and Captain Eckman had been on very friendly terms for about two years (R. 6). They had been in the habit of joking with each other and making slighting remarks about each other in private but not in the presence of ladies (R. 13). Accused was acquainted with Miss Haynes (R. 21).

At about eleven o'clock accused went to the table where Miss Haynes was and occupied the chair of Captain Eckman who had temporarily left the table. When Captain Eckman returned to his table accused was engaged in conversation with Miss Haynes. Accused got up and said, "Any girl who went out with Captain Eckman would be considered as a two-bit whore." This remark was heard by Miss Haynes and Captain Eckman (R. 23, 24). Accused and Captain Eckman then moved up to the middle of the table and accused stated that anybody who went out with Captain Eckman is a whore (R. 8, 23, 24, 41). The second time the remark was made in a voice loud enough for those at the table to hear, and it was heard by Captain Eckman, Miss Haynes and other officers and ladies at the table (R. 8, 22, 24, 52, 57). Accused then left the vicinity of the table. Following the remark by accused, there was a period of embarrassment and of silence (R. 9, 58). Miss Haynes was embarrassed, very upset, and was on the verge of crying (R. 59).

At the time accused made the statements complained of, he had been drinking but was not drunk (R. 9, 14, 25). His voice was normal and his walk was steady (R. 36). He was not "completely sober" (R. 43). His speech was coherent but a trifle labored (R. 9). He was under the influence of intoxicating liquor (R. 15).

Later in the evening Captain Eckman requested accused to apologize (R. 16). Miss Haynes also requested accused to apologize but he said "he would not give any apology and that he meant it and he meant it as a warning to me" (R. 26). As accused was leaving the dance, he shook

hands with Captain Eckman and four days later he apologized to Captain Eckman saying "he was awfully sorry about what he had said - that he had too much to drink and was not conscious of the magnitude of the remark and wanted to apologize" (R. 19). Twelve days after making the remark, accused apologized to Miss Haynes (R. 27).

Captain Eckman did not consider the remarks of accused as an insult to himself. He testified:

> "Well, the remark is defamatory per se, but I did not believe he had the intention or was malicious about it" (R. 16).

Miss Haynes testified:

> "Q. Would you say as a result of this alleged remark you felt grossly insulted?"
>
> "A. I was very embarrassed."
>
> "Q. Were you insulted?"
>
> "A. To a certain extent I was. I didn't know how to take it."
>
> "Q. In your own mind at that time did you believe Colonel Hambury meant it seriously?"
>
> "A. I thought it was due to his being under the influence of alcohol."
>
> * * *
>
> "Q. As a result of the remark, do you feel you have been defamed in the eyes of other people?"
>
> "A. Yes, I do - well, yes." (R. 30, 31).

A WAC lieutenant who was a member of the party testified:

> "Q. Did you consider this defamatory remark was directed toward Miss Haynes?"
>
> "A. I certainly did, sir."
>
> "Q. Did you also consider it defamatory toward Captain Eckman?"
>
> "A. Yes, I did, sir." (R. 49)

The senior officer present at the table when the remarks were made testified:

> "Q. As a result of the remark alleged to have been made by Colonel Hambury, was Captain Eckman's reputation lowered in your estimation?"
>
> "A. His reputation was not affected in my own personal opinion because of that remark."
>
> "Q. As a result of the remark alleged to have been made by Colonel Hambury, was her (Miss Haynes) reputation lowered in your estimation?"
>
> "A. Not in my estimation, because I didn't place any truth in the remark" (R. 66).

Another witness testified to substantially the same effect (R. 54).

At the time accused made the remarks "he was not in a serious mood - he had a smile on his face" (R. 37) and the remarks were made in a somewhat jocular tone (R. 41, 42). His expression conveyed happiness, not to the point of laughing, but there was a smile on his face as he was talking (R.62).

Neither Captain Eckman nor Miss Haynes made any request that charges be preferred against accused (R. 20, 31).

4. Accused, having been fully informed of his rights as a witness, elected to be sworn as a witness. He testified that he and his wife had dinner at home on the evening in question; that after dinner and before going to the dance he had four drinks of whiskey; that he took a pint of whiskey with him to the dance and by eleven o'clock he had consumed about a pint, including what he drank at home; that he was "high" but not drunk. He did not deny making the remarks alleged to have been made but did not remember making them (R. 71. 73). He and Captain Eckman were on the best of terms and were in the habit of making remarks similar to the ones complained of to each other.

> "Q. Do you remember having made the same remark or similar ones to him prior to that occasion?"
>
> "A. The same one and similar ones."
>
> "Q. Were they unusual remarks for you to make to him?"
>
> "A. That is the way Captain Eckman and I talk to each other. We have always bandied each other.
>
> "Q. He speaks that way to you?"

"A. Yes."

"Q. Dpes he accept such remarks from you?"

"A. Yes."

"Q. And you accept his?"

"A. Certainly" (R. 76).

Accused did not know that he had made the remarks until the morning following the dance when his wife admonished him for having done so (R.77).

Evidence that accused had been on active duty since June 1940 and that his efficiency ratings have been excellent and superior was introduced (R. 98; Def. Ex. A). Former commanding officers of accused testified that his reputation as an officer and gentleman was excellent (R. 92, 95).

5. The evidence clearly shows that accused at the time and place and under the circumstances alleged in the Specifications made the insulting and defamatory statements set out in the Specifications. He said that any woman who went out with Captain Eckman was a whore. A whore is a prostitute, a harlot, a lewd woman who engages in sexual intercourse for hire. The use by accused of the word "whore" in referring to the female guest of Captain Eckman was therefore insulting and defamatory both to the guest and to Captain Eckman. Accused said in effect that Miss Haynes was a whore and that Captain Eckman was in the habit of associating with whores. Association by an officer with known or "common" prostitutes is an offense which may subject the officer to dismissal. Accused not only made the accusation once but repeated it so that all members of the party of which Captain Eckman and his guest were members heard it. Actions of accused were grossly out of place and inexcusable. The language used by accused in the presence of ladies and at a semi-public social affair attended by both officers and civilians is not the sort of language expected of an officer and gentleman. Accused's conduct in using such language in reference to Miss Haynes and to Captain Eckman and in the presence of other ladies and officers was in violation of Article of War 95.

At the time accused made the defamatory remarks, he was under the influence of intoxicants and according to his testimony he does not remember making the statements. He does admit, however, indulging in intoxicants to such an extent that he became "high." There is no testimony in the record that accused was drunk. However, if accused had been drunk at the time of the offense, such drunkenness would not excuse him for his actions as voluntary drunkenness is not an excuse for crime committed while in that condition.

There is considerable testimony in the record that accused and Captain Eckman were in the habit of using uncomplimentary language toward each other and of joking with each other. Assuming that such a relation

did exist between the two, such language as used by accused on the evening in question and under the circumstances was grossly improper. It may have been permitted in the privacy of their quarters between the two of them, but it could not be tolerated in mixed company in a ballroom. It was not ballroom language.

It seems apparent that accused was considerably under the influence of intoxicants at the time he made the defamatory remarks and further that he and Captain Eckman were in the habit of joking and using uncomplimentary remarks about each other and that accused was not serious at the time he made the remarks. These facts do not constitute a defense but they may properly be considered in determining the appropriateness of the sentence.

6. Accused is married and 33 years of age. He was commissioned in 1939 and entered on active duty on 1940. He was assigned to the Philadelphia Depot until April 1942 when he was transferred to the New Orleans Port of Embarkation upon the request of the officer who had been his commanding officer at the Philadelphia Depot. He was Assistant Civilian Personnel Officer until early in 1944 when he became Industrial Personnel Officer. The record shows that of six efficiency ratings, five were "Excellent" and one was "Superior." His numerical rating for the period from 1 January 1945 to 30 June 1945 was 5.9.

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

(on leave), Judge Advocate

W. T. Beck Jr., Judge Advocate

Joseph J. Stern, Judge Advocate

Robert C. Trenchan, Judge Advocate

SPJGH - CM 292702 1st Ind

Hq ASF, JAGO, Washington 25, D.C. NOV 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 Lieutenant Colonel Robert E. Hambury (0-379989), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of making insulting and defamatory remarks to and about a fellow officer and of making insulting and defamatory remarks about a civilian lady, in violation of Article of War 95. 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. Accused consumed alcoholic beverages at a dance given by the Civilian Welfare Association of the New Orleans Port of Embarkation in the Jung Hotel, New Orleans, Louisiana. While under the influence of those beverages he went to the table occupied by six officers and their lady guests. There he said to one of the officers and his lady guest that any woman who went out with that officer was a "two-bit whore." Accused then went to the center of the table and in substantially the same words repeated the statement. He was requested to apologize but refused to do so, although several days later he did apologize to the officer and to the lady. Accused and the officer were close friends and were in the habit of making uncomplimentary remarks about each other. Accused did not seem to be serious when he made the remarks and there appeared to be a smile on his face. Accused's record as a soldier has been excellent and there appears no evidence of prior convictions. The conduct of accused cannot be condoned, but there are the extenuating circumstances of the familiarity of accused and the officer about whom and to whom he made the remarks, the fact that accused had been drinking, and the fact that he did not appear to be serious when he made the remarks and the remarks were not taken seriously by the majority of those who heard them. Therefore, it is not believed that accused's conduct was so extreme as to compel the severe penalty here imposed.

Accordingly, I recommend that the sentence be confirmed, but that it be commuted to a reprimand and forfeiture of $100.00 of accused's pay per month for two months and that the sentence as thus commuted be carried into execution.

4. Consideration has been given to: the attached copy of a letter from Honorable Millard E. Tydings, United States Senate, dated 24 October 1945, addressed to the Secretary of War; the attached memorandum from Colonel John P. Dinsmore, GSC, dated 4 November 1945, in which reference is made to the interest of Honorable Allen J. Ellender, United States Senate, in this case; and to attached letter from Mr. William H. Kushnick, Director of Civilian Personnel and Training, Office of the Secretary of War, addressed to Brigadier General Thomas H. Green, Acting The Judge Advocate General, dated 31 October 1945.

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
Brigadier General, U.S.A.
Acting The Judge Advocate General

5 Incls
1. Record of trial
2. Form of action
3. Cpy ltr fr Senator Tydings, 10-24-45
4. Cpy memo fr Col Dinsmore 11-4-45
5. Ltr fr Mr. Kushnick 10-31-45

(Sentence confirmed, but commuted to a reprimand and forfeiture of $100 pay per month for two months. GCMO 496, 30 Nov 1945).

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

SPJGK - CM 292834

28 NOV 1945

UNITED STATES	)	FOURTH AIR FORCE
v.	)	Trial by G.C.M., convened at Ephrata Army Air Base, Washington, 25 September 1945. Dismissal, total forfeitures and confinement for two (2) years.
Second Lieutenant DONALD C. WILLIAMS (0-2091388), Air Corps.	)	

OPINION of the BOARD OF REVIEW
MOYSE, KUDER and WINGO, Judge Advocates.

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

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

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

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

Specification 2: In that Second Lieutenant Donald C. Williams, Squadron T-1, 430th Army Air Force Base Unit, did, at Ephrata Army Air Base, Washington, on or about 14 August 1945, feloniously take, steal and carry away about Twenty ($20.00) Dollars, lawful money of the United States, the property of Second Lieutenant Robert F. Cone.

Specification 3: (Withdrawn before arraignment by order of the appointing authority).

Specification 4: (Withdrawn before arraignment by order of the appointing authority).

Specification 5: In that Second Lieutenant Donald C. Williams, Squadron T-1, 430th Army Air Force Base Unit, did, at Ephrata Army Air Base, Washington, on or about 26 August 1945, feloniously take, steal and carry away about Forty ($40.00) Dollars, lawful money of the United States, the property of First Lieutenant Horace B. McLean.

Specification 6: (Finding of guilty disapproved by the reviewing authority).

Specification 7: In that Second Lieutenant Donald C. Williams, Squadron T-1, 430th Army Air Force Base Unit, did, at Ephrata Army Air Base, Washington, on or about 14 August 1945, unlawfully enter the dwelling of Second Lieutenant Robert F. Cone, with intent to commit a criminal offense, to-wit, larceny, therein.

Specification 8: (Withdrawn before arraignment by order of the appointing authority).

Specification 9: (Withdrawn before arraignment by order of the appointing authority).

Specification 10: In that Second Lieutenant Donald C. Williams, Squadron T-1, 430th Army Air Force Base Unit, did, at Ephrata Army Air Base, Washington, on or about 26 August 1945, unlawfully enter the dwelling of First Lieutenant Horace B. McLean, with intent to commit a criminal offense, to-wit, larceny therein.

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

NOTE: Ten specifications similar in all respects to the ten specifications of Charge I were laid under this Article. Specifications 3, 4, 8 and 9 were withdrawn before arraignment by order of the appointing authority. The court found accused guilty of the remaining specifications, and the reviewing authority disapproved the findings of guilty of Specifications 1 and 6.

He pleaded not guilty to and was found guilty of both Charges and of all Specifications not withdrawn. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority disapproved "the findings of Specifications 1 and 6 of Charge I and of Specifications 1 and 6 of Charge II," approved the sentence, and forwarded the record of trial for action under Article of War 48.

This opinion will consider only Specifications 2, 5, 7 and 10 of each Charge in view of elimination of other Specifications by the appointing and reviewing authority as noted above.

3. Evidence for the prosecution.

13 August 1945 at approximately 2100 hours Second Lieutenant Robert F. Cone, according to his testimony, "undressed and put my wallet in my pants pocket, where it always was, and hung them on the door" of his room, number 22, Bachelor Officers' Quarters 3327, Ephrata Army Air Base, Washington (R. 7). The wallet contained "8 twenties and $18.50 in change" (R. 7). He left the room, visited friends in the "barracks," and went

to bed at about 2300 hours. "The next morning I showered again and dressed and had breakfast and at 1000 I counted my money and I was twenty short" (R. 7).

26 August 1945 at about 1830 hours First Lieutenant Horace B. McLean, according to his testimony, "took $50.00 and put it in the hidden folder in my bill-fold" (R. 18), and placed the bill-fold on the sill over his bed in his room, Number 24, Bachelor Officers' Quarters 3327, Ephrata Army Air Base, Washington (R. 16). He then "went across the hall" to a friend's room until approximately 2030 hours, when he returned to his own room "and noticed that my bill-fold had been moved. I looked at it and counted my money and found it was $40.00 short" (R. 16). He then "called all the officers in the BOQ together in a front room," and told them that he "had lost the money. I also told them I knew who it was took it and that it was a trap, that it was marked money planted there by the Provost Marshal" (R. 16). Accused was present at this meeting (R. 16). Lieutenant McLean then required each officer to come to his room and "talked" to him "in regard to the money" (R. 16). Accused was the last to come, and "simply stated, 'I am sure someone will return it by noon to-morrow.' The reason he said 'noon to-morrow' was because that was the time I set for it to be turned over to the Provost Marshal" (R. 16).

The next morning Lieutenant Cone gave Lieutenant McLean a sealed envelope, later discovered to contain $40.00 (R. 19), which Lieutenant Cone had picked up about 0640 hours from the floor of a room occupied by one Lieutenant Peterson, situated next to that of Lieutenant McLean (R. 17, 21,39). Lieutenant McLean delivered the sealed envelope to the Provost Marshal and then "about 1001" (R. 25), accompanied by one Sergeant Tumlinson, went to the room of each officer in the quarters and told him "to be in the BOQ that noon" (R. 18). Lieutenant McLean testified that when they entered the room of accused he "was asleep and I woke him and told him to be in the BOQ that day at noon, and about that time he asked if he could see me alone, and Sergeant Tumlinson stepped in the hall and closed the door, and he then admitted getting the money and asked me if I had seen Lieutenant Peterson. He told me he returned the money to Lieutenant Peterson's room by mistake; that he was so nervous he made a mistake and got the wrong room. I don't recall everything that was said, but I asked him why he took the money and he said he didn't want to talk about it, that he didn't know, and he asked me what he should do. There was nothing for me to say but to turn himself in to the Provost Marshal" (R. 19).

Thereafter, about 1130 hours, accused reported to the Provost Marshal's office and, after Sergeant Tumlinson had explained his rights under the 24th Article of War (R. 26,27), made and signed a confession (Pros. Ex. 5) in which he stated that he "went into a room in BOQ 3327 on or about 10 August 1945 while no one was present and looked into different officers Trousers pockets. If the trousers had a bill-fold with money in it, I would only take a portion around $10.00 or $20.00." He thus took $20.00 from Lieutenant Cone. On 26 August 1945 accused "went to Lt., McClain's

room and *** saw a bill-fold lying on a shelf *** I extracted $40.00 from this pocket book." He became frightened when Lieutenant McLean subsequently talked to him, and "thought of returning the money about 2400 hours. I placed the $40.00 I had taken into an envelope and placed it in an adjoining room by mistake." He took the money because he was without funds as a result of gambling.

About 1400 hours, after having been again warned of his rights (R. 30), accused made and signed a second statement (Pros. Ex. 6), which reads in part as follows:

> "In each instance that I took money, the door was open. I don't know the various times of the day I made entrance into these rooms. I took money from Lt. McClain's pocket book on the 26th of of August and this is the only time of day I remember. I do know that I never gained entrance to a room during the night."

Accused was not quartered in either of the rooms thus entered (R. 20,21).

4. Evidence for the defense.

Accused, after having been apprised of his rights as a witness, elected to take the stand and testify under oath (R. 34). He testified substantially as follows: He is twenty years old, and "up to this time *** had a purely spotless record, both in civilian life and the Army. *** when I was a senior in high school I was elected to the presidency of the class, I held an office in the band and was a member and officer of other clubs in the school, and I was a member of the YMCA governing board, and eventually I was elected to the National Honorary Society" (R. 37). He graduated from high school in June 1943, worked in a "defense plant" for two months and then entered the Army. He was "commissioned a bombardier" 18 November 1944, and assigned to Ephrata Army Air Base 24 July 1945.

He had gambled only since 26 April 1945 and this practice was induced by idleness attendant upon a reduced training schedule. Except for a small amount of money which he had sent home, and expenditures "for things I needed," he "spent" all his pay and allowances for July, some $239.00, "at the dice table at the Officers' Club" during the first week in August (R. 35,38). On cross-examination by the court he admitted he knew that when he "got into difficulties" he could "go to" the chaplain and the Red Cross, but had not done so. In answer to the question, "How much thinking did you do before you arrived at the solution for raising the money?" he replied, "I didn't think at all, sir, which accounts for the fact that I am here to-day" (R. 38).

Accused wants "to stay in the Army, I like my job and I like the

service, and if the powers that be would permit, I would be more than willing to stay in. I have already made arrangements to pay back everything I owe. I offered no defense in this case because I have none, ***" (R. 37).

Lieutenant Cone testified on cross-examination that accused had the reputation among his fellow officers of being a person of good character (R. 10). Lieutenant McLean testified on cross-examination that "everyone" considered accused "honest and truthful" (R. 20).

Five letters from residents of accused's home town, the minister of his church, the principal of his high school, one of his teachers, and two adult friends, were introduced into evidence (Def. Exs. 2,3,4,5,6). These letters declare him to be a "fine christian boy," whose "character, associates, conduct and reputation have been of the very highest." The high school principal "cannot recommend him too highly to any position which would require courage, honesty, tact and leadership" (Def. Ex. 3).

5. Letters addressed to the reviewing authority by the defense counsel, Lieutenant Cone and Lieutenant McLean, recommending clemency, are attached to the record of trial.

6. Larceny and housebreaking as alleged are proved by the evidence. Unlawful entry into a room with intent to commit a criminal offense therein has been held to constitute housebreaking even though entry into the building containing the room has been lawfully made (CM 202951, Wyatt, 6 B.R. 386).

Larceny and housebreaking are separate offenses and may properly be separately charged. They are violations of both Article of War 93 and Article of War 95 (CM 220398, Yeager, 12 B.R. 401; CM 230239, Marks, 17 B.R. 340). Since larceny and housebreaking are tainted with corruptness and moral turpitude, the Specifications under Article of War 93 represent the more serious aspects of the case, and punishment may properly be imposed with reference thereto; the limitation on punishment to dismissal only, contained in Article of War 95, does not apply (par. 80a, MCM 1928, p. 67; CM 248104, Porter, 31 B.R. 143).

7. War Department records disclose that this officer is 20 years of age, is single, and is a high school graduate. He was employed in a machine tool company, where he "painted finished machines" and "assisted in boring mill and planer," from February 1943 to August 1943, at a starting wage of fifty cents an hour and a final wage of fifty-four cents an hour. He entered the service 27 August 1943 and, upon completion of training as an aviation cadet, was commissioned second lieutenant, Army of the United States, 18 November 1944.

8. The court was legally constituted and had jurisdiction of accused and the offenses. No errors injuriously affecting the substantial rights of 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 as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93 and is mandatory upon conviction of a violation of Article of War 95.

Herman Mayer, Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 292834 1st Ind DEC 13 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 Donald C. Williams (0-2091388), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of three larcenies of money in the total sum of $80.00 and three offenses of housebreaking in connection therewith, in violation of Articles of War 93 and 95 (Specifications 1,2,5,6,7 and 10 of Charge I, and Specifications 1,2,5,6,7 and 10 of Charge II. Specifications 3,4,8 and 9 of each charge had been withdrawn by the appointing authority before arraignment.) No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority disapproved "the findings of Specifications 1 and 6 of Charge I and of Specifications 1 and 6 of Charge II" (relating to one larceny and one housebreaking), 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 and sentence as approved by the reviewing authority, and to warrant confirmation of the sentence.

The accused entered the room of another fellow officer and took $20.00 on 14 August 1945. He entered the room of another fellow officer and took $40.00 on 26 August 1945. He admitted entering the rooms and taking the money and said he did so because he was without funds as a result of gambling at dice. The sum of $40.00 was recovered, and accused stated at the trial that he had "already made arrangements to pay back everything I owe."

The accused did not serve overseas. His performance ratings are not shown in the papers accompanying the record of trial, in the record of trial, nor in War Department records. He is twenty years old. His reputation for honesty was good in his home community and among his fellow officers prior to commission of his present offenses. Despite his youth and previous good reputation, his stealthy and surreptitious commission of the offenses alleged and his attempt to return without detection the second sum stolen indicate criminal tendencies which justify his dismissal and confinement. I therefore

recommend that the sentence be confirmed but that the forfeitures be remitted and the period of confinement be reduced to six months, that the sentence as thus modified be ordered executed, and that a post guardhouse 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.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence confirmed , forfeitures remitted and confinement reduced to six months. Senetence as modified ordered executed. GCMO 26, 25 Jan 1946).

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

SPJGN-CM 294102

U N I T E D S T A T E S	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Coffeyville Army Air Field, Coffeyville, Kansas, 9-10 October 1945. Each: Dismissal.
Second Lieutenants ROY L. PARKS (0-1305823), and WILLIAM M. KELLEY (0-775388), 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 officers named above and submits this, its opinion, to The Judge Advocate General.

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

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

Specification 1: In that Second Lieutenant Roy L Parks, Squadron S, 379th AAF Base Unit, Coffeyville Army Air Field, Kansas, and Second Lieutenant William M Kelley, Squadron S, 379th AAF Base Unit, Coffeyville Army Air Field, Kansas, acting jointly, and in pursuance of a common intent, did, at or near Bartlesville, Oklahoma, on or about 5 August 1945, feloniously take, steal and carry away one baked ham, value about $5.00, and one platter, value about $0.50, property of the Silver Castle Inn, Bartlesville, Oklahoma.

Specification 2: In that Second Lieutenant Roy L. Parks, Squadron S, 379th AAF Base Unit, Coffeyville Army Air Field, Kansas, and Second Lieutenant William M. Kelley,

Williams admitted that he was an old acquaintance of Lieutenant Parks.

Two young women, who were in the same party with Lieutenant Kelley at the Victory Club on 17 May 1945, stated that he was at their table when a disturbance arose at the other end of the room. They all went down to the scene but Lieutenant Kelley did not engage in any fisticuffs. He did have some discussion there with an intoxicated soldier (R. 85-87, 89; Pros. Ex. 4).

Contradicting the prosecution's testimony concerning the theft and assault at the Silver Castle, Miss Esther Paulsen and Miss Lenore Ellis, the young women with the accused that evening, stated that, when they left the Silver Castle, they drove away without incident (R. 108-111, 118-121). They categorically denied that Lieutenant Kelley re-entered the club, that Mrs. Lucas had come to the car, that she was pushed, or that they drove away hurriedly (R. 109,111, 120). They recalled that they had purchased ham sandwiches at the club earlier and that Lieutenant Parks had remarked that for the prices charged they should have the whole ham. However, nothing was ever said about taking the ham (R. 109-110, 113, 119, 123). On the cross-examination of Miss Ellis the prosecution introduced in evidence her pre-trial statement in which she related that after the four left the club and entered their car the following happened:

> "Lt. Kelley got out of the car and said 'just a minute, Parks.' He was gone only a minute, it seemed. I have no recollection of the car being moved or of starting up. The first I remember was when we went on the highway" (R. 127; Pros. Ex. 5).

5. The Specification of Charge II alleges that on 17 May 1945, at Bartlesville, Oklahoma, the accused wrongfully stuck Private Joseph W. Langston on the head with their hands. Specification 1 of Charge I alleges that on 5 August 1945, at Bartlesville, Oklahoma, the accused stole a baked ham and a platter, valued at $5.00 and fifty cents, respectively, the property of the Silver Castle Inn. Specification 2 of Charge I alleges that at the same time and place the accused assaulted Helen Lucas, with intent to do her bodily harm, by pushing her from a moving automobile and swerving such moving automobile, thereby causing her to be thrown to the ground. The first offense is laid under the 96th Article of War and the remaining offenses under the 93rd Article of War. In each Specification it is alleged that the accused acted jointly and in pursuance of a common intent.

The offenses charged are established by the evidence for the prosecution. It is not disputed that Lieutenant Parks struck Private Langston in a fight at the Victory Club. The witnesses for the defense did dispute Lieutenant Kelley's part in the fisticuffs, but the

unequivocal testimony of the prosecution's witnesses that he was present and struck the enlisted man was accepted by the court-martial. In making this decision the court-martial acted within its province as the determiner of controverted questions of fact and no reason appears why their findings should be disturbed.

The theft and assault at the Silver Castle cannot be seriously questioned. The testimony of Mrs. Lucas concerning the taking of the ham and platter is entirely credible. Her account of the ensuing assault is corroborated by a disinterested witness. It must be said that the testimony given by the accused's companions blandly denying the whole incident does more credit to their loyalty than to their veracity.

In taking the ham and platter out of the Silver Castle with the obvious intent to appropriate it, Kelley was guilty of a larceny. The manner in which the theft occurred shows the complicity of Parks. Although the value of the articles was small and the taking somewhat in the nature of a drunken prank, the commission of a technical offense cannot be gainsaid. The assault following was much more serious. The action of Kelley in pushing Mrs. Lucas from the running board as Parks sped away at high speed seriously endangered her life. It was done in reckless disregard of her safety and affords ample basis for the inference of a specific intent to do bodily harm. Although the evidence shows that the accused were drinking, their capacity to entertain the requisite intent is clear. The Board concludes that the offenses alleged are established beyond reasonable doubt.

6. At the close of the defense testimony counsel for the accused stated that he desired to place them on the witness stand for a limited purpose and that it was his understanding that cross-examination would be limited to the matters testified to on direct examination. Following argument by the trial judge advocate that the accused could be cross-examined fully as to any offense concerning which they testified, the President, acting in the absence of the law member, ruled, "If he takes the stand, he will be subject to cross-examination." This ruling apparently was interpreted as supporting the position of the trial judge advocate and the defense counsel thereupon stated he would not place the accused upon the witness stand.

There was no error in the court's ruling. The Manual for Courts-Martial provides as follows:

> "An accused person taking the stand as a witness becomes subject to cross-examination like any other witness. So far as the latitude of the cross-examination is discretionary with the court, a greater latitude may properly be allowed in his cross-examination than in that of other witnesses. When the accused testifies in denial

> or explanation of any offense, the cross-examination may cover the whole subject of his guilt or innocence of that offense. Any fact relevant to the issue of his guilt of such offense or relevant to his credibility as a witness is properly the subject of cross-examination. The accused can not avail himself of his privilege against self-incrimination to escape proper cross-examination. Where an accused is on trial for a number of offenses and on direct examination has testified about only a part of them, his cross-examination must be confined to questions of credibility and matters having a bearing upon the offense about which he has testified" (par. 121b, MCM, 1928).

In addition to the limitations specifically noted by the Manual, the Board of Review has recognized that an accused may take the witness stand for the purpose of attacking the legality of the manner in which evidence against him has been obtained without subjecting himself to cross-examination concerning the offense. Thus, in CM 275738, Kidder, it was held that the accused might take the witness stand for the limited purpose of showing that his confession was involuntary. But, when an accused testifies in denial of the offense itself, his cross-examination cannot be limited. The reason for this rule is given in Grantello v. United States, 3 F. (2d) 117 (C.C.A., 8th, 1924) as follows:

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

7. The accused Parks is about 28 years and 5 months of age having been born 2 July 1917. Following graduation from high school at Nampa, Idaho, he went to Los Angeles, California, and attended an electrical school for eighteen months. He was subsequently employed as an electrician in a mine and as a plant operator in the oil refining business. Entering the Army on 25 February 1941, he attained the grade of corporal and was sent to the Infantry School at Fort Benning. He was appointed a temporary second lieutenant in the Army of the United States and entered upon active service on 26 December 1942.

The accused Kelley is 23 years and 7 months of age having been born 6 May 1922. A native of Connecticut and a high school graduate,

he was employed as a clerk in an insurance company and in the same capacity in a machine factory prior to his entry into the Army on 15 September 1942. Upon completion of his course of training as an aviation cadet he was appointed, on 15 April 1944, a temporary second lieutenant in the Army of the United States, reporting for active duty on that date.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Blomer, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 294102 1st Ind JAN 11 1946
Hq ASF, JAGO, Washington, 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 Lieutenants Roy L. Parks (0-1305823), and William M. Kelley (0-775388), Air Corps.

2. Upon trial by general court-martial these officers were found guilty of jointly assaulting an enlisted man, in violation of Article of War 96; of jointly stealing a ham and platter valued at $5.50, and, of jointly assaulting a woman with intent to do her bodily harm, in violation of Article of War 93. Each officer was sentenced to dismissal, total forfeitures, and confinement at hard labor for one year. The reviewing authority approved only so much of the sentences as to each accused 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.

On the night of 17 May 1945, the accused, Parks and Kelley, attacked a soldier in a night club at Bartlesville, Oklahoma, after an altercation between Parks and the enlisted man. The latter's face was cut by a blow from Kelley but he was not otherwise injured. All of the participants in the fracas had been drinking. Sometime later, on the early morning of 5 August 1945, the accused, accompanied by their girl friends, were eating and drinking in the Silver Castle, another night club near Bartlesville. The party left the club but Kelley shortly returned, snatched a baked ham on a platter from the counter, and fled to the car. Mrs. Helen Lucas, the proprietress, pursued him and jumped on the running board in an attempt to retrieve the stolen property. Kelley pushed her from the car as Parks drove off at high speed causing her to strike the ground and rendering her unconscious. She was hospitalized for two days and suffered severe pain as a result of her fall.

The incidents described amply indicate that the accused are unworthy to retain their commissions as officers. I recommend that the sentence as to each accused, as approved by the reviewing authority, be confirmed and ordered executed.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(Sentence, as to each accused, as approved by reviewing authority, confirmed and ordered executed. GCMO 18, 25 Jan 1946).

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

SPJGN-CM 294194

U N I T E D S T A T E S	)	MILITARY DISTRICT OF WASHINGTON
	)	
v.	)	Trial by G.C.M., convened at Fort Belvoir, Virginia, 31 October 1945. Dishonorable discharge and confinement for one (1) year and six (6) months. Central Branch, Disciplinary Barracks, Jefferson Barracks, Missouri.
Private BERT E. SMITH (36573521), Company B, 10th Engineer Training Battalion, Army Service Forces Training Center.	)	

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 only question requiring discussion is raised by that part of the sentence which imposes confinement at hard labor for one year and six months.

3. The Specification of Charge I, alleges the larceny of property therein described from Private Francis Cramer, in violation of Article of War 93. The Specification of Charge II alleges the larceny of the property therein described from the United States, in violation of Article of War 94. Both Specifications allege that the larceny occurred on 21 September 1945. The evidence shows that all the property described in both Specifications was stored in one supply room, was discovered to be missing on the same date, and was thereafter found in the possession of the accused. Although this evidence clearly sustains both Specifications, it does not show that two separate entries were made into the building from which the property was taken, or that two larcenies involving separate transactions occurred. From all the circumstances it is reasonable to infer that all of the property was taken on the same date, at substantially the same time, and as part of one transaction. The Manual for Courts-Martial states:

"Where the larceny of several articles is substantially one transaction, it is a single larceny even though the articles belong to different persons. Thus, where a thief steals a suitcase containing the property of several individuals, or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification" (MCM, 1928, par. 149g).

In view of the above principle and in the light of the testimony in the record, the property described in the two Specifications must be considered in law as having been stolen in a single transaction. The two Specifications must, therefore, be regarded as describing one offense. Although the Specification of Charge I was alleged as a violation of Article of War 93, and the Specification of Charge II was alleged to be in violation of Article of War 94, the single transaction, regardless of the diversity of ownership of the property described, should have been alleged in a single Specification and as a violation of Article of War 93. 19 BR 81.

The record shows that the prosecution failed to establish the value of the property described in the Specification of Charge I, and that the court correctly concluded that such property was of some value less than $20. The value of the property alleged in the Specification of Charge II is established as $47.15. Although a court-martial may, by inspection as in the present case, ascertain that an article is of some substantial value, it has been held that it may not determine that it has a specific value. II Bull JAG, Jan. 1943, p. 12-13; 16 BR 299. It follows, therefore, that for the purposes of the sentence in the present case, the total value of the property stolen was less than $50 and that the maximum punishment which may be lawfully imposed is dishonorable discharge, total forfeitures, and confinement at hard labor for one year.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Connor, Judge Advocate.

(Sick in hospital), Judge Advocate.

SPJGN-CM 294194 1st Ind NOV 21 1945
Hq ASF, JAGO, Washington 25, D. C.
TO: Commanding General, Military District of Washington, Room 5-B-518, The Pentagon, Washington 25, D. C.

1. In the foregoing case of Private Bert E. Smith (36573521), Company B, 10th Engineer Training Battalion, Army Service Forces Training Center, I concur in the holding of the Board of Review and for the reasons therein stated recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. Under the provisions of Article of War 50½, you now have authority to order the execution of the above sentence.

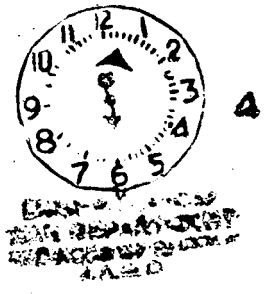
2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of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

(CM 294194).

1 Incl
Record of trial

THOMAS H. GREEN
Brigadier General, USA
Acting The Judge Advocate General

NOV 23 '45 PM



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

SPJGN-CM 294221

UNITED STATES	)	13TH AIRBORNE DIVISION
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, 30 October 1945. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center, Fort Jackson, South Carolina.
Corporal NORMAN (NMI) SUTHERLAND (36287872), Headquarters Company, 13th Airborne Division.	)	

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

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1. The record of trial in the case of the soldier named above, having been examined in the office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and held to be legally sufficient to support the findings in part and the sentence.

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Cpl Norman Sutherland, Headquarters Company 13th Airborne Division, did, without proper leave, absent himself from his station at Camp Mackall, N. C. from about 6 January 1945, to about 4 September 1945.

3. The prosecution introduced into evidence an extract copy of the morning report of Headquarters Company, 13th Airborne Division, Camp Mackall, North Carolina, dated 18 January 1945, containing entries, as follows:

"Sutherland, Norman 36287872 Cpl
(Atchd unasgd)
Absent sk Sta Hosp Camp McCoy, Wis to AWOL as of 6 Jan 45"

"Sutherland, Norman 36287872 Cpl
(Atchd unasgd)
Above 2 EM AWOL to dropped from roll & records fwd
per par 6 c C 3 A R 615-300." (Pros. Ex. 1)

By a stipulation it was shown that the accused was admitted as a patient to the Station Hospital, Camp McCoy, Wisconsin, during the month of December, 1944, and was released therefrom on or about 6 January 1945 (R. 10).

Master Sergeant Joseph Church testified that in January, 1945, he was communications chief of the 326th Glider Infantry to which the accused was then assigned and that he knew that the accused was on a "furlough status" from 6 January 1945 to 14 January 1945. He also testified that effective 14 January the accused was transferred to Headquarters Company, 13th Airborne Division (R. 6-7).

In addition, Captain Albert F. Dawson testified that he was the commanding officer of Headquarters Company, 13th Airborne Division, having assumed that command in February, 1945, and that he was custodian of the morning reports of that organization. In his capacity as custodian he identified the above extract copy of the morning report of his organization. He explained, however, that since the entries on the morning report were made on 18 January, prior to his assuming command of the company, he had no personal knowledge of the subject matter of those entries. He further testified that the accused had never reported to his organization and that he had never seen him until the day prior to the trial (R. 8-9).

In order to show the length of the accused's unauthorized absence and the termination thereof, the prosecution introduced into evidence an extract copy of the morning report of the 1610th SCU, MP Company, Camp McCoy, Wisconsin, which shows that the accused was attached to that organization for confinement on 5 September 1945 (Pros. Ex. 2).

4. The first of the above entries in the morning report of Headquarters Company, 13th Airborne Division, Camp Mackall, North Carolina, purports to recite the unauthorized absence of the accused from the Station Hospital, Camp McCoy, Wisconsin, on 6 January 1945. Inasmuch as the officer making this entry was stationed in North Carolina at that time he would not normally have first hand knowledge of an event occurring in Wisconsin. The entry is, therefore obviously hearsay, and legally insufficient to establish that the

accused was absent without leave from Headquarters Company, 13th Airborne Division on 6 January 1945. Furthermore, the correctness of this entry is contradicted by the testimony of Sergeant Church who testified that within his personal knowledge the accused was on furlough from 6 January to 14 January 1945.

The second entry recites in effect that on the date of that entry, 18 January 1945, the accused was absent without leave, and was dropped from the rolls of Headquarters Company, 13th Airborne Division. This entry is in no way contradicted either by the testimony of Sergeant Church, or the testimony of Captain Dawson. In fact, the testimony of Sergeant Church corroborates this entry to the extent that it shows that the accused was transferred to Headquarters Company, 13th Airborne Division, on 14 January 1945, and that, therefore, the accused was properly carried on the morning report of that organization subsequent to that date. The Judge Advocate General, in explaining the probative force of a properly authenticated morning report, has stated that such report "* * * when properly authenticated is 'prima facie' evidence of the truth of the matters contained therein unless such entries are 'obviously not based on personal knowledge.'" 4 Bull. JAG, 86-88, March, 1945. In view of this clearly stated rule of evidence, and since the entry in question is not obviously based on hearsay, and since it is not contradicted by extrinsic evidence, it must be accepted as "'prima facie' evidence of the truth of the matters contained therein." It follows that the record establishes by prima facie evidence that the accused was absent without leave from Headquarters Company, 13th Airborne Division, on 18 January 1945.

The Manual for Courts-Martial states:

> "The condition of absence without leave with respect to an enlistment having once been shown to exist may be presumed to have continued, in the absence of evidence to the contrary, until the accused's return to military control under such enlistment" (MCM, 1928, par. 130a)

This presumption of law is corroborated in the present case by the testimony of Captain Dawson which shows that the accused was never present with his organization subsequent to February, 1945. Finally, the extract copy of the morning report of the 1610th SCU, MP Company, Camp McCoy, Wisconsin, shows that the accused's status of absence without leave was terminated on 5 September 1945.

5. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to sustain so much of the court's finding as involves a finding that the accused was absent without leave from Headquarters Company, 13th Airborne Division,

from 18 January 1945, to 5 September 1945, and legally sufficient to support the sentence.

Abner E. Lipscomb, Judge Advocate.

Robert J. Clamer, Judge Advocate.

(Sick in hospital), Judge Advocate.

SPJGN-CM 294221 1st Ind
TO: The Judge Advocate General DEC 12 1945

For his information.

Abner E. Lipscomb
ABNER E. LIPSCOMB
Colonel, JAGD
Chairman, Board of Review #3

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

SPJGQ - CM 294348

UNITED STATES	)	SECOND AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Headquarters, Second Air Force, Colorado Springs, Colorado, 22, 23 October 1945. Dismissal and total forfeitures.
Major HARRY E. HAMMOND (0-20742), Air Corps.	)	

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OPINION of the BOARD OF REVIEW
PARTLOW, BIERER and HICKMAN, 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 1: In that Major Harry E. Hammond, Air Corps, Squadron E, 202nd Army Air Forces Base Unit, then 234th Army Air Forces Base Unit, did, without proper leave, absent himself from his station and organization at Clovis Army Air Field, Clovis, New Mexico, from about 26 March 1945 to about 28 March 1945.

Specification 2: In that Major Harry E. Hammond, Air Corps, Squadron E, 202nd Army Air Forces Base Unit, then 234th Army Air Forces Base Unit, did, without proper leave, absent himself from his station and organization at Clovis Army Air Field, Clovis, New Mexico, from about 1 April 1945 to about 4 April 1945.

Specification 3: (Finding of not guilty.)

Specification 4: In that Major Harry E. Hammond, Air Corps, Squadron E, 202nd Army Air Forces Base Unit, did, without proper leave, absent himself from his organization and station at Peterson Field, Colorado Springs, Colorado, from about 15 September 1945 until he was apprehended by military police in Colorado Springs, Colorado, on or about 22 September 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 all Charges and Specifications. He was found not guilty of Specification 3 of Charge I and not guilty of Charge II and the Specification thereunder. He was found guilty of Charge I and Specifications 1, 2 and 4, thereunder. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution with regard to those Specifications as to which findings of guilty were returned is as follows:

Specifications 1 and 2, Charge I

The accused was assigned to duty as officer in charge of Section C, aircraft maintenance, Clovis Army Air Field, New Mexico, in January 1945, replacing Captain Robert C. Zinck, who thereafter acted as his assistant (R. 21, 25, 39; Pros. Ex. 2). Major Richard G. Walker was director of maintenance at this air base during the period involved and, as such, he was the immediate superior officer of the accused (R. 22, 39; Pros. Ex. 2). The accused was absent from his duties on 26, 27 and 28 March 1945, and on 1, 2, 3 and 4 April 1945 (R. 22, 29; Pros. Ex. 2). He was given no authority to be absent upon these days except that one day's absence each week was authorized if all work had been completed (Pros. Ex. 2). Captain Zinck saw the accused in bed at his residence in Clovis on 28 March 1945 (R. 22, 25). The accused's foot was black and blue and very swollen (R. 25). Captain Zinck went to the accused's home to tell him that there were some important papers to sign (R. 22, 25, 27). The accused reported for duty the following day (R. 23). The records of the accused disclosed that he had had no previous experience in "B-29 engineering" (R. 26, 39; Pros. Ex. 2). Major Walker tried to rely upon the accused to perform the work for his section but due to the accused's inconsistency during duty hours, it became necessary to rely more and more on Captain Zinck, although the accused was reliable when he was available (Pros. Ex. 2).

On 12 April 1945, Captain James M. Stubbs, duly appointed investigating officer in the matter of possible reclassification proceedings concerning the accused, interviewed the accused and took a signed and sworn statement from him (R. 31, 32, 33). Captain Stubbs advised the accused that he was being considered for reclassification, or possible disciplinary action, that he might make a statement or remain silent, but that if he made a statement, "it could be used against him if the opportunity arose, in reclassification or disciplinary action" (R. 32, 33). The accused told Captain Stubbs that his foot had been bothering

him and that was the reason for his failure to go to work (R. 33, 34). The investigation disclosed that the accused had a foot injury at the time but Captain Stubbs, upon talking to the doctor who had attended the accused and taking a statement from him respecting the injury, concluded that there was insufficient evidence to justify the absence of the accused, and recommended that reclassification proceedings be initiated (R. 36, 37, 38). The statement executed by the accused on 12 April 1945 was introduced in evidence (R. 33; Pros. Ex. 1). Therein the accused stated, in substance, that as he worked on Sunday, 25 March 1945, he took the following day off and also did not report for duty on 27 or 28 March 1945, that he took his day off on Sunday, 1 April 1945, and did not report for duty on 2, 3 or 4 April 1945 until he entered the hospital on the afternoon of the latter day, that he realized he had no official excuse for being absent but that his foot was bothering him and that the only time it was better was when he did not walk upon it (Pros. Ex. 1). He did not report to the Base Hospital because he did not desire to be placed in it for a period of time, and the personnel in his office always knew that if he was not there he was at home (Pros. Ex. 1).

On 20 April 1945, the accused was interviewed by his superior officers, Brigadier General Newton Longfellow and Colonel Herbert M. Morgan, concerning the proposed reclassification. During the course of such conversation, the accused stated, in substance, that he believed he could "get away" with these absences because of his rank and because no one would check up on the matter (R. 39, 42, 43, 45).

Specification 4, Charge I:

During the forepart of September, 1945, the accused was a patient in the Regional Hospital, Buckley Field, Colorado (R. 48, 51, 52). A disposition board convened at this hospital on 7 September 1945 recommended his return to full military duty (R. 55). By Special Orders No. 227, Headquarters Buckley Field, 11 September 1945, the accused was returned to full military duty, relieved from the hospital, and directed to proceed on or about 13 September 1945 to the 202nd AAF Base Unit, Peterson Field, Colorado Springs, Colorado, for assignment and duty (R. 58; Pros. Ex. 4). It was stipulated that the accused received a copy of such orders and that, pursuant to the directions thereof, he departed Buckley Field on 13 September 1945 (R. 58; Pros. Ex. 5).

An extract copy of the morning reports of the "202nd AAF BU (Sp) Peterson Field" was introduced in evidence and showed the accused assigned not yet joined (enroute) to absent without leave, 0800 hours, effective 15 September 1945, and also showed the accused from absent without leave to confinement, 1030 hours, station guardhouse, effective 22 September 1945 (R. 65; Pros. Ex. 6). Personnel assigned to the Provost Marshal's Office, Peterson Field, apprehended the accused about 1030 hours on the morning of 22 September 1945, at his cabin in an auto court (R. 58, 59, 60). At the time of his apprehension, the accused

stated, "you fellows would have been disappointed if you had come a little later; I would have been out there" (R. 61).

4. In behalf of the accused, several medical reports and forms concerning his physical status were introduced in evidence as follows: WD AGO Form 8-33, 1 April 1945, showing that the accused was admitted to the Station Hospital, Clovis Army Air Field, on 23 February 1945, suffering from a gunshot wound in his right foot caused by a .22 calibre missle and accidentally incurred on that date while he was setting up some targets for practice (R. 74, 75; Def. Ex. B); Form 55F, progress notes, showing satisfactory progress and accused ready for duty, 16 March 1945 (R. 75; Def. Ex. C); a radiologic report on a picture of the accused's right foot, dated 27 February 1945, and indicating the presence of a metallic foreign body in the heel (R. 76; Def. Ex. D); WD AGO Form 8-33, 1 April 1945, showing accused admitted to the same hospital on 4 April 1945, with diagnosis "1. alcoholism, acute, cured 5 April 1945" and the same diagnosis and description of the gunshot wound as made in February (R. 76; Def. Ex. E); progress notes showing satisfactory result as to treatment for the gunshot wound and accused ready for duty, 7 May 1945 (R. 77; Def. Ex. F); a radiologic report, dated 10 April 1945, substantially similar to the one dated 27 February 1945 (Def. Ex. D) (R. 77; Def. Ex. G); and an original X-ray film of the accused's right foot showing the presence of the bullet (R. 78; Def. Ex. H). A medical officer assigned to the Station Hospital testified that the accused was admitted to the hospital on 8 January 1945 and discharged to duty, 12 January 1945, with final diagnosis of "asthma, chronic, bronchial, cause unknown" and that the bullet was still in his foot when he was again discharged from the hospital on 8 May 1945 (R. 80, 81).

When the accused returned to duty on 17 March 1945, he used two-crutches, his foot was bandaged and he complained of it hurting (R. 67, 72). His job was "not entirely a desk job" but involved walking in that he supervised work outside on the line (R. 67, 68, 71, 72). During his absences in late March and early April 1945, his clerk was always able to locate him when necessary and his wife reported his whereabouts by telephone (R. 68, 69, 71).

An extract copy of the morning reports of Squadron E, 234th AAF Base Unit (CCTS)(VH), Air Corps, Clovis Army Air Field, New Mexico, containing entries from 17 March to 8 May 1945, did not show the accused as absent without leave at any time during such period (R. 82; Def. Ex. I).

The accuser, Major Harry H. Baker, testified that the accused was assigned to his organization, the 202nd AAF Base Unit (Special), Peterson Field, Colorado, pending reclassification but that the accused was never assigned any duties because he never reported for duty (R. 82, 83, 84). Major Baker picked up the accused on the morning report of his organization on 13 September 1945, delay enroute was not authorized

for the accused who was not present for duty at any time from 15 September to 22 September 1945, on which latter date he was apprehended (R. 86, 87).

The accused testified that he entered the United States Military Academy in 1933 and graduated therefrom in 1937. He then took flight training at Randolph Field and finished in the pursuit course at Kelly Field in 1938. He received his "wings" in October 1938. He suffered several attacks of asthma in Hawaii just before he left there in December 1940 (R. 8,9). He was bothered again in Florida in 1942 and again "practically the whole year of 1944, and the early part of 1945". He was grounded because of asthma in June or July 1942 and has drawn no flying pay since May 1942. In August 1944, he was placed on limited duty for a year because of his asthma and he was hospitalized for such ailment several times in 1944 (R. 90). In January 1945, he was transferred from Florida to Clovis Army Air Base in accordance with medical recommendation that he go to a cooler climate. He was assigned as officer in charge of Section C, aircraft maintenance, working with B-29 aircraft although he had very little experience in squadron maintenance and was not qualified for such job. Captain Zinck was his assistant, was qualified for the work and had been performing it in a superior manner (R. 90, 91). Major Walker, supervisor of maintenance, consulted Captain Zinck about the work of the section most of the time (R. 91).

On 23 February 1945, the accused accidentally discharged his .22 Colt Woodsman, the shot striking his right foot. He was hospitalized for the injury and discharged from the hospital on 17 March. He could get to his office but most of his duties were outside the office and he could not perform them. He used crutches for awhile. His foot bothered him and he remained away from his office around the 26th and 27th of March 1945 and again during the first three days of April. His foot hurt most when he was moving around, or standing up (R. 92). He stayed at home to rest his foot and "two or three days rest did it a lot of good", and if he had gone to the hospital he would have had to stay there for some period of time. His wife finally called the hospital and he re-entered it where he remained a little over a month (R. 93). About 22 February (1945) he received an efficiency rating of "excellent" and about 12 April (1945) he was given a rating of "satisfactory" (R. 93, 94). Between those dates he was on duty about two weeks and was on crutches most of the time. After leaving Buckley Hospital (in September 1945), he did not report to the 202nd Base Squadron because he had no assigned duties, was "pretty much upset", having been in the hospital three times since spring, was very much ashamed of his organization and was "just trying to get myself together" (R. 93, 94).

Upon cross-examination, the accused testified he was trying to get himself together "mentally and not physically" before reporting to his organization (R. 95), that during his absences on 26th, 27th

and 28th of March and in April, he remained at home with his foot in an elevated position in order to rest it (R. 95), and that such absence was not official (R. 96). He admitted he had been a commissioned officer for eight years and was not unfamiliar with the Articles of War (R. 96).

5. The evidence establishes that the accused, while assigned to duty at Clovis Army Air Field, New Mexico, was absent from his station and organization on 26, 27 and 28 March 1945, and again on 1, 2, 3 and 4 April 1945. The testimony, including the admissions of the accused himself, showed that such absences were without authority from anyone competent to give him leave. On 13 September 1945, the accused received orders directing him to report to the commanding officer of a designated unit at Peterson Field, Colorado, and, in apparent compliance with such orders, he departed Buckley Field, Denver, Colorado, on that date. He did not report to his new organization and station, received no authorization to be absent therefrom, and was carried upon the morning reports of such unit as absent without leave from 15 September 1945 to 22 September 1945, upon which latter date he was apprehended and placed in the guardhouse at Peterson Field. The evidence clearly shows the willful and deliberate absence without leave of the accused upon the dates alleged and therefore sustains the findings of guilty.

It appears that on 23 February 1945, the accused suffered an accidental injury to his right foot due to a gunshot wound. He was hospitalized for about three weeks and returned to duty on 17 March 1945. His work involved walking and he testified that such activity caused his foot to swell and occasioned considerable discomfort. It was to rest his foot that he absented himself without leave in late March and early April. Upon the last day of the second unauthorized absence, he actually re-entered the hospital where he was treated both for the foot wound and for acute alcoholism. For his unauthorized absence of eight days in September 1945, following his release from another hospital, the accused offered the excuse that he had no assigned duties, was "upset", was very much ashamed of his organization and was trying to pull himself together mentally.

The motives for his repeated absences provide no legal justification therefor in any case and are appropriate to consider in extenuation only (CM 239693 Burton, 25 BR 241, 244).

The action of the court in denying the accused's plea to the jurisdiction of the court, based upon the ground that the charges had not been thoroughly investigated in substantial compliance with Article of War 70, was correct. It is well established that the provisions of Article of War 70 pertaining to pre-trial investigation are directory only in all respects and that failure to comply therewith is not ipso facto fatal error (CM 229477 Floyd, 17 BR 149; CM 288951, Burton, Board of Review, 1 November 1945). An investigating officer was appointed

and conducted an investigation in this case, although the investigation appears to have been a somewhat perfunctory matter. The defense complains simply that the investigation should have been more thorough and complete, a criticism which, however well founded, would not affect the jurisdiction of the court. Moreover, there is nothing in the record which indicates that any irregularity or defect in the pre-trial investigation resulted in any prejudice to the substantial rights of the accused within the meaning of Article of War 37.

The defense moved to dismiss or strike Specifications 1 and 2 of Charge I for the reason that prosecution for the offenses involved therein had been unnecessarily, unreasonably and wrongfully delayed (R. 18-20). The motion was properly denied (R. 20). It does not appear that there had been any accumulation or saving up of charges through any improper motive within the meaning of paragraph 26, MCM 1928. The suggestion of defense counsel that the failure to timely prosecute the accused made his defense difficult was not a proper ground for the special plea, however much it may have been a ground for a continuance (MCM, 1928, par. 64b). The repeated misconduct of the accused finally necessitated his trial by court-martial. The entire evidence suggests the disposition upon the part of the military superiors of the accused to bring him to trial only as a last resort.

The law member properly excluded from the consideration of the court so much of the testimony of Brigadier General Longfellow as referred to offenses not alleged (R. 41, 45, 46). Affirmative evidence of the accused's guilt of the offenses of which he was found guilty was abundant and compelling. Indeed, the accused admitted such unauthorized absences. Clearly no prejudice to his substantial rights occurred (See CM 232160 McCloudy, 18 B.R. 389).

6. War Department records show that the accused is 32 years of age and married. He attended the United States Military Academy for a period of four years, graduating therefrom in 1937, and was commissioned in the grade of Second Lieutenant, Field Artillery, Regular Army, on 11 June 1937. In October, 1938, he was transferred to the Air Corps. He was promoted to First Lieutenant, Regular Army, on 12 June 1940. He was promoted to Captain, Army of the United States, 9 September 1940. On 13 May 1942, he was given a temporary Air Corps promotion to the grade of Major and on 19 June 1944 he was given the same grade in the Army of the United States. He successfully completed primary, basic and advanced pilot training at Randolph and Kelly Fields, Texas, between February and December, 1938, followed by a two-year tour of duty in Hawaii. Thereafter he was assigned to many air fields and bases within continental United States, performing duty at various times as squadron commander, group operations officer, air officer on staff of Norfolk Amphibious Force, Atlantic Fleet, base S-3 and S-4, assistant director of maintenance and supply, and as officer in charge of maintenance unit servicing B-29 aircraft. He successfully completed Command and General Staff School, Fort Leavenworth, Kansas, in March, 1944. He has four efficiency ratings of "excellent", one of "very satisfactory", and one of "unsatisfactory".

In December, 1941, he was reprimanded and restricted to his base for one week as disciplinary punishment under Article of War 104 for an unauthorized absence of approximately one hour from his place of duty as controller at the San Francisco Information Center (regional air defense center) on 24 December 1941. On or about 1 February 1945, he was reprimanded administratively for absence without authority on 15 January 1945 and admonished against recurrence of such dereliction by the Executive Officer, Clovis Army Air Field, New Mexico. In addition, it appears from a summary of the accused's testimony in reclassification proceedings at Peterson Field, Colorado Springs, Colorado, 14 June 1945, that he was restricted for one week for "flying a B-26 down the highway as close to the road as I could get" while he was stationed in Hawaii and that he was admonished for failure to attend a scheduled formation while at the Naval Operations Base in Virginia.

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 under Article of War 61.

W. S. Paxton, Jr., Judge Advocate

[illegible], Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 294348 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 16 January 1946

To: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Major Harry E. Hammond (0-20742), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave upon three different occasions, 26-28 March 1945 (Specification 1, Charge I), 1-4 April 1945 (Specification 2, Charge I) and 15-22 September 1945 (Specification 4, Charge I), all 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 and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

While assigned to duty as officer in charge of an aircraft maintenance section at Clovis Army Air Field, New Mexico, the accused absented himself from his station and organization on 26, 27 and 28 March 1945, and again on 1, 2, 3 and 4 April, 1945. Such absences were without authority and admitted by the accused, upon cross-examination, to have been "not official". He asserted that the reason for such misconduct was that he was suffering from the effects of an accidental gun-shot wound in his foot, inflicted on 23 February 1945, and it was to rest his foot, reduce the swelling and relieve the consequent discomfort attendant upon performance of his duties that he absented himself. Upon each occasion he remained at home and rested his foot. He had been hospitalized for the foot injury from 23 February 1945 to 17 March 1945, at which time he was returned to duty status. Subsequently and pursuant to findings and recommendations of a medical disposition board at the Regional Hospital, Buckley Field, Colorado, the accused was relieved from limited service and returned to full military duty status, effective 13 September 1945. He was ordered to report to the commanding officer of the 202d Army Air Forces Base Unit, Peterson Field, Colorado, for assignment and duty, and departed his station in

apparent compliance with such order. He did not report to his new organization or station, received no authorization to be absent therefrom, and was carried upon the morning reports of such unit as absent without leave from 15 September 1945 to 22 September 1945, upon which latter date he was apprehended and confined. He testified that he did not report to his new organization and station because he had no assigned duties, was "pretty much upset", having been in the hospital three times since spring, was very much ashamed of his organization and was just trying to get himself together.

In December 1941 the accused was reprimanded and restricted to his base for one week as disciplinary punishment under Article of War 104 for an unauthorized absence of approximately one hour from his place of duty as controller at the San Francisco Information Center (regional air defense center) on 24 December 1941. On or about 1 February 1945, he was reprimanded administratively for absence without authority and admonished against recurrence of such dereliction by the Executive Officer, Clovis Army Air Field, New Mexico. In addition, it appears from a summary of the accused's testimony in reclassification proceedings at Peterson Field, Colorado, 14 June 1945, that he was restricted for one week for low flying while stationed in Hawaii and that he was admonished for failure to attend a scheduled formation while at Naval Operations Base in Virginia (dates not shown).

A report of further misconduct upon the part of the accused occurring since his trial upon the instant charges has been received by my office. It appears that on 20 November 1945, the accused behaved with gross disrespect toward his commanding officer by using vile and abusive language, resisted arrest ordered by his base commander, used profane language in the presence of women and cursed military police and medical personnel who were directed to take care of him. Several witnesses state that the accused appeared to be intoxicated at the time. A neuropsychiatrist who examined him that day states that the accused is a chronic alcoholic and recommends that he be retained under strict military supervision until such time as a discharge from the Army can be effected.

It also appears from a letter to my office dated 29 December 1945 from the Commanding General, Second Air Force, that on 15 December 1945 accused "was found drunk in the guardhouse at Peterson Field and has generally conducted himself in a most reprehensible manner."

In my opinion, the repeated misconduct of the accused over a long period of time indicates that his retention in the military service

is inadvisable. His conduct is inexcusable, especially in view of his age, rank and long military education, training and experience. I therefore recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be ordered executed.

4. Consideration has been given to a report of investigation concerning alleged misconduct of the accused subsequent to the date of trial, dated 28 November 1945, and forwarded by the Commanding Officer, Peterson Field, Colorado, through channels to my office. Consideration has also been given to a brief and written argument, dated 7 December 1945, submitted by defense counsel 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

5 Incls
1. Record of trial
2. Form of action
3. Ltr Hq Peterson Fld 28 Nov 45, Subj: Confinement of Officer
4. Ltr and brief, 7 Dec 45
5. Ltr Hq 2nd Air Force 29 Dec 45

(Sentence confirmed but forfeitures remitted. Sentence as modified ordered executed. GCMO 44, 6 March 1946).

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

SPJGH - CM 294486

12 DEC 1945

UNITED STATES	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND
v.	)	
Second Lieutenant Sidney B. Gault (0-821623), Air Corps.	)	Trial by G.C.M., convened at Randolph Field, Texas, 28 November 1945. Dismissal.

OPINION of the BOARD OF REVIEW
TAPPY, BECK, STERN and TREVETHAN, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Sidney B. Gault, Air Corps, did, at Lincoln Army Air Field, Lincoln, Nebraska, on or about 7 July 1945, wrongfully and unlawfully make and utter to Second Lieutenant William R. Johns, Air Corps, a certain check in words and figures, as follows, to wit:

Spartanburg, S. C., July 7, 1945
Citizens and Southern Nat. Bank
Pay to the
order of.....Cash $50.00
Fifty and no/100 Dollars
(s) Sidney B. Gault
0821623

he the said Second Lieutenant Sidney B. Gault, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens and Southern National Bank for the payment of said check.

Specification 2: Same allegations as Specification 1.

Specification 3: Same allegations as Specification 1 except check in amount of $100.00.

Specification 4: Same allegations as Specification 1 except check in amount of $40.00.

Specification 5: (Nolle Prosequi entered by direction of reviewing authority).

Specification 6: (Nolle Prosequi entered by direction of reviewing authority).

Specification 7: Same allegations as Specification 1 except check dated, made and uttered 9 July 1945 to Flight Officer George Metkovich.

Specification 8: Same allegations as Specification 1 except check in the amount of $30.00 and uttered to Flight Officer George Metkovich.

Specification 9: Same allegations as Specification 1 except check uttered to Flight Officer George Metkovich.

Specification 10: Same allegations as Specification 1 except check dated, made and uttered on 6 July 1945 to Second Lieutenant Harold J. Kirkwood.

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

Specification 1: In that Second Lieutenant Sidney B. Gault, Air Corps, did, near San Antonio, Texas, on or about 26 July 1945, wrongfully and unlawfully make and utter to Johns Package Store, a certain check in words and figures as follows, to wit:

Spartanburg, S. C. July 26, 1945
Pay to the order of Cash $20.00
Twenty and no/100 dollars

To: Citizens and Southern Nat Bank
Spartanburg, S. C. (s) Sidney B. Gault
Sec H 0821623

he the said Second Lieutenant Sidney B. Gault, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens and Southern National Bank for the payment of said check.

Specification 2: Same allegations as Specification 1 except check dated, made and uttered 28 July 1945.

Specification 3: Same allegations as Specification 1 except check dated, amde and uttered 10 July 1945, in amount of $150.00 to Second Lieutenant Wallace London.

Specification 4: Same allegations as Specification 1 except check dated, made and uttered 10 July 1945, in amount of $50.00 to Second Lieutenant Angelo P. Panos.

Specification 5: Same allegations as Specification 1 except check dated, made and uttered 10 July 1945, in amount of $50.00 to Second Lieutenant Richard S. Herpe.

Specification 6: Same allegations as Specification 1 except check dated, made and uttered 10 July 1945, in amount of $50.00 to Second Lieutenant Richard S. Herpe.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for one (1) year. The reviewing authority approved the sentence, remitted the confinement and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to show that between 6 July 1945 and 10 July 1945 accused and other officers participated in various poker games held at the Officers' Club, Lincoln Army Air Field, Lincoln, Nebraska. During those games accused made and issued the following checks, viz (R. 12-14, 22, 23; Gov'ts. Exs. A-H: Pros. Exs. 1-8, 11-14):

Chg. & Spec.	Pros. Ex. No.	Date Check Uttered	Am't	Payee	Drawee Bank
Chg., Spec. 1	1	7 July 45	$50	Cash	Citizens & Southern National Bank, Spartanburg, S. C.
Chg., Spec. 2	2	"	50	"	"
" Spec. 3	3	"	100	"	"
" Spec. 4	4	"	40	"	"
" Spec. 7	5	9 July 45	50	F/O George Metkovich	"
" Spec. 8	6	7 July 45	30	Cash	"
" Spec. 9	7	"	50	"	"
" Spec. 10	8	6 July 45	50	"	"
Add. Chg Spec. 3	11	10 July 45	150	"	"
" Spec. 4	12	"	50	"	"
" Spec. 5	13	"	50	"	"
" Spec. 6	14	"	50	"	"

Various of the players, including accused, were using personal checks in lieu of cash in these poker games. Of the first four checks itemized above (Chg., Specs. 1-4, incl), Second Lieutenant William R. Johns received all but the $100 check as a portion of the total wagers made on poker hands won by him. The $100 check (Chg., Spec. 3) was cashed for accused by Lieutenant Johns during the game. These four checks were subsequently deposited by Lieutenant Johns and forwarded to the drawee bank through customary banking channels but were all returned unpaid. Accused was advised of that fact and although he promised to redeem them he never did so (Gov't. Ex. B).

The next three checks listed above (Chg., Specs. 7-9, incl) were received by Flight Officer George Metkovich who either cashed them for accused during the poker games or obtained them as a portion of the wagers made on poker hands won by him. He subsequently cashed the first check at the local Post Exchange and deposited the other two. All three of them were subsequently returned unpaid by the drawee bank. Accused did not redeem any of these three checks (Gov't. Ex. C).

The eighth check listed above (Chg., Spec. 10) was received by Second Lieutenant Harold J. Kirkwood during one of the poker games. Lieutenant Kirkwood gave accused cash of $48 for the check and the balance of $2 was applied in settlement of a poker loss sustained by accused. Lieutenant Kirkwood's wife thereafter negotiated the check to a third person and eventually it was returned unpaid by the drawee bank. Accused never redeemed this check (Gov't. Exs. D, E).

The ninth check listed above (Add. Chg., Spec. 3) was received by Second Lieutenant Wallace London from accused during one of these poker games and a portion of the consideration given therefor was cash of "at least $100." This check also was deposited but was returned unpaid by the drawee bank. Accused never redeemed this check (Gov't. Ex. F).

The tenth check listed above (Add. Chg., Spec. 4) was cashed for accused by Second Lieutenant Angelo P. Panos. After deposit it also was returned unpaid by the drawee bank and was not redeemed by accused (Gov't. Ex. G).

The last two checks listed above (Add. Chg., Specs. 5, 6) were cashed for accused by Second Lieutenant Richard S. Herpe during one of the poker games. These two checks were also returned unpaid by the drawee bank and were not redeemed by accused (Gov't. Ex. H).

The remaining two checks to be considered bore the purported signature of accused as maker and were as follows, viz (R.15-18; Pros.Exs.9,10):

Chg. & Spec.	Pros. Ex.No.	Date of Check	Am't	Payee	Drawee Bank
Add.Chg.,Spec.1	9	26 July 45	$20	Cash	Citizens & Southern Nat. Bank, Spartanburg, S.C.
" Spec.2	10	28 July 45	"	"	"

Both of these checks were presented to John's Package Store, San Antonio, Texas, and in exchange therefor there was given either cash or merchandise (R. 15-18). Mr. Ray H. Flaskamper of that store did not know if accused was the person who negotiated these checks at his establishment (R. 20).

It was stipulated by the prosecution, defense and the accused that if F. B. Vincent were present he would testify that (Gov't. Ex. A):

(a) He is vice president of The Citizens and Southern National Bank of South Carolina, Spartanburg, South Carolina.

(b) On 24 May 1945 accused had a commercial checking account with that bank in which he had a balance of $5.38 on deposit. No deposits were made thereafter to the account and after debiting the account with various service charges subsequently accruing, the account was overdrawn on 6 July 1945 and so remained until at least 2 November 1945.

(c) All of the check involved in the instant proceedings are in the handwriting of accused as evidenced by comparison with his signature card on file with the bank and all of these checks were presented to the bank during July and August 1945 and were dishonored by it.

4. The defense offered no evidence and the accused, after his rights had been fully explained, elected to remain silent.

5. Accused is here charged with wrongfully and unlawfully making and uttering a total of fourteen checks aggregating $760 in amount, knowing that he did not have and not intending to have sufficient funds on deposit to pay them. There is no allegation that he intended to defraud or that he fraudulently obtained anything thereby. A Specification worded as are these has recently been held not to contain the element of fraud and the offense alleged thereby was described as "something less than that of obtaining money or property by fraud and something more than mere careless failure to maintain a sufficient bank account" (CM 280789, Hughes; CM 286548, Welch).

The proof with respect to twelve of these checks (Chg., Specs. 1-4, incl., 7-10, incl.; Add. Chg., Specs. 3-6, incl.) clearly establishes that accused uttered these checks during poker games with other officers and at a time when he had no balance on deposit with the drawee bank. Furthermore, his bank account remained in that condition for at least five months thereafter. These facts were ample to warrant the court's

conclusions that when accused uttered these checks he did not have sufficient funds on deposit to pay them and did not intend so to have. These checks were either actually cashed for accused during the poker sessions or were used by him to make wagers. When accused used his checks as wagers he in fact incurred a gambling debt to whomever might eventually win the stakes. His action was no different in legal effect than if he had played "light" on particular wagers and after losing had given a check for the amount of his lost wager. Thus, it is apparent that accused's conduct in making by check wagers which he eventually lost was tantamount to delivery of checks in payment of gambling debts. To issue worthless checks in payment of a gambling debt constitutes conduct violative of at least Article of War 96 (CM 202601, Sperti; 6 BR 171, 219; CM 256563, Andrews, 36 BR 297). Accordingly, the record of trial is sufficient to sustain the findings of guilty of these twelve Specifications.

The evidence also demonstrates that when the two checks for $20 were issued to John's Package Store, San Antonio, Texas, accused's bank account was overdrawn and so remained for several months thereafter. If accused issued these two checks, clearly the court was warranted in finding that he did so without having or intending to have sufficient funds on deposit to pay them. Although there was no direct evidence that accused had in fact issued these two checks, the proof does show that the checks were in accused's handwriting, that they were uttered by someone to John's Package Store and that no indorsement of a third party appeared on the reverse side of the check. Thus, the question is whether or not the court was entitled to infer from these circumstances that accused in fact uttered these two checks as alleged.

Our research has failed to reveal any opinion in this office squarely answering the question before us. In one case, CM 261432, Corcoran, 40 BR 235, where accused was found guilty of uttering a worthless check, the only evidence introduced was that the particular check was presented to the drawee bank and payment refused because of insufficient funds. There was no evidence showing that the check was ever cashed by the payee or that accused negotiated it. Accordingly, the evidence was held insufficient to sustain the findings of guilty. That conclusion was clearly correct.

In the instant case, however, there is express proof that the checks were negotiated to the payee for value by someone. Also, the checks were made by accused and the indorsement of no third party appeared thereon. The accused remained silent and offered no evidence to establish that after he made these checks they were lost or stolen from him or that he otherwise parted with them than by negotiation thereof. Although an accused's silence may not be commented on by the trial judge advocate

(MCM, 1928, par. 27), nor used to create any presumption against him (MCM, 1928, par. 120d), nevertheless, an accused's failure to produce evidence which if favorable would naturally have been produced justifies the inference that the facts are unfavorable to his case (CM 279485, Thompson). Here the accused's failure to produce evidence to show that he lost possession of the checks through some means other than negotiation, justifies the inference that he did not lose possession of them through such other means. Accordingly, the court was warranted in inferring from the foregoing evidence that the accused parted with possession of these two checks by negotiating them as alleged.

The implied finding that accused uttered these two checks is also sustainable upon another basis. It is well established in embezzlement cases that when a person is entrusted with money by others and fails to turn over or to account for the funds when his stewardship ends, he cannot complain if the natural presumption that he spent the money outweighs any uncorroborated explanation he may give (Dig. Op. JAG 1912-40, sec. 451 (17); CM 264264, Canon, 42 BR 45). Similarly, in our opinion, when a person draws a check and subsequently that check is uttered to another person without any intervening indorsement appearing thereon, the natural presumption can only be that the drawer of the check was the utterer thereof. Applying that principle here it is apparent that an unrefuted prima facie case was established by the prosecution which in turn warranted the court's findings of guilty.

6. Accused is 26 years of age. According to War Department records, after completing eleven grades of schooling, he was successively employed as a semi-professional baseball player and as a clerk-typist. He entered military service on 20 March 1941. On 9 February 1942 he was convicted by special court-martial for desertion commenced on 18 August 1941 and terminated on 11 December 1941, and received a sentence of six months confinement and forfeiture of $19.75 of his pay per month for a like period. On 11 April 1943 he became an air cadet and on 7 January 1944, after graduating from Army Air Force Pilot School, Stuttgart Army Air Field, Stuttgart, Arkansas, he was commissioned a second lieutenant. On 21 August 1944 he was punished under Article of War 104 for wrongfully uttering five checks without maintaining a sufficient balance on deposit in the drawee bank to pay them.

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 96.

Thomas N. Jaffry, Judge Advocate.

Wm. T. Beck Jr., Judge Advocate.

Joseph J. Stern, Judge Advocate.

Robert E. Trevethan, Judge Advocate.

SPJGH-CM 294486 1st Ind DEC 14 1945

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

TO: The Secretary of War

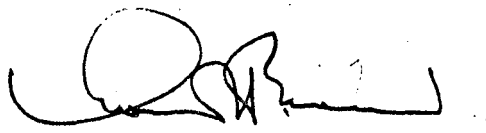
1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Sidney B. Gault (O-821623), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully making and uttering fourteen checks aggregating $760 in amount without having or intending to have sufficient funds on deposit to pay them, all in violation of Article of War 96. He was sentenced to dismissal, total forfeitures and confinement for one (1) year. The reviewing authority approved the sentence, 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. 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. From 6 July 1945 to 10 July 1945 accused participated in several poker games with other officers and during those games he made and issued twelve checks aggregating $720 in amount, some of which he used in lieu of cash to make bets and others of which were cashed for him by participants in the game. On 26 and 28 July 1945 he made and uttered two more checks, each for $20, to a private business enterprise obtaining either cash or merchandise therefor. At the time accused uttered these fourteen checks, his account with the drawee bank was overdrawn and so remained for at least five months thereafter. Accordingly, the checks were all dishonored by the drawee bank. Accused had not redeemed these checks at the time of trial.

War Department records reveal that accused was punished under Article of War 104 on 21 August 1944 for wrongfully uttering five checks without maintaining a sufficient balance on deposit in the drawee bank to pay them. Accused's present conduct in uttering worthless checks for such a substantial sum under the circumstances here existing fully demonstrates his unfitness longer to remain 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 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.



3 Incls
1 Record of trial
2 Form of action
3 Ltr fm accused to Sen Maybank

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed, but forfeitures remitted. Sentence as modified ordered executed. GCMO 517, 18 Dec 1945).

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

SPJGK - CM 294487

2 JAN 1946

UNITED STATES v. Captain CHARLES R. SPILLNER (0-730000), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Brooks Field, Texas, 24 October 1945. Dismissal, total forfeitures and confinement for one year.

OPINION of the BOARD OF REVIEW
MOYSE, KUDER and WINGO, 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 96th Article of War.

Specification 1: In that Captain Charles R. Spillner, Air Corps, did, at San Antonio, Texas, from about 9 August 1945 to about 7 September 1945, wrongfully and unlawfully fail to maintain a sufficient bank balance in the National Bank of Fort Sam Houston, at San Antonio, Texas, to pay the following check issued by him to Brooks Field Officers' Mess, in words and figures, as follows:

FROST NATIONAL BANK

San Antonio, Texas, August 8, 1945

Pay
to the order _____ $ 15.00
of
Fifteen and no/00 ---------- Dollars

To National Bank of
Fort Sam Houston

C. R. Spillner
Capt. A.C. 0-730000

Specification 2: In that Captain Charles R. Spillner, Air Corps, did, at Brooks Field, Texas, on or about 27 August 1945, with intent to defraud, wrongfully and unlawfully make and utter to

the Brooks Field Officers' Mess a certain check in the words and figures as follows, to wit:

No._____ San Antonio, Texas, Aug 27 1945

30-65
NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

Pay to the order of Officer's Mess $ 15.00

Fifteen and no/00 ---------- Dollars

C. R. Spillner
Capt A.C. 0-730000

and by means thereof did fraudulently obtain from the Brooks Field Officers' Mess $15.00, lawful money of the United States, he, the said Captain Charles R. Spillner, 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 payment of said check.

NOTE: Specifications 3 to 9 inclusive are similar in form to Specification 2. Each involves a check for the same amount, namely, $15.00. Wherever a material variance appears it is as to date, payee, or person defrauded. The dates of the offenses, dates of the checks, the payees and parties defrauded are, respectively, as follows:

Spec.	Offense	Check	Payee	Defrauded
3	27 August 1945	"Aug 27 1945"	"Officer's Club"	Brooks Field Officers' Mess
4	28 August 1945	"Aug 28 1945"	"Officer's Mess"	" "
5	28 August 1945	"Aug 29 1945"	" "	" "
6	29 August 1945	"Aug 29 1945"	" "	" "
7	31 August 1945	"Aug 31 1945"	" "	" "
8	31 August 1945	"Aug 31 1945"	" "	" "
9	19 September 1945	"Sept 19 1945"	"Cash"	R. E. Colson

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

Specification 1: In that Captain Charles R. Spillner, Air Corps, did, at Brooks Field, Texas, on or about 12 September 1945, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

San Antonio, Texas, Sept 12 1945

First National Bank
Youngstown, Ohio

Pay to the order of Officers Mess or bearer $15.00

Fifteen and no/00 ---------- Dollars

No. _____ R. L. Goulet
Lt. 0-720341

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

Specification 2: In that Captain Charles R. Spillner, Air Corps, did, at Brooks Field, Texas, on or about 3 September 1945, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

No. _____ San Antonio, Texas Sept 3 1945

30-65
NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

Pay to the
order of Officer's Mess $ 15.00

Fifteen and no/00 ---------- Dollars

Lt. A. E. Prestridge
0-674927

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

Specification 3: In that Captain Charles R. Spillner, Air Corps, did, at Brooks Field, Texas, on or about 18 August 1945, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

San Antonio, Texas, August 1945 No. ____

30-65
NATIONAL BANK OF FORT SAM HOUSTON
At San Antonio

Pay to the
order of Brooks Field Officer's Mess $25.00

Twenty Five xx/00 ---------- Dollars

LT. A. E. Prestridge
0-27E296

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

Specification 4: In that Captain Charles R. Spillner, Air Corps, did, at Brooks Field, Texas, on or about 12 September 1945, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

San Antonio, Texas, Sept.12 1945

First National Bank
Youngstown Ohio

Pay to the order of Cash or bearer $25.00

Twenty-Five and no/00 ---------- Dollars

No. _____

R. L. Goulet
Lt. 0-720341

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

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

3. Evidence for the prosecution.

Specifications 1 - 9, Charge I.

During August and September 1945 Captain Cowan, officer in charge of the Officers' Club at Brooks Field, Texas, according to his testimony, discovered in the course of his duties that a bank draft (Pros. Ex. A) and seven checks (Pros. Exs. B,C,D,E,F,G,H), each in the sum of $15.00, drawn on the "National Bank of Fort Sam Houston," had been submitted by the club to the bank for payment and returned by the bank unpaid (R. 13-18). The draft was payable to the "Officer's Club," the checks to the "Officer's Mess." Each item bore the signature "C. R. Spillner" (Pros. Exs. A-H, R. 13-18). The draft was dated "August 8, 1945," two checks were dated "Aug

27 1945," two "Aug 28 1945," one "Aug 29 1945," and two "Aug 31 1945" (R. 13-18; Pros. Exs. A-H). "The checks from the 27th through the 31st were presented for payment the nights of the dates indicated" (R. 25). Captain Cowan recognized the signatures as those of accused (R. 18), and shortly after 1 September spoke to him "in regard to these checks" (R. 18). Accused admitted "That he had written the checks," and "owing these checks" (R. 18).

> "When I told him that he was not to cash any more checks at the club, he said that he had not cashed any more checks at the club, that he made checks payable to the Officers' Club and other men cashed them. * * * He didn't state whether someone else had cashed all the checks or not. It was a general statement." (R. 25)

The draft and each check were indorsed only by stamp indorsement, "For deposit only * * * Officer's Mess, Brooks Field, Texas." Accused stated that his allotment had not come in and I called the bank in the meantime and told them that I was going to return the checks for collection so that if the allotment came in, they would be made good" (R. 24). The checks were "put through a second time" and were not "collected on" (R. 21,22).

Mr. Eddie Sims, bartender at the Officers' Club, testified that accused presented to and received cash from Sims for the two checks identified as Prosecution's Exhibits B and F. Sims also cashed either the check marked Prosecution's Exhibit G or H for accused 31 August (R. 62,63).

The "Post Barber," Mr. Robert E. Colson, testified that he had cashed a check for $15.00, made in his presence by accused 19 September 1945 (R. 26). The check was dated "Sept 19 1945," drawn on the "National Bank of Fort Sam Houston," payable to "Cash," and signed "C. R. Spillner" (R. 26, Pros. Ex. I). Mr. Colson presented the check for payment to the Post Exchange "and the Post Exchange in turn sent it through the bank and it came back to me," unpaid (R. 26,27). Mr. Colson reimbursed the Post Exchange for the amount of the check (R. 27).

Mr. W. L. Bailey, assistant cashier, National Bank of Fort Sam Houston, testified that accused and his wife had a joint account at the bank (R. 33). Mr. Bailey was one of the custodians of bank records kept in the regular course of business, which showed that an allotment of $200.00 was deposited in accused's account 8 August 1945 (R. 38), but from the close of business 9 August until 7 September, when another $200.00 allotment was deposited, there were not sufficient funds to pay a $15.00 check (R. 37,38). "On the 11th of August 1945, an item signed 'C. R. Spillner', dated August 8th, for $15.00, payable to the Officers' Mess, was presented and not paid" (R. 30; Pros. Ex. K). Four $15.00 checks signed "C. R. Spillner," one payable to the Officers' Club and three payable to the Officers' Mess, were returned by the bank 31 August (R. 32), "each marked 'pay check not in'" (R. 32, Pros. Ex. L). Mr. Bailey further testified:

"Ordinarily a check which is received from the last day of the month until the 15th of the following month prior to the receipt of the officer's monthly deposit, is returned pay check not in instead of insufficient funds, if there are not sufficient funds in the account to pay the check. This is done, of course, as most army installations are at times a little late in sending the officers allotment or pay check and they are late in reaching the bank. Therefore any returned checks are marked in this manner." (R. 32)

On 1 September the bank "returned a check signed 'C. R. Spillner,' payable to the Officers' Club for $15.00, marked 'pay check not in'" (R. 32; Pros. Ex. M). On 4 September the bank returned two checks "signed 'C. R. Spillner,' payable to the Officers' Club for $15.00, marked 'pay check not in'" (R. 33; Pros. Ex. N). On 24 September "a check signed 'C. R. Spillner,' dated September 19, 1945, payable to "cash" for $15.00 was returned marked "not sufficient funds" (R. 33; Pros. Ex. O). Mr. Bailey could not state whether the checks so returned were the nine checks introduced in evidence as Prosecution's Exhibits A-I (R. 31).

Mr. Bailey had been "in the banking business" since 1931, excluding one year, and as "a bookkeeper as well as teller" had had the responsibility of "paying out money on signatures" (R. 38,39). In his position as Assistant Cashier he had "an opportunity to compare the signatures of * * * depositors or of other persons who present known handwriting in order to have their checks cashed" (R. 33). In his opinion the signatures on the nine checks in evidence were "the same" as that of accused on the "bank's authorized signature card for the joint account of Charles R. and Mrs. Charles R. Spillner" (R. 33,35; Pros. Ex. P).

Specifications 1-4, Charge II

Lieutenant James E. Funston testified that on "V-J Day," at the Brooks Field Officers' Club, accused gave him a check for $25.00 drawn on the "National Bank of Fort Sam Houston," dated "August 1945" and signed "Lt. A. E. Prestridge" (R. 57; Pros. Ex. T). Lieutenant Funston gave accused $5.00 for the check. "I had won $20.00 from him in a dice game and I gave him $5.00 in cash" (R. 57).

Mr. Leland Ferguson, "Exchange Office Manager and Accountant of the Brooks Field Post Exchange," testified that on 12 September 1945 at the Exchange Office accused gave him a check for $25.00 drawn on "First National Bank, Youngstown, Ohio," dated "Sept 12 1945" payable to "Cash" and signed "R. L. Goulet" (R. 59; Pros. Ex. V). Accused endorsed the check in Mr. Ferguson's presence and Mr. Ferguson gave him "cash value" for the check (R. 59).

Master Sergeant J. B. Irish, Senior, testified that on 24 September 1945 he was Provost Sergeant at Brooks Field, and there on that day heard Second Lieutenant Walter R. Bills read the following statement to accused (R. 40,42):

"I have been warned of my constitutional rights concerning compulsory self-incrimination under Article of War #24, as follows:

"That I need not make any statement concerning charges against me which are under investigation, nor need I make any statement nor answer any questions which may tend to incriminate me. That I may make a statement, either oral or written, sworn or unsworn. That if I make any statement the same may be used in court as evidence against me. That no promise of immunity from nor threat of prosecution has been made to me. That any statement I make will be of my own free will and accord, full knowing that same will be used as evidence against me.

"I am Capt. Charles R. Spillner, O-730000, Squadron H, 2510th AAF Base Unit, Brooks Field, Texas.

"During the month of August 1945, I wrote a check in the amount of $25.00, signed 'A.E. Prestige' drawn on the First National Bank of Ft. Sam Houston, Texas, and during the month of September 1945, I wrote two checks, each in the amount of $15.00 and signed A.E. Prestige, on one check, drawn on the First National Bank of Ft. Sam Houston, the other signed R. L. Goulet, drawn on the First National Bank of Youngstown, Ohio.

"These checks were written while I was under the influence of alcohol." (Pros. Ex. Q)

After the statement was thus read, accused signed and swore to it in the presence of Lieutenant Bills, Second Lieutenant Roy D. Sanders, and Sergeant Irish (R. 42). Neither Lieutenant Bills nor Lieutenant Sanders offered accused at that time "any hope or benefit if he signed this confession" (R. 41).

Two qualified handwriting experts testified (R. 43,56) that the same person who had written the checks marked Prosecution's Exhibits A,B, C,E,F,G and H also wrote the Prestridge check marked Prosecution's Exhibit T and two other checks, one for $15.00 drawn on the "First National Bank Youngstown Ohio," dated "Sept 12 1945," payable to "Officers Mess," and signed "R. L. Goulet" (Pros. Ex. R), and the other for $15.00 drawn on the "National Bank of Fort Sam Houston," dated "Sept 3 1945," payable to "Officer's Mess" and signed "Lt. A.E. Prestridge" (Pros. Ex. S). One of these experts likewise testified that the Goulet check marked Prosecution's Exhibit V had been written by the same person who wrote the other checks (R. 56).

The Assistant Personnel Officer, Brooks Field, testified that no officer named A. E. Prestridge or R. L. Goulet had been listed in the records as present at the Field since 1 July 1945, and the names Prestridge and

Goulet did not appear in the records of enlisted men since that date (R. 65).

It was stipulated by the prosecution, defense and accused, "That on 1 September 1945, and since that date, there has been no such banking institution in existence as the 'First National Bank, Youngstown, Ohio'" (R. 66, Pros. Ex. Y).

4. Evidence for the defense.

Accused, after having been apprised of his rights, elected to make an unsworn statement, which he did in response to questions of the defense counsel (R. 67). His statement is substantially as follows: He is twenty-seven years old. "Just prior" to his induction in March, 1942, he was a blueprint inspector for "Western Electric Inc." in Chicago, and earned "about $210 or $215 a month at that time." He "graduated" from "bombardier school" in September 1942, and was transferred overseas 7 May 1943 after completion of additional training "in B-26 as bombardier-navigator." He "returned to the states May 7, 1944. I left the states for another overseas assignment July 1, 1944, came back to the states December 27, 1944. My first tour of combat was in ETO in England. My second tour was in ETO in France" (R. 67). He served with the 322nd Bomb Group, Ninth Air Force, on both tours, first as Wing Bombardier, and later "worked up into lead position as Squadron Bombardier". He completed 73 combat missions. His first efficiency rating was "Very Satisfactory," followed by three "Excellents," a "Superior," and another "Excellent." He received the Distinguished Flying Cross with Oak Leaf Cluster, the Air Medal with twelve Oak Leaf Clusters, and a Unit Citation with one Oak Leaf Cluster. His adjusted service rating score is 151 points. After his second return to the United States he was "recommended to go to a convalescent center" but did not do so because he "wanted pilot training and my age was catching up with me."

At the time the checks marked Prosecution's Exhibits A-H were issued he "knew that my allotment would be at the bank - it should have been at the bank. I thought there would be enough time to clear these checks through. By the time they left there the allotment should be there" (R. 68). He was not notified during the period 27 to 31 August that the checks written 27, 29 and 31 August "were of no value," and thought they "were good at that time." He did not receive during the month of August a statement from the National Bank of Fort Sam Houston pertaining to his account, which he held jointly with his wife, who was "able to draw money from the bank the same as" he was, "through checks." He did not attempt nor intend, through writing the checks "under the name of C. R. Spillner * * * and Prestridge and Goulet" to defraud anyone "at the time those checks were written" (R. 69). He had been drinking quite heavily on "V-J night," and did not "remember exactly" when "these Goulet and Prestridge checks were written," because he "was under the influence of alcohol" on the dates which appear on those checks. He could not "very clearly" remember writing them (R. 70).

At the time accused made his pre-trial statement, "Lieutenant Bills and I talked for quite a while and I knew that the commanding officer of the field was having a personal interest in this case, and Lieutenant Bills suggested that if I made the admission and admitted my guilt and so forth on the affidavits signed in his presence, that it would bear on the case and tend toward leniency" and said "in effect" that accused "would be showing good faith as far as the Commanding Officer" was concerned.

On 19 October 1945 accused "paid $130.00 of the amount that I owed to the Brooks Field Officers' Club," which is all the money he believed he owed "under the name of C. R. Spillner" (R. 21,68; Def. Ex. 1).

It was stipulated between the prosecution and defense that if Major Charles W. Miller, Medical Corps, were present in court he would testify that he examined accused 20 October 1945, found "nothing of psychiatric importance in the officer's family history," and that he "shows no pathological alteration of mood and examination fails to elicit any psychotic manifestations." Major Miller's "impression" was that -

> "The psychiatric diagnosis in this case is anxiety state, mild, chronic, precipitated by severe stress of combat duty in a person with no evident predisposition, and resulting in mild functional impairment. There is no evidence of any psychosis in this case, and the officer must be regarded as one who is legally responsible for his acts, who is able to distinguish between right and wrong, and has the ability to adhere to the right, and possesses sufficient mental capacity to conduct or cooperate intelligently in his defense should he come to trial." (R. 71)

5. The evidence concerning the specifications of Charge I is clear that accused wrote the draft and eight checks in question and failed to maintain a balance sufficient to pay them when presented. He admitted (except the Colson check) "owing these checks." There was proof that he uttered, and received value for, some of them (including the Colson check) and also forged and uttered two additional checks during the six weeks period involved. This proof together with the draft and checks which were admitted in evidence is sufficient to corroborate his admission (CM ETO 2452, Briscoe, 7 B.R. ETO 7, III Bull. JAG 423), and with this admission to support the findings of guilty. None of the checks, except the Colson check which accused himself cashed, bore an intermediate indorsement, and it may be assumed that if other officers cashed some of the checks as accused alleged, they did so for him; the checks were uttered at his instigation and on his behalf. His unsworn statements that he did not intend to defraud by uttering these checks and that his wife had access to their account, unsupported by any evidence or even by a statement by accused that she did in fact issue checks against such account, were not sufficient to persuade the court and do not induce this Board to find, with reference to Specifications 2 to 9, that he was merely careless in ascertaining the state of his account, and do not

overcome the inference of fraud drawn from the facts established (CM 250772, Greenamyer, 33 B.R. 42; CM 255260, Porter, 36 B.R. 82). Fraud is not an element of the offense alleged in Specification 1 (CM 251451, Monaghan, 33 B.R. 250, 251, IV Bull. JAG 5; CM 249232, Norren, 32 B.R. 102,103, III Bull. JAG 290).

Redemption of the dishonored checks by accused after charges had been preferred will not absolve him. "The offenses were committed at the time the checks were issued and subsequent conduct can have no effect upon the issue of guilt" (CM 245908, Riley, 29 B.R. 332,333).

The forgeries alleged in the specifications of Charge II were proved by the checks admitted in evidence, by the expert testimony that accused wrote them, and by evidence of his intent to defraud. The checks were false, since they were signed with a name not that of accused. There was some evidence, not rebutted, that Prestridge and Goulet were fictitious names. The checks would, if genuine, apparently impose a legal liability on the purported drawers. Since the Goulet checks were drawn on a bank which did not exist, it may be inferred that they were made with intent to defraud. Fraudulent intent was further demonstrated by accused's acts of cashing one Goulet and one Prestridge check (CM 247111, Grannell, 30 B.R. 258).

Accused's statements that he was under the influence of alcohol when he wrote these checks are not supported by any evidence. Accused was able to make four false checks with two names on three separate dates, designate the same non-existent bank twice and cash two of the checks; since he was alert enough to pursue the pattern thus developed, his allegations of drunkenness do not raise much doubt concerning his mental capacity to entertain the intent to defraud.

Accused in his unsworn statement made a somewhat tenuous allegation that, at the time he discussed with Lieutenant Bills the statement he subsequently signed (in which he admitted executing three of the checks), Lieutenant Bills "suggested that if I made the admission and admitted my guilt and so forth on the affidavits signed in his presence, that it would bear on the case and tend toward leniency." Accused's allegation is not supported by deposition or other evidence. He does not allege he was promised immunity. When he signed the statement, which contains a full recital of his rights, he was not offered "any hope or benefit if he signed," according to Sergeant Irish. Independent of this signed statement there is adequate proof that he made these checks. Even if Lieutenant Bills' reported suggestions are assumed to be true, introduction of the document into evidence did not prejudice substantial rights of accused.

6. War Department records disclose that this officer will be 28 years of age 12 February 1946, is married and has no children. He is a high school

graduate and was employed, as a cabinet maker, from 1936 to 1941 by a furniture manufacturer, and from 1941 to 1942 by the Western Electric Company. He entered the service 9 April 1942 and upon completion of training as an aviation cadet was commissioned Second Lieutenant, Air Reserve, in the Army of the United States 26 September 1942, and was ordered to active duty the same date. He was promoted to first lieutenant 17 February 1944 and to captain 15 October 1944. He was awarded the Air Medal 2 September 1943 and thereafter, by 21 November 1944, had received twelve Oak-Leaf Clusters for this medal for meritorious achievement in the European Theater of Operations while participating in operational sorties against the enemy. He was awarded the Distinguished Flying Cross 6 January 1944, "For extraordinary achievement while serving as a bombardier or navigator-bombardier on a B-26 airplane on twenty-five bombardment missions over enemy occupied Continental Europe." On 14 August 1944 he was reprimanded under the provisions of Article of War 104 for engaging in a fight with another officer at Camp Kilmer, New Jersey, 30 June 1944.

7. The court was legally constituted and had jurisdiction of accused and the offenses. No errors injuriously affecting the substantial rights of 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 violations of Articles of War 93 and 96.

Thomas M. Mayne, Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 294487 1st Ind MAR 1 - 1946

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 Charles R. Spillner (0-730000), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongful failure to maintain a sufficient bank balance to pay a check in the sum of $15 issued by him (Specification 1 of Charge I) and of uttering eight checks in the total sum of $120 against an insufficient bank balance with intent to defraud (Specifications 2-9 of Charge I), in violation of Article of War 96, and of forging four checks in the total sum of $130 (Specifications 1-4, Charge II), in violation of Article of War 93. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority 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 and sentence and to warrant confirmation thereof.

The accused cashed a check for $15 on 8 August 1945 and did not have sufficient funds to pay it when it was presented to the bank 11 August 1945. Between 27 August 1945 and 19 September 1945 he cashed eight more checks, each for $15, against an insufficient bank balance. Between 16 August 1945 and 12 September 1945 he forged four checks, two for $15 and two for $25, and cashed two of them. Before trial he repaid $130 of the money he thus acquired. Accused is nearly 28 years old and has an outstanding combat record. In recognition of his achievements while participating as a bombardier and bombardier-navigator in aerial flights in the European Theater of Operations he was awarded the Distinguished Flying Cross and the Air Medal with twelve Oak Leaf Clusters. In his unsworn statement at the trial the accused stated that he also was awarded an Oak Leaf Cluster for the Distinguished Flying Cross, received a Unit Citation with Oak Leaf Cluster, and completed 73 combat missions while he was serving as wing and squadron bombardier in the 322nd Bombardment Group, Ninth Air Force, and that his efficiency ratings were one "Very Satisfactory," four "Excellent" and one "Superior." A thorough search of War Department records has failed to reveal record of an award to the accused of the Oak Leaf Cluster to the Distinguished Flying Cross or of a Presidential citation of the 322d

Bombardment Group. The records do show, however, that the 322d Bombardment Group was proposed for a citation, but as the activities proposed for recognition were other than combat operations, as required by governing regulations, the citation was not confirmed by the theater commander. The accused was reprimanded 14 August 1944 for fighting with another officer. On 20 October 1945 he was examined by a psychiatrist and found to be suffering from "anxiety state, mild, chronic, precipitated by severe stress of combat duty." Despite the grave offenses of which the accused has been found guilty, it is felt that his meritorious combat service justifies some clemency. I therefore recommend that the sentence be confirmed but that the forfeitures and confinement be remitted and that the sentence as thus modified be carried into execution.

5. 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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence confirmed , but forfeitures and confinement remitted. As thus modified ordered executed. GCMO 58, 6 March 1946).

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

SPJGH - CM 294499

12 DEC 1945

UNITED STATES v. Private ARLOWAYNE F. BEHNKE (46003236), Company B, 14th Training Battalion, 4th Training Regiment.	INFANTRY REPLACEMENT TRAINING CENTER FORT MCCLELLAN, ALABAMA Trial by G.C.M., convened at Fort McClellan, Alabama, 6 November 1945. Dishonorable discharge and confinement for one (1) year. Southeastern Branch, Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
TAPPY, BECK, STERN and TREVETHAN, Judge Advocates.

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

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

CHARGE: Violation of the 64th Article of War.

Specification 1: In that Private Arlowayne F. Behnke, Co B, 14th Bn, 4th Regt, IRTC, Ft McClellan, Alabama, having received a lawful command from 1st Lieutenant Robert G. Britton, his superior officer, to fall out for training, did, at Fort McClellan, Alabama, on or about 2 October 1945, willfully disobey the same.

Specification 2: (Findings of guilty disapproved by reviewing authority).

Accused pleaded not guilty to and was found guilty of the Charge and both Specifications thereof. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for two (2) years. The reviewing authority disapproved the findings of guilty of Specification 2 of the Charge, approved the sentence, but reduced the period of confinement to one (1) year, designated the Southeastern Branch, United States Disciplinary Barracks, Camp Gordan, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The only question requiring consideration here is whether the evidence is legally sufficient to support the findings of guilty of

Specification 1 of the Charge. This Specification charges accused with the willful disobedience of a lawful order "to fall out for training."

The evidence in support thereof shows that on 2 October 1945, First Lieutenant Robert G. Britton, accused's company commander, "gave Behnke a direct order to draw his equipment and go to the field the next day." Lieutenant Britton testified that he could not recall the exact words used in giving accused this order, but asked accused if he clearly understood the order, as there was some question in his [Britton's] mind as to whether accused did understand it. Accused replied that he did understand the order and Lieutenant Britton thereupon dismissed him. At the time this order was given to accused, Lieutenant Britton wore the insignia of his rank.

The remaining pertinent parts of Lieutenant Britton's testimony were as follows:

"Q. Will you please tell the court what transpired the following morning with relation to Private Behnke."

"A. He failed to fall out, that's all."

"Q. Were you present at the formation?"

"A. Yes, I was."

"Q. Was Private Behnke reported to you as being absent?"

"A. Yes, sir, he was."

"Q. Did you investigate for yourself to determine whether he was present or absent from the formation?"

"A. No, I didn't."

The Board of Review is of the opinion that the proof that accused was ordered "to go to the field" is responsive to the allegation that he was ordered "to fall out for training." In common military parlance, the "field" is an abbreviated expression used at training camps to refer to field training and maneuvers as distinguished from garrison and parade close-order drill. No material variance affecting the substantial rights of accused exists between the allegation that accused was ordered to fall out for training and proof that he was ordered to attend field training. (BR 20, 135; CM 233780, Bentley). Turning next to the proof to ascertain what order accused disobeyed, we find only that the next morning accused "failed to fall out" for some undisclosed formation. There is no proof that the formation which he failed to attend was preparatory to going to the field for training and, for all that the proof shows, it may have been

that accused absented himself from reveille or some other routine formation unconnected with immediate exodus to the field training area. From this scant and indefinite evidence the court could not reasonably have inferred first, that accused did not fall out for a formation immediately preparatory to going to the field and secondly, that because he missed such formation he did not "go to the field" as ordered.

Even had the foregoing evidence been sufficient to warrant a reasonable inference that the formation was preparatory to moving off for field training and the further inference that having been absent from such formation, accused must have failed to "go to the field," still there is a further objection which is fatal to the court's finding of guilty. It is patent from the above quoted portion of Lieutenant Britton's testimony that he did not know of his own knowledge that accused failed to fall out on that particular morning. Accused's absence was reported to Lieutenant Britton by an undisclosed person and Lieutenant Britton made no independent investigation himself to determine whether or not accused was present. Such testimony is clearly hearsay and incompetent to establish that accused did not, in fact, fall out. Inasmuch as there is no other testimony bearing upon this essential point, the record is barren of competent evidence to establish that accused failed to fall out for any formation of any description. Accordingly, the record of trial is legally insufficient to sustain the findings of guilty of Charge I and Specification 1 thereof.

5. For the foregoing reasons the Board of Review holds the record of trial legally insufficient to support the findings of guilty of the Charge and Specification 1 thereof and legally insufficient to support the sentence as approved by the reviewing authority.

Thomas N. Tappy, Judge Advocate.

W. T. Burton Jr., Judge Advocate.

Joseph J. Stern, Judge Advocate.

Robert E. Trevithan, Judge Advocate.

SPJGH - CM 294499 1st Ind

DEC 14 1945

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

TO: Commanding General, Infantry, Replacement Training Center, Fort McClellan, Alabama.

1. In the case of Private Arlowayne F. Behnke (46003236), Infantry, 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 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 294499)

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

SPJGN-CM 294612

U N I T E D S T A T E S	)	THE INFANTRY SCHOOL
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 8 November 1945. Dismissal, total forfeitures and confinement for two (2) years.
Captain RICHARD P. DORROUGH (0-885746), Infantry.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Captain Richard P. Dorrough, Infantry Replacement Training Center, Camp Wolters, Texas, attached to 18th Company, 1st Student Training Regiment, The Infantry School, did, at Fort Benning, Georgia, on or about 30 September 1945, wrongfully attempt to have sexual intercourse with Second Lieutenant Kathleen J. McHugh, Army Nurse Corps, a woman, by force and without her consent.

The accused pleaded not guilty to, and was found guilty of, the Charge and Specification. 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 a period of five years. The reviewing authority approved the sentence, reduced the period of confinement to two years, recommended that the execution of the sentence be suspended, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that Second Lieutenant Kathleen J. McHugh, who at the time of trial was 35 years of age and unmarried, entered the Army Nurse Corps on 3 May 1945 and on 15 July was assigned to the Army Service Forces Regional Hospital, Fort Benning, Georgia (R. 31, 32). On Saturday evening, 29 September 1945, escorted by "Captain Ryan" to whom she had been introduced that evening by a mutual friend, she attended a social function at the Officers' Club. Accompanying them were Lieutenant Sasada, Captain Moe, and Lieutenant Levin, with her escort, Captain Bryce (R. 32, 33, 45, 46). Because the Club was so crowded that the three couples were unable to find accommodations at a single table, Lieutenants McHugh and Levin with their escorts sat at a table "on the lawn outside" (R. 46). Of the several rounds of whiskey served Lieutenant McHugh consumed three drinks at about thirty minute intervals. At one point the group left the Club for a short while to replenish their supply of liquor from a nearby store and, after returning, Lieutenant McHugh had a fourth drink. She stated that the alcohol so consumed had no effect on her "mentally or physically" (R. 33, 47-49, 72).

Leaving the Club at about midnight, the two couples entered Captain Bryce's automobile and, although Lieutenant McHugh "understood" that she was to be taken "directly home," Bryce drove to a parking lot located approximately four blocks "past the Main Theatre," near the First Student Training Regiment Area (R. 33, 34, 50; Pros. Ex. 1). There Ryan entered his parked automobile with Lieutenant McHugh and, for the next twenty or thirty minutes, they engaged in a "petting party." After they had embraced and kissed "a few times," Ryan placed his hand under her dress and urged her to indulge in sexual intercourse, stating that only if she complied would he drive her home. She refused and repeatedly "plead" with him to drive to her quarters or at least to an area of the post familiar to her. Her importunities apparently angered him because he struck her "over the head" and asked her to leave the car. She thereupon left him, walked "through the parking lot," turned left on Ingersoll Street, and proceeded in the direction of the Main Theatre (R. 30, 33, 34, 50-54; Pros. Ex. 1).

After walking a short distance, she encountered the accused, whom she had never seen before, and asked to be directed to the hospital area. Stating that he had not intended to go in that direction, he, nevertheless, volunteered to escort her. As they walked together, she explained her present plight by relating her recent experience with Captain Ryan and, having reached the Theatre, expressed her ability to reach home unassisted from that point. He insisted,

however, on escorting her the remainder of the distance (R. 35, 36, 45, 54, 56, 57). The time of their arrival at the theatre area was fixed at about one o'clock (R. 36). As they walked down Morrison Road, the accused attempted several times to kiss her but she resentfully refused, each time reminding him of her reason for walking home (R. 37, 57-59). They arrived at the junction of Morrison and Lumpkin Roads and decided to follow the path across a vacant lot adjacent to "General Fulton's Home," apparently intending to proceed by the most direct route to the nurses' quarters (R. 37, 59, 79; Pros. Ex. 1). As they stepped "onto the lawn" near General Fulton's residence, the accused suggested that they sit under a tree growing there on the vacant lot. When she demurred, he "picked [her] up off the ground, * * * walked very fast then over to the tree and threw [her] on the ground." Although momentarily stunned, she soon realized that she was lying on her back, that her legs were apart, and that the accused was "completely over" her and holding her down with the weight of his body. A struggle ensued during which, according to her, he stifled her screams by placing his hand over her mouth. In her frantic efforts to escape she kicked with such violence that the shoes fell from her feet. She all the while attempted without success to hold her legs together. Her weight was 114 pounds. He raised her skirt, pulled down her underwear, placed his hand on the "pubic region" of her body, and inserted his penis approximately "an inch and a half" into her vaginal canal. A "muscular movement" on his part followed but she was unable to tell whether there was an emission of fluid from his body. Neither at that time nor later did she notice the presence of semen. During the few minutes in which he was lying on her she exerted all her energy "trying to fight him off and screaming" (R. 37-42, 60-63, 74).

Mrs. Walter S. Fulton in her nearby residence heard "hysterical, pitiful sobbing" and the pleading voice of a girl repeating the words, "Please don't. Please don't. Let me up. Let me up." Mrs. Fulton, however, heard no screams or calls for help. She stepped out to the hedge which "divides our lot from the vacant lot from where the voices were coming" and, finding that the darkness of the night concealed "any forms," summoned the Military Police (R. 79-83). The accused, meanwhile, lifted himself from the body of Lieutenant McHugh. She thereupon sat up and took stock of her condition and appearance. Her dress was "rolled up," her "panties" were down below her knees, her stockings were torn, and her purse lay a few feet distant where it had fallen earlier (R. 39, 42). She put herself in order as best she could and, when the Military Police arrived, she was entering First Division Road from the vacant lot followed by the accused (R. 8, 42, 80). She was observed to have "bits of leaves, or grass" in her disheveled hair; her uniform was badly soiled; she walked "dazedly"; and she had a "terribly frightened expression" on her face. First Lieutenant Freeman Jones of the Military Police considered her

either "scared * * * or under the influence of alcohol." The accused's khaki uniform, while not badly soiled, had dirty "knee fronts" and he had "a bit of dirt * * * in the corners of his shoe toes" (R. 9-11, 80).

Lieutenant McHugh and the accused were driven immediately to Military Police Headquarters where they were separated and questioned (R. 12, 24). Notice was there taken of her "rather frozen, fixed expression, and pale face," and a spot of blood, about two and a half inches in diameter, on the back of her skirt (R. 14, 24). She declined medical attention despite her discovery that the underwear which she had been wearing was saturated with blood. Her "cyclic period" had ended four days before (R. 13, 14, 18, 44, 67). During the hour which she spent at Military Police Headquarters she lodged no complaint or accusation against the accused except to say that "he picked her up and threw her on the ground," and, when asked whether he had attempted sexual intercourse, answered "I don't remember" (R. 11, 12, 18, 19, 22, 67, 69). She explained at the trial that, when questioned on the night of the incident, she had failed to relate all the details in order to avoid embarrassment to herself and unfavorable publicity to the Army Nurse Corps (R. 20, 43, 67, 69). Lieutenant Jones expressed the opinion that both the accused and Lieutenant McHugh had been drinking but were not drunk (R. 19, 23).

A thorough inspection, conducted at about nine o'clock on Sunday morning, revealed "several marks" on the ground and a "second lieutenant's bar" underneath a tree located 24 or 25 yards from the "hedge of General Fulton's house" (R. 21). Lieutenant McHugh failed to locate the chief nurse of the hospital on Sunday but, on the following day, related to her "the whole story from beginning to end" (R. 70, 71). At approximately 10:30 o'clock on that Monday morning Lieutenant McHugh was given a "pelvic examination" by Major R. W. Wilkins, who was in charge of the obstetric and gynecological division of the Station Hospital. Examination of the external genitals revealed an abrasion in the area of the posterior fourchette, and a "sudden appearance" of fresh blood from a tear in the hymeneal ring suggested a comparatively recent injury to that structure, possibly within the past twenty-four to thirty-six hours. Such a tear could have been caused by "intercourse * * * or other things," such as the insertion of a finger. No semen or sperm cells were found (R. 24-31).

4. The accused, after his rights relative to testifying or remaining silent had been explained, elected to testify in his own behalf (R. 89-91). He enlisted in the Army on 17 March 1937 at Fort Lincoln, North Dakota, took his training with the 4th Infantry of the Third Division, remained with that organization until his regiment was "broken up," and was then transferred to the 15th Infantry. When he left the States on 24 October 1942, he was First Sergeant of Company H

of the last mentioned Regiment. On 8 November 1942 he landed with the invasion forces at Fadela, French Morocco, and thereafter participated in the campaigns of "Tunisia; Sicily; Italy, up to and including the Volturno River; Anzio, to include Rome; Southern France; and Germany." He received his commission as the result of a "Field promotion" at Statigliano, Italy, and was awarded the Purple Heart medal for wounds received at Anzio and the Silver Star for his action, while commanding Company G, 15th Infantry, in resisting a German "battalion counter-attack" near Remieront, France. As a result of his combat activities with the First French Army near the Rhine River, he is entitled to wear the fourragere of the Croix-de-Guerre with two unit citations. He has the "Arrowhead" for participation in five invasions, and each of his seven bronze stars represents a battle engagement. He was also awarded the Combat Infantryman's Badge and the "Pre-Pearl Harbor ribbon." He returned to the States in March, 1945, soon thereafter became "a member of the regular Army," and arrived at Fort Benning on 17 September 1945 to take "The Officers' Refresher Course" (R. 92-94).

On Saturday evening, 29 September 1945, he, for the first time, went to the Officers' Club at Fort Benning. The "few drinks" which he consumed there did not make him drunk. Leaving the Club at about midnight with the intention of proceeding directly to his quarters, he walked past the Main Theatre and "down the avenue * * * toward the First Student Training Regiment." He had reached a point about 75 to 100 yards from the intersection of Pearman Street and Ingersoll Avenue when he first saw Lieutenant McHugh. She was standing near a car from which, however, he did not see her alight. When it had driven away, she approached the accused and asked to be directed to the nurses' quarters or hospital area. Considering her "either lost * * * or * * * under the influence of intoxicating beverages," he noticed that her hair was "badly mussed up," that she seemed "in a fog," and "didn't know exactly what was going on" (R. 95, 96, 111, 118). She failed to give any specific reason for walking home, merely saying that she had experienced a "rough evening" (R. 112). When his suggestion that he escort her home met with no objection, they walked together along Pearman Street in the direction of Morrison Road. He soon put his arm around her, she cuddled "as close to [him] as she could walk," and, a short while later, they stopped, embraced, and kissed. This performance was repeated three times before the couple reached the vicinity of General Fulton's residence (R. 96-99, 112). Having arrived at the vacant lot and stopped under the trees growing there, the accused, at a point some thirty or forty feet from the Fulton home, sat down, leaned back on his right elbow, and asked Lieutenant McHugh to recline on his shoulder, to which suggestion she assented. He did not throw her to the ground or force her in any way to lie down (R. 99, 100, 113). As they "made a little love," he sought to arouse her passion by "natural advances that most anybody would make," and, although they exchanged several ardent kisses, he did not feel her breasts or buttocks. Their kisses were not "little pecks * * * [but]

passionate * * *, where when you kiss you open your mouth." When these advances met with no show of resistance, he extended his left leg on and over her left leg and, while allowing the weight of her body to remain on his right forearm, rolled over so that they were face to face, his knees being placed on the ground between her legs. He placed his left hand beside her right shoulder and, supporting himself by his extended left arm, did not allow the weight of his body to rest on her.

While his intention, admittedly, was to indulge in sexual intercourse, he did not raise her dress or lower her underwear. Nor did he unbutton his trousers, remove his penis therefrom, insert his finger into her organs, or display violence in any form. Shortly after he had assumed the position above described she, for the first time, objected to his advances and displayed an unwillingness to proceed further. She began to "whimper," to cry, and "kind of sing, 'Let me up, please let me up, please don't do that.'" She did not attempt to scream or utter an outcry, nor did she bite or scratch him, tear his clothes, or kick with her feet or legs. He remained in the same position for two, three, or four minutes, and, realizing that she did not wish to have sexual intercourse, desisted in his attempt (R. 100-105, 109, 110, 113-125).

After standing up, he did not observe her "pull up [her] pants" or recover her shoes or pocketbook. She gave no evidence of anger and together they walked from the vacant lot to First Division Road which runs in front of the Fulton residence. The Military Police arrived at this moment and drove the accused and Lieutenant McHugh to the Provost Marshal's office. During their stay there of about an hour's duration she appeared, in the opinion of accused, calm and unpeturbed and made no accusation of assault or attempted rape (R. 106, 107).

Captain William Bryce, appearing as a defense witness, testified that, on the evening of 29 September 1945, he, in company with Captain Ryan and Lieutenants McHugh and Levin, attended a dance at the Fort Benning Officers' Club. "Captain Moe" had arranged the "dates with the girls." The two couples sat at a table in the yard and, during the course of the evening, each member of the group consumed three or four drinks of whiskey. At one point they left the Club to obtain more liquor. When the two female officers, at about 11:15 o'clock, left the table to visit the ladies' room, Bryce noticed that Lieutenant McHugh appeared "unsteady on her feet, * * * definitely faltered as she moved along," and Lieutenant Levin "had her arm there walking together." The witness was confident that Lieutenant McHugh was present at the time the suggestion was made that Ryan drive her home in his car. She displayed no reluctance to leave Bryce's car

and enter that of Ryan (R. 126-130).

5. The Specification of the Charge alleges that the accused "did, at Fort Benning, Georgia, on or about 30 September 1945, wrongfully attempt to have sexual intercourse with Second Lieutenant Kathleen J. McHugh, Army Nurse Corps, a woman, by force and without her consent." This offense is alleged as a violation of Article of War 96.

Both the accused and the prosecuting witness agreed that they were strangers at the time of their chance meeting on one of the streets of Fort Benning in the early morning hours of 30 September 1945. Lieutenant McHugh related how, after she had approached the accused and asked for directions to her quarters, he insisted on escorting her; how, as they walked together, he made several attempts to kiss her, in spite of her objections and explanation as to why she was walking home; how, upon reaching a vacant lot along the way, the accused, upon her refusal to sit under a tree with him, threw her to the ground and, by sheer strength and the weight of his body, overcame her resistance and frantic efforts to escape, ultimately effecting a penetration of his penis into her vagina.

The accused, on the other hand, related a course of conduct which to him indicated encouragement and willingness on her part. The fact that she responded to his advances, exchanged several passionate kisses with him, willingly delayed their walk home by stopping under the trees and reclining on his shoulder, and interposed no objection when he placed his leg on and over hers, led him to believe that she would cooperate in the consummation of his desires. Even he acknowledged, however, that she soon put him on notice that such was not the case. Should the truth of his assertions be conceded, the fact that she offered no resistance to his early overtures clearly would not justify his aggressiveness beyond the point of her consent. He admitted that he maintained his position for several minutes after she began to cry and plead with him, but insisted that he refrained from further advance. He denied raising her dress, pulling down her "panties," or touching the pubic region of her body. It is hardly plausible, however, that having assumed the position to accomplish his admitted purpose, he would remain there for an appreciable time without further effort. The great weight of the evidence belies his contention in this regard. From the fact that the importunities of the prosecuting witness continued unabated and were of such alarming and distressing character that Mrs. Fulton, realizing that more than "another Saturday night petting party" was in progress, summoned the Military Police; from the "marks" on the surface of the ground where the incident occurred; from the presence of blood on Lieutenant McHugh's clothes produced apparently by an injury to her hymeneal ring; and from her strong and unshaken testimony attesting an actual penetration of her genitals, the conclusion is inescapable that

his advances were accompanied by such force and violence as to manifest a determination to override her genuine will and efforts to resist, and constituted a wrongful attempt to have sexual intercourse by force and without her consent. The record amply sustains the findings of guilty.

6. The records of the War Department show that the accused is approximately 27 years of age. He completed the 10th grade in high school in 1937. He enlisted in the regular service on 20 April 1937 and has been in the service since that date. On 16 October 1943 he was awarded a battlefield commission to the grade of second lieutenant. On 26 May 1944 he was promoted to the rank of first lieutenant and on 25 October 1944 he was promoted to the rank of captain. He has been awarded the Combat Infantryman's Badge and the Purple Heart. In addition he has been awarded the Silver Star for gallantry in action on 29 September 1944.

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

Abna E. Lipscomb, Judge Advocate.

Robert Konner, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 294612 1st Ind
Hq ASF, JAGO, Washington, D. C. JAN 1 1946
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 Richard P. Dorrough (0-885746), Infantry.

2. Upon trial by general court-martial this officer was found guilty of wrongfully attempting to have sexual intercourse with Second Lieutenant Kathleen J. McHugh, Army Nurse Corps, with force and without her consent, 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, but reduced the period of confinement to two years and forwarded the record of trial for action under Article of War 48. In a supplemental action he recommended that the execution of the sentence be suspended.

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.

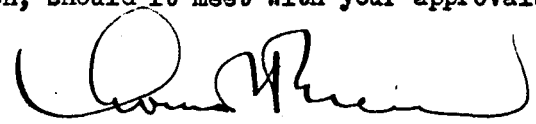
The record shows that on the evening of 29 September 1945, Second Lieutenant Kathleen J. McHugh of the Army Nurse Corps, an unmarried woman 35 years of age, had a date with an officer at Fort Benning, Georgia, which culminated in a "petting party" and with her being struck over the head by her escort and asked to leave his car when she refused to have sexual intercourse with him. After leaving her escort and walking a short distance, she encountered the accused whom she had never seen before, and asked him to direct her to the hospital area, whereupon he volunteered to escort her. During their walk he became amorous and attempted to kiss her several times. She repulsed his advances and reminded him of her reason for walking home. As they followed a path across a vacant lot adjacent to a house occupied by General Fulton, the accused suggested that they sit under a nearby tree. When she refused he picked her up and threw her to the ground. Although she struggled and pleaded he succeeded in penetrating her sexual organs. The accused denied such a penetration, but admitted endeavoring to have sexual intercourse with her, asserting that he desisted therefrom at her request. Since an examination of Lieutenant McHugh, which was made shortly thereafter, revealed an injury to her "hymeneal ring" it is not believed that the accused's testimony on this vital matter is worthy of belief. The Specification did not, however,

allege rape, but a wrongful attempt to have sexual intercourse by force and without consent, and such offense is fully sustained by the evidence beyond reasonable doubt.

The accused was originally commissioned on the field of battle and is shown to have an excellent war record. He served in the campaigns in Fadela, French Morocco, Italy, Southern France, and Germany. He has been awarded the Purple Heart and the Silver Star for gallantry in action, and is reputed to be a very efficient company commander. He has, however, been generously dealt with in the present case. I cannot, therefore, concur in the reviewing authority's recommendation that the sentence imposed be suspended during good behavior. It would be prejudicial to the service to retain an officer under a suspended sentence who has committed an offense which is tantamount to a common law felony and an offense for which many men have been sentenced to long periods of confinement in the present war. I recommend, therefore, that the sentence as approved by the reviewing authority be confirmed and ordered executed, and that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

4. Consideration has been given to letters addressed to me from Mrs. Richard Dorrough, wife of the accused; Honorable Fajo Cravens, House of Representatives, inclosing a letter from Honorable Charles Evans; and to letters addressed to the Secretary of War from Brigadier General Robert N. Young, and Lieutenant Colonel Eugene A. Salet; and to a statement from Colonel Hallet D. Edson.

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



THOMAS H. GREEN
Major General
The Judge Advocate General

7 Incls
1 - Record of trial
2 - Form of action
3 - Ltr. fr. Mrs. Richard Dorrough
4 - Ltr. fr. Hon. Cravens enclosing ltr. fr. Hon. Charles Evans
5 - Ltr. fr. Brig. Gen. Young
6 - Ltr. fr. Lt. Col. Salet
7 - Statement fr. Col. Edson

(Sentence as approved by reviewing authority confirmed and ordered executed. GCMO 15, 25 Jan 1946).

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

SPJGQ - CM 294633

UNITED STATES	)	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 2
v.	)	
Captain WILLIAM L. HALL (0-1310437), Infantry	)	Trial by G.C.M., convened at Fort Ord, California, 13 November 1945. Dismissal.

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OPINION of the BOARD OF REVIEW
PARTLOW, BIERER 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: Violation of the 96th Article of War.

Specification: In that Captain William L. Hall, Company "C", First Replacement Regiment (Infantry), Army Ground Forces Replacement Depot No. 2, Fort Ord, California, was, at 498 David Avenue, Monterey, California, on or about 1 November 1945, drunk and disorderly in uniform.

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

Specification: In that Captain William L. Hall, Company "C", First Replacement Regiment (Infantry), Army Ground Forces Replacement Depot No. 2, Fort Ord, California, did, on or about 1 November 1945, at 498 David Avenue, Monterey, California, the home of Staff Sergeant Arthur E. Iauck, United States Army, and Norma Iauck, wrongfully and unlawfully have sexual intercourse with Mrs. Mary Matthews, a female not his wife.

He pleaded not guilty to the Specifications and Charges, and was found guilty of the Specification of the Charge and of the Charge, and of the Specification of the Additional Charge, and not guilty of the Additional Charge but guilty of a violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved "only so much of the findings of guilty of the Specification of the Additional Charge and the Additional Charge as finds the accused guilty of

wrongfully and unlawfully attempting to have sexual intercourse with Mrs. Mary Matthews, a female not his wife, at the time and place alleged, and in violation of the 96th Article of War", approved the sentence and forwarded the record of trial pursuant to Article of War 48.

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

Staff Sergeant Lauck and his wife resided at 498 David Avenue, in a residential section of Monterey, California (R. 7, 8, 12, 13). The house consisted of a kitchen, two bedrooms, a bathroom and a glass enclosed porch on the side (R. 8). Doors from the front room and the kitchen opened on the sun porch (R. 8). On 31 October 1945 Mrs. Lauck rented the front room to a Mrs. Mary Matthews, who was not previously known to her or her husband (R. 8, 13). Included in the furnishings of the room were a floor lamp and a folding bed which opened from a leatherette settee (R. 13). On 1 November 1945 Mrs. Matthews came home about 1650 hours with the accused whom she introduced to Mrs. Lauck as "Captain" (R. 13, 14). After securing permission from Mrs. Lauck to have the accused in her room, Mrs. Matthews and the accused entered the room (R. 14, 20). Staff Sergeant Lauck arrived home at about 1715 hours from his work in a fish cannery (R. 8, 9). He was on the sun porch when the accused and Mrs. Matthews came out of the front room and Mrs. Matthews introduced the accused to him as "Captain" (R. 9, 14). The accused was wearing a Class A uniform without headgear and was neatly dressed (R. 10, 14). When the accused was introduced to Staff Sergeant Lauck he did not speak (R. 11). Staff Sergeant Lauck testified that the accused was in a sort of stupor (R. 10). "His eyes and face were flushed" (R. 10). He could not say that the accused was drunk (R. 10). He did not smell anything because "when you work in a fish cannery all you can smell is fish" (R. 12). He has "seen men that wasn't drunk that was in that shape too. Cracked on the head or under the influence of dope" (R. 10). His actions did not appear to be those of a normal man (R. 10). There was no disorder during the 20 minutes that Staff Sergeant Lauck was home (R. 11). Mrs. Matthews asked for and was given permission for the accused to use the bathroom (R. 14). The accused went into the bathroom where he vomited and urinated on the floor (R. 9, 14). Mrs. Lauck then asked Mrs. Matthews to have the accused leave the house (R. 14). Later she heard Mrs. Matthews crying and a lot of noise in her room as if a chair and a floor lamp were being knocked over (R. 15). She knocked on the door and told Mrs. Matthews and the accused to leave or she would call the "cops" or the Military Police (R. 15). The accused made no answer. He was sitting on the bed which had broken down (R. 15, 22). "He just sat there like he was a rum-dumb" (R. 22). At this time the accused had on green slacks but his blouse, shirt and undershirt were off (R. 15). Later she heard the accused ask Mrs. Matthews "to have an intercourse with him" (R. 16). Mrs. Matthews said that she wanted $10 and that she was menstruating. The accused said that he would give her

a bath and a douche (R. 16). The accused then tried to go through the door to Mrs. Lauck's bedroom but the door was locked (R. 16). She heard Mrs. Matthews say, "You brute, you brute, don't do that to me" (R. 16). The accused then took Mrs. Matthews out on the front lawn where she urinated. At this time it was getting dusk (R. 16). Mrs. Lauck then called the police station and about 15 minutes later Lieutenant Marinello of the Monterey, California police department arrived at the Lauck residence (R. 16, 22). With Mrs. Lauck he went to the porch and saw that the shade on the door to the front room was raised about three to five inches but all the other blinds were closed (R. 17, 20, 21, 23). The door had a window about two feet square which was four feet six inches above the floor (R. 17, 25). A lace curtain extended beyond the bottom of the shade but it was possible for persons on the porch to see inside the room, which was illuminated by a dome light in the center of the room, by bending down and looking through the opening (R. 17, 21, 24, 25). When Mrs. Lauck and Lieutenant Marinello looked in the room they saw the accused nude and Mrs. Matthews nude except for a blouse and slip which were up under her arms (R. 17, 23). Mrs. Matthews was lying on the bed with her feet "hanging off the side of the bed" and the accused was on top of her "in a normal position where sexual intercourse could be consummated" (R. 18, 23). Mrs. Lauck testified that they were having intercourse and that the accused's body was moving (R. 18). When Lieutenant Marinello pounded on the door the accused asked "Who's there?" and was told "The police: open up" (R. 18, 23). Mrs. Matthews jumped out of bed and started to dress (R. 24). Mrs. Lauck testified that the accused got up, walked to the door but could not open it and it was finally opened by Mrs. Matthews (R. 18). According to Lieutenant Marinello three or four minutes elapsed before the door was opened by the accused (R. 23, 24). When the accused came to the door he was nude except for an army shirt which was covering his privates (R. 24). Mrs. Lauck told the policeman "to throw (Mrs. Matthews) out, to get her out" (R. 18). He told the accused to get dressed and get out because he only wanted the woman (R. 18, 24). When the accused did not get dressed the policeman called the Military Police (R. 24). The accused then put on his green slacks and was buttoning his "slacks in front, but had nothing else on" when Mrs. Lauck closed the door to prevent him from coming into the kitchen (R. 19). When the Military Police arrived they took the accused out and Mrs. Lauck gave his tie and undershirt to the Military Police (R. 19, 24). In the opinion of the policeman the accused "was under the influence of intoxicants" but he would have let the accused go if he had not tried to talk him into letting Mrs. Matthews go (R. 21, 24, 25). Mrs. Lauck did not smell liquor on the accused but she "had to mop it up; there was plenty on the floor in the bathroom" (R. 20). She thought that the accused was not in his right mind from alcohol and that he was drunk (R. 19, 21, 22). No neighbors were disturbed by the incident (R. 21).

After the accused and Mrs. Matthews were taken away, Sergeant and Mrs. Lauck examined the room which was "in a mess" and found "a

fifth bottle of sherry wine, about half drank", and another bottle which Mrs. Lauck presumed was gin (R. 10, 11, 19). They did not know where Mrs. Matthews was at the time of trial (R. 11, 19, 20).

When Staff Sergeant McIlwain of the Military Police Detachment at Fort Ord arrived at the Lauck residence at about 1913 hours a civilian police lieutenant, who was in the doorway with the accused, asked him to take the accused (R. 25, 26). He put the accused in a jeep and took him to headquarters at the Presidio of Monterey where he turned him over to Lieutenant Walner of the Army Ground Forces Replacement Depot No. 2, Fort Ord. The accused was drunk but he was not creating a disturbance when the witness saw him and did not resist (R. 26, 27). He had on a uniform but "it was a little sloppy" (R. 26). Captain Plowman of the Medical Corps made a sobriety examination of the accused at about 2130 hours on 1 November 1945 in Dispensary No. 2, Fort Ord (R. 27, 28). In his opinion the accused was drunk but he created no disturbance or disorder (R. 28).

First Lieutenant McKelvey was the investigating officer appointed pursuant to Article of War 70 (R. 29). He began his investigation on 3 November 1945 and interviewed the accused on 4 November 1945, at which time he explained his rights and read Article of War 24 to him (R. 29, 30, 31). He told the accused that he was the Investigating Officer and advised him of the nature of the charges (R. 31). He did not know at that time who was the accuser (R. 31). He did not call the accused at the beginning of the investigation (R. 32). The statements of the witnesses were reduced to writing before the accused knew that an investigation was being made (R. 34). Some of the witnesses were interviewed by Lieutenant Hargett, who took their statements (R. 31). Sergeant McIlwain and Captain Plowman were not interviewed but the Investigating Officer had their reports (R. 32). The accused was shown the statements of the witnesses and was asked if he desired to interrogate them, but he said that it would not be necessary (R. 31, 33). After that the accused made and subscribed to a sworn written statement (R. 30; Pros. Ex. 1). Later on 4 November First Lieutenant McKelvey prepared his report and recommended that "disciplinary action under the 104th Article of War be administered" (R. 34). An additional investigation was made on 8 November when Mrs. Lauck and Police Lieutenant Marinello were questioned in the presence of the accused and defense counsel (R. 35). At this time the accused stated that he did not desire to question the witnesses nor call additional witnesses (R. 35). No new evidence was disclosed by this additional investigation (R. 35).

In his sworn statement to the Investigating Officer the accused stated that he was 44 years of age, had been in the service since 1 July 1942 and had been assigned to Fort Ord on 15 September 1945. On

Thursday 1 November 1945 he had the afternoon off and left Fort Ord about 1240 hours to go swimming at Pacific Grove. For about an hour he visited the museum in the Old Custom House at Monterey. About 1500 hours he stopped at the Half Way House for a bottle of beer. While he was drinking, a woman spoke to him, sat beside him and asked him to buy her a drink. They had some drinks of whiskey. She wanted to accompany the accused when he went swimming but he did not want her. She had the bartender call the taxi in which they went to the beach. The accused was swimming until 1730 hours. The woman asked him to go to her room and he did so. There he was introduced to a sergeant. In her room they did some more drinking. He has no further recollection of what happened until he found himself riding in a vehicle with a military policeman and was taken to a Military Police Station. There he was placed in the custody of a first lieutenant, taken to a hospital and turned over to the regimental duty officer. This was the first that he knew of all the details. He offered to make restitution for the damage which he had done and to apologize to Mrs. Lauck (Pros. Ex. 1).

4. The accused testified. He is 44 years of age, married and has a daughter 18 years of age who is a freshman at the University of Michigan (R. 37). His home is at Sharon, Massachusetts, and before entering military service he had been employed as a securities salesman since 1920 (R. 37). In 1929 his yearly earnings were slightly less than $10,000 and were about $4,000 just before he came into the service (R. 37, 38). He entered the military service on 1 July 1942 as a private and was commissioned a second lieutenant on 5 February 1943 upon graduation from the Infantry Officers Candidate School (R. 38). He was promoted to first lieutenant on 14 September 1943 and to captain on 17 February 1945 (R. 38). He served at Fort McClellan until coming to Fort Ord on 15 September 1945 (R. 38). On 1 November 1945 he was company commander of Company "C", First Replacement Regiment (R. 38). The accused testified substantially in accordance with his sworn statement (R. 38-40). He further testified that his last recollection was being introduced to someone, who was Sergeant Lauck, and recalled nothing until he was in the car with the military police (R. 40). He had one drink in Monterey, a glass of beer and five or six drinks after he met the woman and before he went swimming (R. 40). He has been married over 19 years and his relationships with his wife are pleasant. She had planned to visit him at Fort Ord about Christmas (R. 40). He had asked for an overseas assignment but his application was returned (R. 41). On the afternoon of 1 November he was drunk but he pleaded not guilty so that the court could decide the degree of drunkenness and disorder (R. 41).

Under cross-examination the accused testified that the woman, whom he was with, was not his wife (R. 41). He knew that he got in a taxi with the woman to go to the beach but from there on things are hazy (R. 41, 42). Other than shaking hands with a soldier he could not remember what took place at the house on David Street (R. 42). He knew that he was drunk (R. 42).

Upon being examined by the court the accused stated that he did not believe that he was drinking at the beach (R. 43). He stayed at the tavern for approximately an hour or more but he did go in the water and swim (R. 43).

Lieutenant Colonel Bodner, the battalion commander of the accused, testified that he knew the accused for a month, that he "classed him as excellent in his capacity as company commander" and that he is an excellent officer (R. 43, 44). Major Saling, who had been executive officer of accused's battalion at Fort McClellan, considered the accused's company as the best trained in the regiment. The accused had a good reputation both professionally and socially (R. 44, 45). Lieutenant Colonel Grovers knew the accused at Fort McClellan and rated him as a superior officer and company commander (R. 45, 46).

The accused's qualification card (WD A.G.O. 66-1) shows that he has received four "superior", ten "excellent" and one "satisfactory" efficiency ratings (R. 47; Def. Ex. A). It was stipulated in writing that if Lieutenant Colonel Howard Archer, Regimental Executive Officer, First Regiment, Fort McClellan, were present he would testify that the accused was rated by him as high superior and that he had "high social standing" (R. 47; Def. Ex. B); and if Lieutenant Colonel Duke E. Jones, Adjutant, Infantry Officers Candidate School, Fort Benning, Georgia, were present he would testify that the accused was a superior officer and that he "was sober and always found at his place of duty" (R. 47, 48; Def. Ex. C).

5. As approved by the reviewing authority, the accused was found guilty of one Specification of being drunk and disorderly in uniform and of one Specification of wrongfully and unlawfully attempting to have sexual intercourse with a woman not his wife in violation of Article of War 96. On the afternoon of 1 November 1945 the accused officer, 44 years of age and with an excellent record, left his station to visit a museum and to go swimming. While on his way to the beach he stopped in a tavern for a glass of beer. In the tavern he was "picked up" by a woman who induced him to buy drinks for her, accompanied him to the beach and then took him to her room which she rented from an enlisted man and his wife. The evidence shows and the accused admitted that he was drunk when he arrived at the woman's room. There is, however, no evidence that the accused was disorderly while he was in uniform. The disorders which occurred in the woman's room took place after the accused had taken off his uniform. Such failure of proof may be cured by approving the findings of guilty of the Specification of the Charge except the words "in uniform".

The evidence amply supports the finding, as approved by the reviewing authority, of guilty of wrongfully and unlawfully attempting to have sexual intercourse with a woman not his wife, under circumstances discreditable to the military service.

6. War Department records show that the accused is 44 years of age, married and has one child. He is a native of Massachusetts and a resident of Sharon, Massachusetts. He is a high school graduate. In civilian life he was employed as an office boy and reporter by the Boston Evening Record for seven months, as a clerk, salesman and trader in the stock brokerage and securities business by Lea, Higginson and Company for 12 years and two months, and by Clark, Dodge and Company for ten years and one month. He served in enlisted status during July 1940 in the Citizens Military Training Camp and from March 1941 to July 1942 in the Massachusetts State Guard. He was inducted as a Volunteer Officer Candidate on 1 July 1942 and served in enlisted status till 4 February 1943. On 5 February 1943 he was appointed a second lieutenant in the Army of the United States upon graduation from Infantry Officers Candidate School, The Infantry School, Fort Benning, Georgia, and ordered to active duty in the Infantry. He was promoted to the grade of first lieutenant on 14 September 1943 and to the grade of captain on 17 February 1945. He has served in commissioned status as platoon leader, company executive officer and company commander. To 3 February 1945 he had received one efficiency rating of "Superior", fourteen of "Excellent" and one of "Satisfactory".

7. The court was legally constituted. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Specification of the Charge except the words "in uniform", legally sufficient to support the finding of guilty of the Charge, and legally sufficient to support the findings of guilty of the Specification of the Additional Charge as approved by the reviewing authority, and of the Additional Charge, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized for a violation of Article of War 96.

W. E. Parlow, Jr., Judge Advocate

[illegible], Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 294633 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JAN 15 1946

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 William L. Hall (0-1310437), Infantry.

2. Upon trial by general court-martial this officer pleaded not guilty to and was found guilty of being drunk and disorderly in uniform in violation of Article of War 96 (Specification of Charge). He pleaded not guilty to a Specification of wrongfully and unlawfully having sexual intercourse with a woman not his wife in violation of Article of War 95 (Specification of Additional Charge) and was found guilty of the Specification and not guilty of the Additional Charge but guilty of a violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority approved "only so much of the findings of guilty of the Specification of the Additional Charge and the Additional Charge as finds the accused guilty of wrongfully and unlawfully attempting to have sexual intercourse with Mrs. Mary Matthews, a female not his wife, at the time and place alleged, and in violation of the 96th Article of War"; approved the sentence, and forwarded the record of trial pursuant to 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 of the Specification of the Charge except the words "in uniform", legally sufficient to support the finding of guilty of the Charge, and legally sufficient to support the findings of guilty of the Specification of the Additional Charge as approved by the reviewing authority, and of the Additional Charge, and legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

The accused, a 44 year old officer, was accosted in a tavern by a woman who asked him to buy her a drink. After having some drinks, the woman accompanied him to the beach and then she invited him to her room which she rented from an enlisted man and his wife. When the accused arrived at the house where the woman lived he was drunk. He was there introduced as an officer to the enlisted man and his wife who rented the lodgings. The accused and his companion made a disturbance in the woman's room and the enlisted man's wife requested the woman to have the accused leave. Later the accused was heard asking

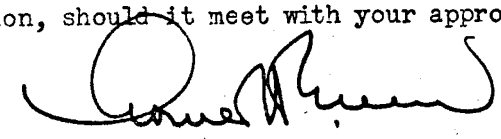
the woman to have intercourse with him and she was heard asking for $10. The police were called by the enlisted man's wife. She and a policeman looked into the room through an opening where the shade had not been completely pulled down. They saw the woman lying in the bed with her blouse and slip pulled up under her arms and the accused, who was nude, on top of her in the normal position for sexual intercourse. The policeman knocked on the door, and when it was opened the accused was holding a shirt over his privates. When the accused tried to have the policeman release the woman the military police were called. The accused put on his uniform and was taken away by the military police. Later he was given a sobriety test and pronounced drunk. He did not resist the policeman or the military police, and the policeman stated that the military police would not have been called if the accused had not tried to have the woman released. The accused had no recollection of events after arriving at the house with the woman. It is clear that drunkenness was the accused's principal offense and the cause of his other offenses.

The accused is married and has an 18 year old daughter in college. He volunteered as an officer candidate, was commissioned after graduation from the Infantry Officer Candidate School, The Infantry School, Fort Benning, Georgia, and is highly regarded by his fellow officers and former commanders. He has four superior efficiency ratings with a high overall average, his last three ratings being 5.6, 5.9 and 5.9, respectively. His request for overseas service was not favorably considered, apparently because of his age and grade. This is his only offense during over three years of service.

In view of the accused's previous excellent record and the circumstances surrounding the offenses, I recommend that the sentence be confirmed but that the execution thereof be suspended during good behavior.

4. Consideration has been given to a telegram from the Honorable John W. McCormack, House of Representatives of the United States, as well as to a letter from Congressman McCormack addressed to the Under Secretary of War, dated 6 December 1945, requesting clemency in behalf of the accused. Consideration has also been given to a letter from the Honorable Leverett Saltonstall, United States Senate; to a letter from the Honorable Joseph W. Martin, Jr., House of Representatives of the United States; to a letter from the Honorable David I. Walsh, United States Senate, addressed to The Adjutant General, with inclosures; and to letters from the accused addressed to The Judge Advocate General and to the Chairman of Board of Review No. 4, Office of The Judge Advocate General.

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



9 Incls
1 - Record of trial
2 - Form of action
3 - Tlgm fr Cong. McCormack
4 - Ltr fr Cong. McCormack
5 - Ltr fr Sen. Saltonstall
6 - Ltr fr Cong. Martin
7 - Ltr fr Sen. Walsh
8 - Ltr fr accused to JAG dated 27 Nov 1945
9 - Ltr fr accused to Chmn, Bd. of Rev. #4, dated 20 Nov 1945

THOMAS H. GREEN
Major General
The Judge Advocate General

(Findings approved in part. Sentence confirmed but execution suspended during good behavior. GCMO 17, 25 Jan 1946).

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

SPJGH - CM 294637

UNITED STATES v. First Lieutenant JULIO G. SILVA (0-736036), Air Corps	AIR TRANSPORT COMMAND PACIFIC DIVISION, WEST COAST WING Trial by G.C.M., convened at Fairfield Suisun Army Air Base, California, 26 October 1945. Dismissal and total forfeitures.

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OPINION of the BOARD OF REVIEW
TAPPY, BECK, STERN and TREVETHAN, 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 Julio G. Silva, Air Corps, Squadron H, 1504th Army Air Forces Base Unit, West Coast Wing, Pacific Division, Air Transport Command, did, without proper leave, absent himself from his station at Fairfield Suisun Army Air Base, California, from about 5 August 1945 to about 7 August 1945.

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

Specification 1: In that First Lieutenant Julio G. Silva, AC, Squadron "H" 1504th Army Air Forces Base Unit, West Coast Wing, Pacific Division, Air Transport Command, did, at Fairfield Suisun Army Air Base, California, on or about 8 August 1945, with intent to defraud, wrongfully and unlawfully make and utter to the Officers Mess, Fairfield Suisun Army Air Base, a certain check in words and figures as follows, to wit:

No.
To 8 August 1945

Bank of America
(name of bank)

Sacto Main	#148 Branch		Sacramento, California
Pay to the Order of	Officers Mess Fairfield Suisun AAB		(city) $25.00

Twenty Five and 00/100 DOLLARS

Name /s/ Julio G. Silva
0-736036

Sq. "H"
Fairfield AAB
California

Address

and by means thereof, did fraudulently obtain from the Officers Mess $25.00 in cash, he the said First Lieutenant Julio G. Silva, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of America, Sacramento Branch, for the payment of said check.

Specifications 2 through 5, inclusive, are identical in form with Specification 1 except as to date and amount. Specification 6 differs in form from Specification 1 as to date, amount, payee and organization defrauded, alleging that the check was made payable to "cash" and that the "Hamilton Field Branch of the Bank of America" was the organization defrauded. The variations in date and amount are as follows:

Specification	Date	Amount
2	10 August 1945	$25.00
3	11 August 1945	10.00
4	13 August 1945	25.00
5	14 August 1945	25.00
6	30 August 1945	10.00

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

Specification 1: In that First Lieutenant Julio G. Silva, AC, Squadron "H", 1504th Army Air Forces Base Unit, West Coast Wing, Pacific Division, Air Transport Command, having been duly placed in arrest in quarters at Fairfield-Suisun Army Air Base, California, on or about 12 September 1945, did, at Fairfield-Suisun Army Air Base, California, on or about 18 September 1945, break said arrest before he was set at liberty by proper authority.

Specification 2: Same allegation as in Specification 1 except date of offense is 24 September 1945.

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

Specification 1: Same allegation as in Specification 1, ADDITIONAL CHARGE II except date and time of offense is 2200, 3 October 1945.

Specification 2: Same allegation as in Specification 1, ADDITIONAL CHARGE II except date and time of offense is 2240, 3 October 1945.

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

Specification: In that First Lieutenant Julio G. Silva, Air Corps, Squadron H, 1504th Army Air Forces Base Unit, West Coast Wing, Pacific Division, Air Transport Command, was at Fairfield-Suisun Army Air Base, California, on or about 3 October 1945, drunk in uniform in station.

Accused pleaded not guilty to Additional Charge I and its Specifications and guilty to all other Charges and Specifications. The court made the following findings as to each Specification of Additional Charge I: "Guilty with the exception of the words 'with intent to defraud', 'fraudulently' and 'he the said 1st Lt. Julio G. Silva, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of America, Sacramento Branch, for the payment of said check' and substituting for the word 'fraudulently' the words 'wrongfully and unlawfully'. Of the excepted words, Not Guilty, and of the substituted words, Guilty". It also found accused guilty of all Charges and all other Specifications. No evidence of previous convictions was introduced. Accused 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 accused absented himself without leave from his organization and station on 5 August 1945 and remained in that status until 7 August 1945, when he was returned to military control at San Francisco, California (R. 6; Pros. Ex. 1). Between 8 August 1945 and 14 August 1945 accused made and uttered his five personal checks, in a total amount of $110.00, drawn on the Bank of America, Sacramento, Main Office, Sacramento, California, to the Officers' Mess of the Fairfield-Suisun Army Air Base. These checks are more particularly identified and described as follows:

Specification	Date of Check	Amount	Pros. Ex. No.
1	8 August 1945	$25.00	5
2	10 August 1945	25.00	6
3	11 August 1945	10.00	7
4	13 August 1945	25.00	8
5	14 August 1945	25.00	9

All of the foregoing checks were received from accused in the regular course of business and he was paid the face amount of each in cash.

These checks were deposited for collection in due course and all were returned unpaid by the bank on which they were drawn (R. 12-15).

It was stipulated by the prosecution, defense and the accused that if Scotty L. Williams was present, she would testify as follows: On or about 30 August 1945, while she was on duty as a teller at the Bank of America Branch at Hamilton Field an "officer" requested her to cash a check made by him payable to cash in the amount of $10.00. She asked him for identification and he presented an identification card issued by The Adjutant General's Office, "which disclosed that he was 1st Lieutenant Julio G. Silva, serial number 0-736036, and assigned to Squadron H at the Fairfield-Suisun Army Air Base, California." She thereupon cashed said check, identified by her as Prosecutions' Exhibit 10, which was dated 30 August 1945 and drawn upon the Sacramento Main Branch of the Bank of America, Sacramento, California. On 3 August 1945 the check was indorsed and forwarded to the drawee bank for collection, but was returned unpaid. It was redeposited on 11 September 1945 but was again returned unpaid (R. 18; Pros. Ex. 10).

It was stipulated between the prosecution, the defense and accused that the signatures appearing on Prosecutions' Exhibits 5 through 10, inclusive, are the signatures of accused (R. 18), and that on 27 August 1945 the accused made a voluntary sworn statement to Captain Thomas J. Waltz to the effect that he had had an account with the Bank of America, Main Branch, since about 2 January 1943 and that he drew, signed and cashed the five checks, which are the subject of Specifications 1 through 5 of Additional Charge I, at the Officers' Club, Fairfield-Suisun Army Air Base, California. When he made and uttered these checks to the Officers' Club he believed he had sufficient funds in the bank. The bank had been sending his statements to his overseas and other stations, as a consequence of which he had not been receiving them regularly. An overpayment of a $200.00 monthly class E allotment to his parents had resulted in a debt to the Government of $1200.00, as a result of which there was a stoppage placed against his pay amounting to $300 per month. The final deduction was made against his July pay. His parents had been depositing money to his credit in the bank on which the checks were drawn from time to time and he wrote the checks in question believing that his parents had complied with his telegraphic request of the first part of August to deposit $150.00 in his bank account (R. 19).

Accused's bank balance with the Bank of America, Main Office, was insufficient to pay any of the six checks when they were presented for payment between 10 August 1945 and 31 August 1945 and all of said checks were returned unpaid by the drawee bank (R. 16, 17; Pros. Exs. 11, 12). Subsequently, the Officers' Club of the Fairfield-Suisun Air Base and the Hamilton Branch of the Bank of America were reimbursed by accused for all of the checks (R. 15, 18).

On 12 September 1945 accused was duly placed in arrest in quarters by competent authority and informed as to the limits of his arrest (R. 6, 7; Pros. Ex. 2). Thereafter, on 18 September 1945 accused was seen in front of and entering the post theater at the Fairfield-Suisun Army Air Base (R. 7, 8). On 24 September 1945 he could not be found within the limits of his arrest and a search failed to reveal his whereabouts (R. 8). Again, on 3 October 1945 accused broke his arrest by going to the Officers' Club at his station. He was observed there at about the hour of 2140 by Lieutenant Harold J. Applin, Officer of the Day, and as accused "appeared inebriated," he was taken to his quarters by Lieutenant Applin and instructed to remain there. He, however, returned to the Officers' Club at about 2210 and was again returned to his quarters by Lieutenant Applin. Once again accused returned to the Officers' Club, this time at the hour of 2240. Accused "was not boisterous or raucus" (sic), but his walk was not completely steady and he required some assistance. Lieutenant Applin was of the opinion that accused was not capable of complete reasoning and was not sober (R. 9). Another witness for the prosecution testified that at the time and place in question accused was apparently under the influence of whiskey or intoxicating liquor because of the manner in which he was being assisted by the officer of the day (R. 12). In two voluntary statements accused admitted that he received notice from his commanding officer on 12 September 1945 of his arrest in quarters and that on 18 September 1945 he left his quarters to go to the post theater. He further admitted that on 24 September 1945 he left his quarters for about an hour to go to the Base Western Union office and to the Squadron Supply room and that on 3 October 1945 he broke arrest between the hours of 1800 and 2400 by going to the Officers' Club. His reason for going to the Officers' Club was to make a long-distance telephone call. While there he drank beer and "became very intoxicated" (R. 11; Pros. Exs. 3, 4).

4. Accused, after being apprised of his rights as a witness, elected to remain silent and the defense presented no witnesses (R. 19, 20).

5. By his plea, the accused admitted his guilt of the offenses alleged in all Charges and Specifications, except Additional Charge I and its Specifications. Aside from the plea, however, there is ample evidence in the record of trial to establish the unauthorized absence of accused as alleged in violation of the 61st Article of War; his breach of arrest under four Specifications, in violation of the 69th Article of War; and his drunkenness in station, in violation of the 96th Article of War.

The uncontradicted evidence also reveals that accused on the dates and at the places alleged in Specifications 1 to 6 inclusive, Additional Charge I, made and uttered six checks, five to the Officers' Club, Fairfield-Suisun Army Air Base, California, and one to the Bank

of America, Hamilton Field Branch, in amounts totalling $120.00; that he received the proceeds of said checks in cash and that they were all dishonored when presented to the drawee bank because of insufficient funds in accused's account. Accused's bank statement for the month of August, 1945 when the various checks were presented for payment shows the following status:

Specification	Am't	Check Dated	Pros. Ex. Number	Check Presented	Bank Balance
1	$25.00	8 August 1945	5	10 August 1945	$ .62
2	25.00	10 August 1945	6	13 August 1945	23.12
3	10.00	11 August 1945	7	16 August 1945	32.62
4	25.00	13 August 1945	8	17 August 1945	7.62
5	25.00	14 August 1945	9	20 August 1945	6.62
6	10.00	30 August 1945	10	31 August 1945	6.12

On 8 August 1945, the date on which the first check was cashed the balance was $.62. On 11 August 1945 a deposit of $23.00 increased it to $23.62 and this amount was further increased to $33.12 on 14 August 1945 by a deposit of $35.00 against which other checks were drawn. On 16 August 1945, accused made a deposit of $25.00, but other withdrawals resulted in the account showing a balance of $32.62 at the close of business August 16.

While the bank statement shows that on 16 August 1945, the date on which the check, the subject of Specification 3, was presented for payment, accused's balance was $32.62, the assistant cashier of the drawee bank testified that on the following day another check in the amount of $25.00 was paid, and "apparently there was a hold on the account for this check which reduced the account to $7.62." From then, 17 August 1945 until 18 September 1945, accused's bank balance was never greater than the latter amount. Thus it is apparent that because of the hold order the free balance in accused's account was insufficient to pay the $10 check.

The court in making its findings, by exceptions and substitutions, acquitted the accused of fraudulently making and uttering the several checks and of fraudulently obtaining the proceeds. It also acquitted him of guilty knowledge of the insufficiency of his bank account for the payment of said checks, but found him guilty of "wrongfully and unlawfully" making and uttering the checks. Such a finding involves the military offense of careless failure to maintain a sufficient bank balance.

The passing of worthless checks, even though without guilty knowledge of the insufficiency of the account to provide for their payment upon presentation in due course, is an offense denounced by the 96th Article of War, as it constitutes conduct discreditable to the military service. In this regard the rule has been stated and reaffirmed in numerous cases.

"A member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. Such conduct is not only a reflection on the individual, but is service-discrediting as well. Proof that a check given for value by a member of the military establishment is returned for insufficient funds imposes on the drawer of the check, when charged with service-discrediting conduct, 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 BR 95; Bull JAG 341 and cases cited).

In this case the defense offered no evidence to establish that the insufficiency of accused's account was due to an honest mistake. Assuming the truth of accused's statement that he telegraphed his parents to deposit $150.00 in his account and that he did so prior to negotiating the checks, such evidence falls far short of establishing the excuse of honest mistake without neglect. Accordingly, the court was justified in its findings of guilty under Additional Charge I, and its Specifications.

6. War Department records show that accused is 29 years old, single and attended college for three years. He enlisted as an aviation cadet and upon completion of training was appointed a second lieutenant in the Air Reserve, entering on active duty on 2 January 1943. On 12 February 1944 he was promoted to the grade of first lieutenant. He held the rank of second lieutenant as a Reserve Officer, Infantry, from 1937 to 1941, but according to the service data on the Charge Sheet, resigned his commission and enlisted as an aviation cadet on 22 November 1941. War Department records further reveal that this officer sustained an injury as the result of an accident in March 1943 which was the subject of a line of duty investigation, resulting in approved findings that the injury was incurred not in line of duty as a result of his own misconduct due to intoxication. He received an official reprimand as punishment under the 104th Article of War for being intoxicated, disorderly and disrespectful to superior officers at the Tropoli Officers' Club, APO 860, on 6 May 1944. The Staff Judge Advocate's review indicates that accused has received punishment under the 104th Article of War on three other occasions. It is also stated therein that the accused has had extensive combat and foreign service.

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 the 61st, 69th or 96th Articles of War.

Thomas H. Taffy, Judge Advocate

W. T. Bee, Jr., Judge Advocate

Joseph J. Stern, Judge Advocate

Robert C. Newthan, Judge Advocate

SPJGH-CM 294637 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JAN 10 1946

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 Julio G. Silva (0-736036), Air Corps.

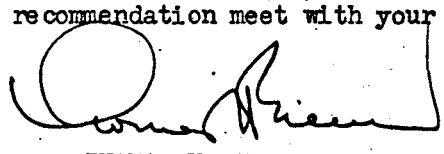
2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absence without leave for two days in violation of Article of War 61 (Charge, Specification), of breach of arrest on four occasions in violation of Article of War 69 (Additional Charge II, two Specifications and Additional Charge III, two Specifications), and of being drunk in uniform at his station in violation of Article of War 96 (Additional Charge IV, Specification). He pleaded not guilty to the fraudulent making and uttering of six worthless checks totalling $120.00 and by appropriate exceptions and substitutions was found guilty of negligent failure to maintain a sufficient bank account for the payment of said checks in violation of Article of War 96 (Additional Charge I, Specifications 1 through 6, inclusive). No evidence was introduced of any previous convictions. 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 96.

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 absented himself without leave from 5 August 1945 until he was returned to military control on 7 August 1945. Between 8 August 1945 and 30 August 1945 he made and uttered six checks totalling $120.00, five of which were given to the Officers' Mess at his station. The sixth check in the amount of $10.00 was uttered at a branch of the bank in which his account was kept. All were dishonored for insufficient funds, but were redeemed by the accused before trial. Accused did not testify at the trial, but a voluntary statement made by him during the investigation which was introduced in evidence set forth that the accused had a Class E allotment of $200.00 in effect in favor of his parents and that it had been the custom of his parents to replenish his bank account whenever he requested them to do so. He had wired them to deposit $150.00 to his account about 1 August 1945, but they had failed to do so, and he had written the checks on the supposition that his parents had complied with his request. He was placed in arrest on

12 September 1945 and thereafter on 18 September 1945, 24 September 1945, and twice on 3 October 1945, breached his arrest. On the latter date he was seen at the Officers' Club of his station in an intoxicated condition.

The check offenses of which this officer stands convicted demonstrate a weakness and instability of character when considered with the other offenses of which he was found guilty. In addition, accused passed four other "insufficient funds" checks aggregating $117.00 for which offenses he was not brought to trial. Three of said checks were passed while he was stationed at the Greenland Base Command and the other was given to a hotel in Springfield, Missouri. It appears that the accused's difficulties have been brought on by the immoderate use of intoxicants. In 1943 he sustained severe injuries as a result of being in an intoxicated condition and on four occasions received punishment under the 104th Article of War, one of which was for intoxication, disorderly conduct and disrespect to superior officers in an overseas theater. Under these circumstances, I am of the opinion that accused is unworthy of his commission and 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 the above recommendation into efect, should such recommendation meet with your approval.



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence confirmed, but forfeitures remitted. As thus modified ordered executed. GCMO 23, 25 Jan 1946).

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

SPJGN-CM 294685

UNITED STATES	)	30TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Possneck, Germany, 9 June 1945. Dishonorable discharge and confinement for life. Penitentiary.
Private CHARLIE L. MAGBY (14066264), 3173 Quartermaster Service Company.	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Charlie L. Magby, 3173 Quartermaster Service Company, did, at Atzendorf, County of Calbe, Province of Madgeburg, Germany, on or about 27 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one 2d Lieutenant Cletus R. James, a human being by shooting him with a rifle.

The accused pleaded not guilty to, and was found guilty of, both the Charge and the Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life. The reviewing authority approved the sentence; designated the United States Penitentiary, Lewisburg, Pennsylvania, 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 27 April 1945, at about 10:30 p.m., Second Lieutenant Cletus R. James and Technician Fifth Grade Aaron Raskin were patrolling Atzendorf, Germany, and adjacent towns for the purpose of determining "who was responsible for violations of blackout regulations and what civilians were harboring German soldiers." Proceeding along Linden Strasse, they heard the sound of voices emanating from, and saw light "filtering through," a building. As they drew nearer, a door opened and the accused stepped out with a pistol in his hand. Upon seeing him Lieutenant James shouted, "Halt." The accused came to a stop, raised his pistol, and "leveled" it at the officer. Unintimidated by this menacing gesture, Lieutenant James directed the accused to "put that pistol down." Defiant, the accused replied, "No, I won't put it down." Pointing his Thompson sub-machine gun at the accused, Lieutenant James said, "I order you to put the gun down." At this display of force the accused lowered his weapon and held it at his side (R. 8-9, 11-13; Pros. Ex. 2).

Lieutenant James "walked" him back into the building to a point directly under a light at the rear of the hallway and demanded the surrender of the pistol. The accused demurred, saying "No, I paid a lot of money for it and I don't want to give it to you." Aroused by the accused's argumentative manner," Raskin declared, "you know you had no business leveling the pistol at the officer in the first place and when he orders you to give him the pistol, I suggest you give it to him." The accused made no further protest and handed over his weapon. When asked for his dog tags, he again complied. Lieutenant James retained one, returned the other, and ordered the accused "to double time it back to his quarters" (R. 9, 11-12).

After the accused's departure Lieutenant James and Raskin went upstairs to the second floor to question the occupants of the house, who were displaced persons of Polish and Russian nationality (R. 15). In room "B" three women and five men were present. Three of the men were American enlisted personnel; the women and the other men were displaced persons. The three Americans had escorted two civilians to the building earlier in the evening and had remained to inquire about some laundry which had been left there. Before his encounter with Lieutenant James the accused had approached one of the enlisted men to ask "what was the story" about "the women and all that." When told that they were "just doing * * * laundry," the accused had apologized, declaring that "I didn't mean to barge in on you." He had left the room and was on his way out of the building when challenged by Lieutenant James (R. 9-10, 13-15, 17).

After looking through several rooms on the second floor, Lieutenant James entered room "B" (R. 17). He chatted with the enlisted men for a few minutes, explaining that he was searching

for German soldiers, and then prepared to leave. At the door he stopped and turned "to say a few words." At that moment the accused came running up the stairs to the second floor and, upon perceiving Lieutenant James, pointed an M-1 rifle at him. Confronted with this deadly threat, Lieutenant James began to say something to the accused, who paid no heed but pulled the trigger two or three times (R. 10, 12, 15-22). Two bullets pierced Lieutenant James' body, one through the heart and the other through the abdomen (R. 29-30; Pros. Ex. 4). Technician Fifth Grade Michael Rinaldi, one of the enlisted men in room "B", aimed his carbine at the accused, but the weapon jammed (R. 15, 16). The accused ran downstairs and escaped (R. 19). Lieutenant James was promptly removed to a field hospital, but was "pronounced dead on arrival" (R. 25; Pros. Ex. 4).

Attracted by the sound of shooting, Staff Sergeant Philip A. Machiarelli, who was in charge of a motor patrol, visited the scene of the homicide shortly after its occurrence. Upon investigating and learning that the assailant was a negro, he informed the Sergeant of the Guard and, accompanied by him and a Sergeant "Perry," proceeded to a butter factory "in which the colored soldiers were billeted." When they arrived there, the accused stepped forward and asked, "Are you looking for the man who shot the officer?" Being told that they were, he handed them his rifle and "said he was the one" (R. 23-24, 29). He was thereupon removed to the orderly room of the 992nd Engineer Treadway Bridge Company for questioning by First Lieutenant Clarence A. Lambelet. After first denying that he was in any way involved in the homicide, the accused declared,

> "Well, sir, I will tell you the truth. So help me God, if it kills me, I shot the Lieutenant" (R. 26-28).

4. Having been advised of his rights as a witness, the accused elected to take the stand on his own behalf. After his evening meal on 27 April 1945, he had been accosted by a strange soldier who had three quarts of "schnapps" and invited to have a drink. The accused accepted and began a drinking bout which did not end until they had consumed "a bottle and a half." They then parted, and the accused, after a brief stop at the warehouse in which he was quartered, "decided to take a walk down the street" (R. 31). In his field jacket he carried a 7.65 calibre Belgian pistol for which he had paid the sum of ten dollars (R. 31-32, 36).

Noticing soldiers going in and out of an alleyway, he "went down to see what the excitement was." Upon approaching the building in which the fatal shooting later occurred he heard the sound of voices "upstairs" and saw more soldiers both entering and leaving. His curiosity fully aroused, he walked in and up to the second floor where he encountered a soldier who had a bottle of cognac in his pocket. The accused offered

to buy the liquor but, when told that the price would be one hundred marks, lost all interest in the purchase and set out to leave the building. As he started out the door, a flashlight was flashed in his face and his pistol was demanded. Having been warned that snipers were in the area, he refused but, upon hearing a bolt snap back, decided that it would be wise to acquiesce. Deprived of his weapon, he was escorted into the building where under a light he recognized that he was in the presence of an officer. After one of his dog tags had also been taken from him, the accused inquired whether his pistol would be restored to him and was told that it would be. He was released and directed "to double time it out of there" (R. 32-33).

He returned to the warehouse, but, after a short while, he determined "to wait until the Lieutenant had scattered the soldiers and I would go back and see if the Lieutenant would give me my gun back." He was confident that he would be able to retrieve the pistol, because the Lieutenant "talked so nice * * * and seemed like such a nice officer" (R. 33). Arming himself with an M-1 rifle for "protection," the accused made his way to the scene of his encounter with superior authority. As he re-entered the building and paused momentarily at the foot of the stairs, he saw Lieutenant James and several other soldiers above him and said to himself, "nobody has left yet; I am too early" (R. 33-34).

Transferring his rifle from his left shoulder to his right hand, the accused slowly mounted the stairs. Upon perceiving him, either Lieutenant James or a "T/V" said, "here you are again what do you want" (R. 34, 41-43). The Lieutenant "brought up" his Thompson sub-machine gun but did not directly point it at the accused (R. 36-37). A girl hurried into room "B", the soldiers present fled in all directions, and one of them loaded a carbine. Not being able to "see anything that they had been running from," the accused "got excited" and his rifle was fired twice. He did not aim, or consciously pull the trigger, or intend to harm anyone. He remembered "somebody dropping" but did not know whether it was the Lieutenant or an enlisted man. After hesitating briefly, the accused left the building but did not recall whether he "walked or run" (R. 35-36).

He again went to the warehouse and informed Private First Class Murray M. Thacker that "I had shot a soldier and for him to come across to the message center and I was going to turn in." As they were leaving through the front gate, they met a group of soldiers who stated that "they wanted a roll call." The accused asked whether they "were looking for the fellow who done some shooting down there." When they said, "yes," he declared "I am the one." He did not mention the word "officer," because he did not know at the time whether he had shot Lieutenant James or an enlisted man. When he arrived at the

orderly room to which he was taken for questioning, he was placed against the wall and kicked, and someone threatened "to kill this black bastard." Being severely frightened, he at first denied, upon interrogation by Lieutenant Lambelet, that he was involved in the fatal shooting but finally admitted it (R. 36-38, 41). In conclusion he stated that:

> "Sir, I wouldn't harm nobody for just ten dollars. I had been treated worse than that and just went off and forgot it by myself and as far as shooting and killing anybody for ten dollars, I wouldn't do that. I have been treated lots worse by officers and never said nothing about it. In the States in the supply room one time, Lt McWilliams from Texas hit me three times with a rubber hose and if I didn't do nothing about that, then I surely wouldn't want to kill this Lieutenant over ten dollars, or a little thing like taking my gun. He talked nice to me and I only figured I would go back and try and get it from him - I didn't care much for the gun except to sell it later on as I needed the money. If I had had a plan to kill him or do anything to him, I would have shot him at the bottom of the steps or waited until he come out in the alley where it was dark, instead of going in there with all those white soldiers to kill him for just a little thing like a gun like that. No sir, in my mind and in my heart, I am innocent. I had no mind to harm nobody all that day or night - to harm nobody." (R. 43).

The only other evidence adduced by the defense was the stipulated testimony of Lieutenant Colonel William J. M. Turner, the Investigating Officer in this case. According to him,

> "Two of the witnesses, Wasul Hohol and Andry Jwanciw, declared in their sworn statements that they saw the accused aim and fire at Lieutenant James, the deceased. But when questioned by me at the scene of the action, they 'spotted' themselves in a room where they could not have seen the shooting" (R. 31; Def. Ex. A).

5. In rebuttal the prosecution presented First Lieutenant Clarence A. Lambelet, Staff Sergeant John Zrepskey, and Technician Fourth Grade Joseph E. Dolinsky. All three testified that they had been present at an interview of certain civilian witnesses by Lieutenant Colonel Turner and that Jwanciw and Hohol had then "spotted" themselves as indicated on Prosecution Exhibit 1, that is, in a position from which they could easily have observed the shooting (R. 43-47).

6. The Specification of the Charge alleges that the accused did, "on or about 27 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one 2nd Lieutenant Cletus R. James, a human being by shooting him with a rifle."

Armed with an M-1 rifle, the accused went in search of the deceased and, upon finding him, fired the shots which deprived him of his life. These facts are not controverted, the sole question being whether the homicide was accidental, as contended by the defense, or with deliberation, premeditation, and malice aforethought, as maintained by the prosecution. According to the accused, he mounted the stairs with the rifle in his right hand, intending no harm to anyone, but, upon reaching the top, became excited by the panic-stricken flight of several others present and unconsciously pressed the trigger twice. On the other hand, the testimony for the prosecution is to the effect that he raised the rifle to his arm pit and took deliberate aim before firing. This conflict must reasonably and logically be resolved against the defense. In the first place, the accused had every motive to distort and pervert the truth; the witnesses for the prosecution, so far as the record shows, had none. Secondly, the nature of the wounds inflicted were such as to negative the contention of an accidental shooting; for it is extremely doubtful, to say the least, that an M-1 rifle held merely in the right hand and haphazardly fired would by some miraculous combination of circumstances propel one bullet through the heart and another through the "right upper quadrant of the abdomen." The deadly location of both wounds bespeaks deliberate aiming and renders any other possibility unlikely. Thirdly and finally, the very fact that the accused carried an M-1 rifle indicates that violence was contemplated from the moment he left the warehouse to seek out the deceased. The accused's statement that he took the weapon with him for "protection" must be deemed, in the light of all the evidence, to be palpably specious. For all these reasons the Board of Review is impelled to the conclusion that the Charge and the Specification have been established beyond a reasonable doubt.

7. The record shows that the accused is about twenty-four years old; that he enlisted on 1 January 1942 at Fort McPherson, Georgia, for the duration 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 and the sentence and to warrant confirmation thereof. Death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

Abner E. Lipscomb, Judge Advocate.

T. Ray Connor, Judge Advocate.

Samuel Morgans, Judge Advocate.

(Sentence duly executed. GCMO 4, 21 Jan 1946).

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

SPJGK - CM 294764

9 JAN 1946

UNITED STATES v. First Lieutenant VLADAMIR A. VUCHETICH (O-1546449), Medical Administrative Corps.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Butner, North Carolina, 9 November 1945. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
MOYSE, KUDER and WINGO, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Vladamir A. Vuchetich, Medical Administrative Corps, Hospital Center, Camp Butner, North Carolina, did, at Camp Butner, North Carolina, on or about midnight 29-30 September 1945, wrongfully and wilfully enter Women's Ward Number 23, General Hospital, in disobedience of the lawful orders of Second Lieutenant Virginia Jones, Army Nurse Corps, the night nurse on duty thereat.

Specification 2: In that First Lieutenant Vladamir A. Vuchetich, * * *, did, at Camp Butner, North Carolina, on or about 30 September 1945, behave himself with disrespect to Second Lieutenant Virginia Jones, Army Nurse Corps, by saying in a violent and abusive manner to her while she was in the performance of her lawful duties: "Goddam you, don't sling orders the length of the hall at me. Goddam you, don't forget I was a commissioned officer a long time before you were", or words to that effect.

Specification 3: In that First Lieutenant Vladamir A. Vuchetich, * * *, did, at Camp Butner, North Carolina, on or about 29 September 1945, wrongfully and falsely represent himself to be Administrative Officer of the Day of the Hospital Center.

He pleaded not guilty to and was found guilty of the Charge and all 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 Article of War 48.

3. Evidence for the prosecution.

On 29 September 1945 accused was "Chief, Officers' Patient Disposition Section, Personnel," Hospital Center, Camp Butner, North Carolina (R. 5). Second Lieutenant Charles A. Vonderbruegge was Administrative Officer of the Day at the General Hospital at the Center for a tour the "night of September 29 and morning of September 30, 1945," and did not delegate his authority to anyone else. There could not "be two Administrative Officers of the Day on duty at one time" (R. 7,8).

Second Lieutenant Virginia I. Jones, Army Nurse Corps, was on duty the "night of September 29 and morning of September 30, 1945," "covering ward 17, 19, 21 and 23" at the General Hospital at the Center (R. 10). About 2030 hours 29 September, according to her testimony, she saw accused in one of the rooms in Ward 21, a ward for male officers (R. 11). "He was wearing the AOD band," a brassard which indicated he was Administrative Officer of the Day (R. 12). About 0200 hours 30 September she saw him leave Ward 21 and go "over to ward 23 * * * the women's ward" (R. 13,18). Lieutenant Jones "stepped across the hall and told him it is past visiting hours and not go to in the women's ward." She "turned to the utility room in Ward 21 to wash my hands and he followed me *** into the utility room," told her he was Administrative Officer of the Day, and said, "God damn you, don't sling your orders across the hall at me *** don't forget I was a commissioned officer a long time before you was," (R. 13,36). He then followed her to Ward 17, where she "sat down at the desk and started writing. He grabbed the books and slammed them down on the desk and told me I would listen to him, that he was a commissioned officer" (R. 14). Accused again told her he "was AOD," and could "go to any 'God damn' ward he wanted to" (R. 14). She "asked" him "please not to go back down" to the women's ward, and he replied, "'I'm going back to that ward. I'm going to marry that God damn woman and I can do anything to her I want'" (R. 14,35,36,39). He went back to the women's ward and Lieutenant Jones followed him "down to the entrance of that ward and I told him, 'I am asking you for the last time, don't go in there'" (R. 14). Accused nevertheless went in, and stayed "about twenty minutes or twenty-five. *** in the open ward where there are about twenty-seven patients *** I watched him and I stood there until he came out" (R. 17,19). About 0230 hours accused "came out of the ward and went out the side door" (R. 16). The last time she saw him, accused did not "have the AOD band on *** it was just hanging by the one end when he left the ward. He didn't have it on at all" (R. 16). Lieutenant Jones thought accused "was the AOD. I didn't question that" (R. 15), until about 0230 hours, when the night supervisor told her accused was not the "Administrative Officer of the Day" (R. 17).

Three other witnesses saw accused during the evening in question

in Ward 21 wearing the "AOD" brassard (R. 20,25,27), and two of them testified he was not wearing it the last time they saw him, about 0145 hours (R. 26,28). Technician Fifth Grade Lessie R. Barber, WAC, while on duty that night in Wards 21 and 23, heard Lieutenant Jones "command" accused to "stay off of" the women's ward, and heard accused employ profane language, swear at Lieutenant Jones and use the words "God damn you" (R. 28). This witness testified that Lieutenant Jones attempted to placate accused and tried "to avoid the trouble" (R. 28), and that she saw accused "come out" of the women's ward "about 1:30 or 2:00 o'clock" (R. 27,28). Another witness testified that accused was "arguing" with Lieutenant Jones and said to her, "'I don't like the idea of you calling me "little boy", and remember, I'm a commissioned officer'", and that accused was in the women's ward for "about twenty minutes *** around 11:00 o'clock" (R. 30).

4. Evidence for the defense.

Accused, after having been fully apprised of his right to make a sworn or unsworn statement or to remain silent, elected to make a sworn statement (R. 31). He testified that he had an "AOD" brassard in his room, and there, on the night of 29 September, "mentioned" to Lieutenant Bernard Holmes, who was about to be separated from the service, "'Well, Bud, you'll never have to wear these things any more.' I put it on my arm and forgotten about it" (R. 32). About 2000 hours accused went to the women's ward to see a girl whom he intended to marry, and left the ward with her "no later than 9:15." About fifteen minutes later they stopped in a room in the male officers' ward, where accused drank three bottles of beer. He removed the brassard while he was in this room and stayed there until about 0130 hours, when he accompanied the young lady to the women's ward, where "Lieutenant Jones said, 'You have been creating enough disturbance all night long. You had better get off the ward.' I had a feeling she resented me for some reason or other, *** I did say 'God damn it' and did not say 'God damn you'. 'You have been slinging more orders at all of us the whole night long.' I talked with her and she didn't listen to me. She said, 'Stop being such a little boy. You'd better get back to the Officers' Quarters'. At no time did she give me a direct order" (R. 33). He expected Lieutenant Jones to report him because he "was on the ward drinking beer and had beer on the ward" (R. 34). He followed her to Ward 17 "to get straightened out about creating a disturbance on the ward because we had not created a disturbance." He asked her permission to return to the women's ward to tell his friend "everything was all right." Lieutenant Jones said, "'No, you are not going to be on the ward at this time of night.' *** She only implied, sir, that it wasn't proper for me to be on the ward at that time of night. She gave no direct or indirect order for me not to enter the ward." Accused "thought she was referring to the moral obligations or something and I told her I was in love with the girl." Accused then returned to the women's ward and went into "The open ward, the girl had the first bed right in the open ward, right next to the latrine." He stayed in the ward "approximately three or five minutes" and left about

0200 hours. He was sober when the conversation with Lieutenant Jones took place (R. 36). He knew that she represented the commanding officer and that her lawful orders should be obeyed by everyone. He also knew that it "was wrong" for him to be in the wards at that time of night. "I had no more business in Ward 21 than I had in Ward 23" (R. 35).

War Department Adjutant General's Office Form 66-4, "Officer's and Warrant Officer's Qualification Card Copy," pertaining to accused, was admitted in evidence as Defense's Exhibit "A" (R. 39). This exhibit was a true copy of his card, and shows he entered active commissioned service 28 April 1943 at Camp Butner, North Carolina. There he served, until the date of his present offenses, as Assistant Mess Officer, Assistant Commanding Officer of the Medical Detachment, Chief of Military and Civilian Personnel, and Commanding Officer, Detachment of Patients, at the Station Hospital; as Commanding Officer, Detachment of Patients, at the General Hospital; and as Chief, Officers' Patient Disposition Section, Personnel, at the Hospital Center. His first four efficiency ratings were "Very Satisfactory," his next three were "Excellent," and his last two were "4.9" and "5.1" respectively.

5. The evidence clearly establishes that accused entered the women's ward about 0200 hours 30 September after the nurse in charge had informed him that she did not wish him to go there and followed him to the ward and repeated the prohibition. He knew she "represented the commanding officer," and told her not to "sling" her "orders" at him. Accused also knew that he "had no *** business" there. It is a reasonable inference to be drawn from the conversation between accused and the nurse under the circumstances that her direction was phrased as an order to stay out of the women's ward and that it was so understood by accused (CM 244825, Miles, 29 B.R. 42). It was the nurse's duty to exclude unauthorized persons from the women's ward, and accused's disobedience of her orders was prejudicial to good order and military discipline in violation of Article of War 96. Accused's use of profanity toward an Army nurse, his unseemly altercation with her, overheard by her enlisted subordinate, and his deliberate misrepresentation that he was Administrative Officer of the Day, apparently made for the purpose of overriding her authority, were obviously prejudicial to good order and military discipline and constituted conduct of a nature to bring discredit upon the military service, in violation of Article of War 96 (see CM 252576, Smith and Shields, 34 B.R. 89,91; Winthrop, 1920 reprint, page 727, note 12).

6. War Department records disclose that this officer is 27 years of age, is married and has one child. He is a high school graduate and attended a teachers' college for one semester. From July 1936 to November 1942 he was employed variously in a clothing store, a paper mill, a tavern and a food market. He entered the service 3 November 1942 and was on an inactive status in the Enlisted Reserve Corps until 17 November 1942. Upon completion of the required course of instruction at the Medical Administrative Corps Officer Candidate School, Camp Barkeley, Texas, he was commissioned

Second Lieutenant, Medical Administrative Corps, 28 April 1943, and was ordered to active duty (limited service) the same date. He was promoted to first lieutenant 3 January 1945.

7. The court was legally constituted and had jurisdiction of accused and the offenses. No errors injuriously affecting the substantial rights of 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 sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

(On Leave), Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 294764 1st Ind

JAN 16 1946

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 Vladamir A. Vuchetich (O-1546449), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongful entry into the women's ward of a general hospital in disobedience of a nurse's orders, disrespect and use of profanity toward the nurse, and false representation that he was Administrative Officer of the Day at the hospital, in violation of Article of War 96 (Specifications 1, 2 and 3 of the Charge). 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 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 thereof.

The accused is a Medical Administrative Corps Officer at the Hospital Center, Camp Butner, North Carolina. About 0130 hours, 30 September 1945, the nurse in charge of the women's ward at the general hospital at the center saw the accused going to the women's ward. She had previously that evening seen a brassard on his arm indicating he was Administrative Officer of the Day. She told the accused not to go in the ward, whereupon he followed her to two other wards and engaged in an argument with her, during which he said, "God damn you, don't sling your orders across the hall at me, *** don't forget I was a commissioned officer a long time before you" and told her that he was Administrative Officer of the Day and could go to "any God damn ward" he wanted to. She asked him "not to go back down" to the women's ward and he replied, "I'm going back to that ward." An enlisted woman on duty nearby heard accused employ some of this profane language. About 0200 hours accused proceeded to the women's ward, followed by the nurse, who "for the last time" asked him not to go in there. He went into the ward, where he stayed about twenty minutes, and then left the hospital. The accused was not Administrative Officer of the Day, but the nurse did not discover that fact until after he had left the hospital. His purpose in entering the women's ward was to speak with a patient whom he intended to marry and with whom he had decorously spent the earlier part of the evening at the hospital. There is no allegation or proof that his conduct with her or the other occupants of the ward was in any way otherwise improper. The accused is 27 years of age and is classified limited

service. He has been continuously on duty in various administrative capacities at this hospital center since 28 April 1943. During this period his efficiency ratings have been four "Very Satisfactory" followed by five "Excellent." He has no record of punishments imposed under Article of War 104. The commanding officer of the hospital center recommended punishment under Article of War 104 for his present offenses. Long association and familiarity with the operation of the hospital and with its personnel doubtlessly account for the irregular hours of his presence there the night in question, and may in part explain, although not excuse, his conduct, which, though disgraceful, in view of all the circumstances is not deemed to require dismissal. I therefore recommend that the sentence be confirmed but commuted to a reprimand and fine of $100 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
1. Record of trial
2. Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence confirmed, but commuted to a reprimand and fine of $100.00 . Sentence as modified ordered executed. GCMO 25, 25 Jan 1946).

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

SPJGN-CM 294832

UNITED STATES	)	FOURTH AIR FORCE
v.	)	Trial by G.C.M., convened at Gowen Field, Boise, Idaho, 25 October 1945. Dismissal, total forfeitures, and confinement for two (2) years. Disciplinary Barracks.
First Lieutenant GEORGE W. LEWIS (0-1594301), 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 58th Article of War.

Specification: In that First Lieutenant George W. Lewis, Air Corps, 425th Army Air Forces Base Unit, Squadron A, did, at Gowen Field, Idaho, on or about 9 July 1945, desert the service of the United States and did remain absent in desertion until he surrendered himself at Luke Field, Arizona, on or about 27 September 1945.

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

Specification 1: In that First Lieutenant George W. Lewis, Air Corps, 425th Army Air Forces Base Unit, Squadron A, did, at McCall, Idaho, on or about 7 July 1945, with intent to defraud, wrongfully and unlawfully make and

utter to The Dog House a certain check in words and figures as follows, to wit:

Boise, Idaho 7/7/45 19 No.

Boise Branch
FIRST SECURITY BANK OF IDAHO
National Association

92-6
12

Pay
To The
Order Of _____ $10.00

Ten and no/100 _____ Dollars

COUNTER CHECK

/s/ George W Lewis
1st Lt AC 0-1594301

and by means thereof did fraudulently obtain from said The Dog House $10.00, lawful money of the United States, he, the said First Lieutenant George W. Lewis then well knowing that he did not have, and not intending that he should have any account with the said First Security Bank of Idaho, Boise Branch, Boise, Idaho, for the payment of said check.

Specification 2: Similar to Specification 1 except that check was in the sum of $20.

Specification 3: Similar to Specification 1 except that check was in the sum of $25.

Specification 4: Similar to Specification 1 except that check was made and uttered on 8 July 1945, and was in the sum of $20.

Specification 5: Similar to Specification 1 except that check was made and uttered on 8 July 1945, and was in the sum of $25.

Specification 6: (Nolle prosequi entered).

As to Charge I and its Specification, accused, by appropriate exceptions and substitutions, pleaded guilty to, and was found guilty of, absence without leave, in violation of Article of War 61. He pleaded guilty to, and was found guilty of, Charge II and its Specifications. After evidence was introduced of a previous conviction by general court-martial, on 10 January 1944, of absence without leave for 19 days and of taking

an automobile without the consent of the owner, 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; designated the Northwestern Branch, United States Disciplinary Barracks, Fort Missoula, Montana, as the place of confinement; and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: On the night of 7 July 1945, accused played poker at "The Dog House," a gambling house in McCall, Idaho (R. 9-10). Three times during the game he went to the office of Mr. Roy Stover, the proprietor, and cashed a check (R. 10). The checks were drawn by accused on the First Security Bank of Idaho, Boise, Idaho, for $20, $25 and $10 (R. 10-12; Pros. Exs. 3, 4, 6). The following night, 8 July 1945, accused was in The Dog House again and cashed two more checks drawn by himself on the same bank for $20 and $25 (R. 12; Pros. Exs. 5, 7). On both occasions accused was "reasonably sober." The checks were deposited for collection and returned unpaid (R. 13). Accused had no checking account in the First Security Bank of Idaho at the time (R. 14).

Accused failed to return to his organization at Gowen Field, Idaho, on the morning of 9 July 1945 and was reported absent without leave on the morning report (R. 8; Pros. Ex. 1). He was returned to military control at Luke Field, Phoenix, Arizona, on 27 September 1945 (R. 9; Pros. Ex. 2).

In a pre-trial statement, made after explanation of his rights, accused admitted that he wrote the checks in question and that he was aware he had no account in the bank on which they were drawn. He asserted that he had been in McCall on a pass which expired on 9 July and that after writing the worthless checks he decided not to return to his station but to seek employment to raise enough money to pay them off. After leaving McCall he wandered all over the western states but obtained very little work. He made just enough by gambling to live on and finally turned in at Luke Field on 27 September (R. 14-16).

4. The defense offered no evidence. Accused, cognizant of his rights, elected to make an unsworn statement through counsel. He asserted that he was inducted into the Army in February 1942 and by April 1943 had risen to the rank of master sergeant. During this period his record was unblemished. He entered a Quartermaster Officer Candidate School and on 16 July 1943 received his commission as a second lieutenant. Having been assigned to an Air Corps installation, he found that he was unable to maintain the same standards of living as officers of equal rank, who, because of their flying status, received greater pay. His attempts to relieve the inequality by gambling

only caused his financial situation to become more desperate. Under these circumstances he sought to resign his commission or secure a transfer but was unsuccessful in both endeavors. Although in the spring of 1945, he was promoted to first lieutenant, his financial burdens were not materially lightened. He continued gambling and losing. While gambling at McCall, he lost all of his money and wrote a worthless check hoping that he would be able to redeem it on the next hand. One check followed another until he was hopelessly in debt. In a fit of desperation he left with the expectation that he would be able to earn enough money to pay his debts. Nothing "seemed to work out right," and finally he surrendered himself (R. 17-18).

5. The five Specifications of Charge II allege that on 7 and 8 July 1945, at McCall, Idaho, accused made and uttered to "The Dog House," with intent to defraud, five checks aggregating $100, and fraudulently obtained that amount in cash, knowing that he did not have and not intending to have any account in the First Security Bank of Idaho, Boise, Idaho, on which they were drawn, for payment. The Specification of Charge I, as amended by the court's findings, alleges that accused absented himself without leave from his station at Gowen Field, Idaho, from 9 July 1945 to 27 September 1945.

The offenses alleged are established by the evidence for the prosecution and admitted by his pleas of guilty. It is shown that accused drew the checks in issue on a bank in which he had no account. He was under no misapprehension or illusion on this point and consequently his intent to defraud may be inferred. Inasmuch as he received the face amounts in currency, the checks were issued for value, even though they were cashed by a gambling house and the proceeds subsequently lost in a poker game. Immediately after negotiating the checks accused absented himself without leave from his station and remained away for over two and a half months. He asserted that he went off in order to earn money to discharge his worthless checks. However, he never earned the required sums and, insofar as the record shows, the checks were never redeemed. It appears doubtful that this was the real reason for his absence, but, even if true, it affords no defense, of course, to the offense charged. His issuance of the worthless checks contravened Article of War 95, for one of the violations of that Article listed in the Manual for Courts-Martial, 1928, is "giving a check on a bank where he knows or reasonably should know there are no funds to meet it, and without intending that there should be" (MCM, 1928, par. 151).

6. War Department records show that the accused is about 33 years of age having been born 24 November 1912. He is a resident of California and has an 11th grade schooling. His employment record discloses that he has worked for the railroads in various capacities from 1932 to 1942. During this period he was, successively, a station clerk and telegraph

operator, a waybill clerk, and a material construction clerk and accountant. In February 1942 he was inducted into the Army and by April 1943 when he entered the Quartermaster Officer Candidate School at Camp Lee, Virginia, he had attained the grade of master sergeant. He was appointed a temporary second lieutenant in the Army of the United States on 16 July 1943 and immediately entered upon active duty. On 10 January 1944 he was tried by general court-martial as previously stated, the sentence, as approved by the reviewing authority, to be dismissed the service, being suspended by the President. He was promoted to the rank of first lieutenant on 13 April 1945. In July 1945 he requested relief from active duty in order to return to employment with the railroad and, while his application was pending, he committed the offenses involved in the present case. The request was subsequently denied by the War Department.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Glamon, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 294832 1st Ind
Hq ASF, JAGO, Washington, D. C. JAN 11 1946
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 George W. Lewis (0-1594301), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, absence without leave from his station from 9 July 1945 to 27 September 1945, in violation of Article of War 61; and of making and uttering, with intent to defraud, on 7 and 8 July 1945, five worthless checks totalling $100, knowing that he did not have, and not intending that he should have, an account in the bank on which drawn, 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 seven years. The reviewing authority approved the sentence but reduced the period of confinement to two years; designated the Northwestern Branch, United States Disciplinary Barracks, Fort Missoula, Montana, 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 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.

Accused, stationed at Gowen Field, Idaho, went to the nearby town of McCall on pass and, on the nights of 7 and 8 July 1945, sat in a poker game in a gambling establishment known as The Dog House. His funds exhausted he drew a $10 check on a bank in which he had no account, cashed it with the proprietor, and lost the proceeds in the game. He drew and cashed four more checks totalling $90 and lost these amounts. After passing this worthless paper he failed to return to his station and was absent without leave from 9 July until 27 September 1945 when he surrendered at Luke Field, Arizona.

This is accused's second general court-martial. In January 1944 he was convicted of absence without leave for 19 days and of taking an automobile without the consent of the owner. The sentence in that case, which, as approved by the reviewing authority, provided for his dismissal, was suspended by the President on 25 May 1945.

Accused has failed to appreciate the opportunity afforded him when clemency was extended him in his previous court-martial and is obviously unworthy of further consideration. I recommend that the sentence as approved by the reviewing authority be confirmed and ordered executed.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(Sentence as approved by reviewing authority confirmed, and ordered executed. GCMO 19, 25 Jan 1946).

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TITLE

DATE	BORROWER'S NAME	EXT.