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CONTENTS OF VOLUME XIV

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

SPJGH
CM 223489

AUG 1 1942

UNITED STATES	)	SEVENTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Francis E. Warren,
Private LEROY MADISON	)	Wyoming, June 23, 1942. Dis-
(20502536), Company E,	)	honorable discharge (suspended)
128th Infantry.	)	and confinement for one and one-
		half (1½) years. Disciplinary
		Barracks.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

1. The record of trial in the case of the soldier named above having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part, 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 on the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Leroy Madison, Co. E, 128th Infantry, did, at Fort Ord, California, on or about April 21, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Cheyenne, Wyoming, on or about April 22, 1942.

The accused pleaded not guilty to the Specification and Charge, but guilty to absence without leave in violation of Article of War 61. He was found guilty as charged, sentenced to be dishonorably discharged the service, to forfeit all pay and allowances now due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the findings and sentence, but reduced the confinement adjudged to one and one-half years, ordered the execution of the sentence as modi-

fied, but suspended the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The result of the trial was published in General court-Martial Orders No. 239, Headquarters Seventh Corps Area, July 14, 1942.

3. It was stipulated that if an extract copy of the morning report of Company E, 128th Infantry, of the morning of April 21, 1942, were introduced in evidence it would show an entry "Private Madison, duty to A.W.O.L, April 21, 1942" (R. 5).

The only witness introduced by the prosecution was Sergeant Raymond F. Sullivan, Military Police Detachment, Fort Francis E. Warren, who testified that he saw accused at 7 p.m., April 22, 1942, standing on a corner in Cheyenne, Wyoming, and noticed a blue braid on his cap. When he found that accused had no written authority for being absent from his organization, he turned him over to the guard at Fort Francis E. Warren, Wyoming (R. 5-6).

4. Accused testified that he entered the service on February 19, 1940, and was a member of Company E, 128th Infantry, 32nd Division, Fort Ord, California. On April 21, 1942, he secured a pass at 7 a.m., which was good until 12:45 a.m. that night. He was going to his home in Girard, Ohio, to get married. He left his organization at 8 a.m., left Monterey at about 9 a.m., and hitch-hiked to Cheyenne, where he was picked up by the military police on the evening of April 22, 1942, with another soldier who lived in his home town. He knew of no expected movement of his organization, and would not have been given a pass if a move were contemplated. He knew it was against Army regulations to take off without permission and also knew that he did not have the consent of his company commander to get married. At no time during his absence did he intend to desert the service of the United States (R. 7-12).

5. The evidence thus shows that accused absented himself without leave for one day, terminated by apprehension in Cheyenne, Wyoming. He was traveling, in uniform, by hitch-hiking on a direct route to his home in Girard, Ohio, for the purpose of getting married. The record fails to show that the accused was dissatisfied with his station, organization, or with the service generally. His statement of his destination and explanation of his purpose negative an intent not to return. The Board of Review finds nothing in the absence or attendant circumstances to justify a reasonable inference that accused intended to desert, i.e., intended to quit the service of the United States.

In CM 213817, Fairchild, where accused was apprehended after an absence without leave of 22 days, during which he lived openly near his post, the Board of Review stated:

> "* * * The Manual for Courts-Martial states that -
> "'If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent * * *.'
>
> Determination of the question as to whether absence is 'much prolonged' or satisfactorily explained, within the meaning of the quoted clause, must depend upon the circumstances of the absence. An arbitrary yardstick of time may not be applied. The absence must be so prolonged that, considered in the light of proved causes and motives or in the light of a lack of rational explanation, it leads in sound reason to a conclusion that the soldier did not intend to return. The absence in the instant case, so considered, is not of such duration as to justify an inference of intent not to return."

6. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involve findings that accused, at the place alleged, absented himself without leave from his organization from April 21, 1942, to April 22, 1942, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three days and forfeiture of two days' pay.

_____ for Judge Advocate.

_____, Judge Advocate.

_____(Dissent)_____, Judge Advocate.

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

(4)

SPJGH
CM 223489

N.D.

AUG 3 1942

UNITED STATES	)	SEVENTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Francis E. Warren, Wyoming, June 23, 1942. Dishonorable discharge (suspended) and confinement for one and one-half ($1\frac{1}{2}$) years. Disciplinary Barracks.
Private LEROY MADISON (20502536), Company E, 128th Infantry.	)	

DISSENTING OPINION by LIPSCOMB, Judge Advocate

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.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Leroy Madison, Co. E, 128th Infantry, did, at Fort Ord, California, on or about April 21, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Cheyenne, Wyoming, on or about April 22,,1942.

The accused pleaded not guilty to the Specification and Charge, but guilty to absence without leave in violation of Article of War 61. He was found guilty as charged, sentenced to be dishonorably discharged the service, to forfeit all pay and allowances now due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the findings and sentence, but recuded the confinement adjudged to one and one-half years, ordered the execution of the sentence as modified, but suspended the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 239, Headquarters Seventh Corps Area, July 14, 1942.

3. The evidence shows that the accused went absent without leave from his organization at Fort Ord, California, on April 21, 1942. On the evening of the following day he was apprehended, in uniform, at Cheyenne, Wyoming, a distance of about 700 miles by air line and over 1,200 miles by rail from Fort Ord (R. 5-6).

The accused testified that on April 21, 1942, after he had secured a pass, good until 12:45 that night, he had decided to return to his home in Girard, Ohio, and to get married there. He left his organization at 8 a.m., and in company with another soldier of his organization whose home was also in Girard, Ohio, hitch-hiked to Cheyenne, where he was arrested by the military police. He testified that he knew of no expected movement of his organization, and that he did not at any time intend to desert the service. He also testified that he knew he was violating Army regulations in leaving the area of his organization without permission (R. 7-12).

When questioned by the court as to why he had started for his home in Ohio the accused replied that he "* * * got disgusted down there. We didn't have any money for smokes or anything". The accused added, however, that he had not been disgusted with the Army. When questioned further as to whom he blamed for his lack of money or his failure to receive pay, the accused replied, "Sometimes company clerks have something to do with it". The accused explained that he had formerly been a member of the 37th Division and had been transferred to the 32nd Division before it had been sent to California (R. 10).

4. Since the accused admitted that he was absent without leave when apprehended at Cheyenne, Wyoming, the only question requiring determination is whether the evidence supports the conclusion that the accused at sometime during his unauthorized absence intended to remain away permanently from his organization.

The proof of any specific intent is difficult, and can only be determined by facts or circumstances surrounding conduct. This difficulty is clearly recognized in the Manual for Courts-Martial, 1928, wherein the President under the specific authority of Article of War 38, has designated certain evidentiary facts which may be the basis of a legitimate inference of an intent to desert. The Manual states that -

> "* * * Such inference may be drawn from such circumstances as that the accused * * * was arrested or surrendered at a considerable distance from his station; * * * that he was dissatisfied in his company or with the military service; * * *." (M.C.M., 1928, par. 130)

Since in the present case the accused was arrested at a distance of about 700 miles from his organization, it appears, to use the language of the Manual, that he was "arrested * * * at a considerable distance from his station". Furthermore, the accused testified to the fact that he was disgusted because he had not been paid and by insinuation blamed his company clerk for his lack of funds. This evidence indicates "that he was dissatisfied in his company * * *".

Thus, it is apparent that the record presents two evidentiary factors from which, under the instructions of the Manual, the court was permitted to infer that the accused had the "intent" to desert the service. It must be presumed from the findings of guilty that the court drew such an inference. It follows, therefore, since the Board of Review is not to weigh the evidence, nor to deny to the court its fact-finding function, that the findings of the court should be approved.

5. Accordingly, I conclude that the record of trial is legally sufficient to support the findings of guilty of the Charge and the Specification thereunder, and to support the sentence.

Abner E. Lipscomb Judge Advocate.

1st Ind.

War Department, J.A.G.O., SEP 18 1942 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Leroy Madison (20502536), Company E, 128th Infantry, together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review and recommend that so much of the findings of guilty of the Charge and its Specification as involve findings of guilty of an offense by accused other than absence without leave from Fort Ord, California, from April 21, 1942, to April 22, 1942, in violation of the 61st Article of War, be vacated; and that so much of the sentence as is in excess of confinement at hard labor for three days and forfeiture of two days' pay be vacated; and that all the rights, privileges, and property of which accused has been deprived by virtue of that portion of the findings and sentence so vacated, be restored.

3. Inclosed herewith is a form of action designed to carry into effect the recommendation hereinabove made should it meet with your approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

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

SPJGH
CM 223498

NOV 20 1942

UNITED STATES	)	SECOND SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Fort Dix, New Jersey, June 30, 1942. Dishonorable discharge (suspended), and confinement for five (5) years. Disciplinary Barracks.
Private JOSEPH D. CROWLEY (33026719), Task Force Replacement Pool, Fort Dix, New Jersey.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

1. The record of trial in the case of the soldier named above having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part, 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 86th Article of War.

Specification: In that Pvt Joseph D Crowley, Task Force Replacement Pool, Fort Dix, N.J. on guard and posted as a sentinel, at Fort Dix, N.J. on or about June 2, 1942, did leave his post before he was regularly relieved.

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

Specification: In that Pvt Joseph D Crowley, Task Force Replacement Pool, Fort Dix, N.J. did, at San Francisco, California, on or about December 26, 1941, desert the service of the United States by absenting himself without proper leave from his organization, with intent to shirk important service, to wit: embarkation for duty at an un-

known foreign destination, and did remain absent in desertion until he surrendered himself at Fort Dix, N.J. on or about January 12, 1942.

He pleaded guilty to Charge I and the Specification thereunder; and not guilty of desertion in violation of Article of War 58, Charge II, but guilty of absence without leave in violation of Article of War 61. He was found guilty of the Charges I and II and the Specifications thereunder, and sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence, ordered its execution, but suspended the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Order No. 251, Headquarters Second Corps Area, Governors Island, New York, July 21, 1942.

3. The only evidence for the prosecution shows that on December 26, 1941, the accused absented himself without leave from his organization and station "APO 901, Port of Embarkation, San Francisco, California", while his unit was awaiting embarkation for foreign service, and that he thereafter surrendered himself at Fort Dix, New Jersey, on January 12, 1942 (Ex. 1, R. 7-9).

4. Concerning the charge of leaving his post while on duty as a sentinel (Charge I), to which the accused pleaded guilty, the accused testified in explanation and in mitigation that he left his position and went into the boiler room where he was found asleep because he was suffering from a pain in his side and wanted to sit down and rest for a time, that he did not intend to go to sleep, that he had told the corporal of the guard before being posted as a sentinel that he had a pain in his side but the corporal had only laughed, and that he had not called the corporal of the guard or asked for relief.

The accused testified further that he was assigned to guard barracks which required him to walk around a square block, that the boiler room into which he entered was back of the barracks but within the block which he was guarding, that he was instructed to walk on the outside of the buildings, that he entered the boiler room at about 9:15 p.m., that he was due to be relieved from duty at 10 p.m., that he still suffered from pains in his side, and that the pains had been diagnosed as due to constipation (R. 14, 15-18).

5. Concerning the allegation of desertion, Charge II, the accused

testified that he had pleaded guilty to absence without leave in violation of the 61st Article of War and was absent from December 26, 1941, to January 12, 1942. The accused testified further that his organization arrived in San Francisco from Virginia Beach on the day before Christmas; that he was homesick and wanted to see his father who had been hurt in an accident while working in a navy yard; that he absented himself from his organization on Christmas day and went home; that he wore his uniform during his entire absence; and that he surrendered himself at the office of The Provost Marshal, Fort Dix, New Jersey, with the hope of being sent back to his organization. He testified specifically that he never intended to desert.

The accused also testified that the men of his organization had not known that the organization was about to leave for foreign service; that he had packed two bags, each with different equipment, but that he did not remember being told that one bag was to be placed in the hold of a ship and the other bag retained for immediate use; that there were rumors among the men of his organization as to the destination of the organization, including rumors both that the organization was going overseas and that it was not going overseas; that the men of his organization thought that because their organization was a Coast Artillery unit it would be stationed on the west coast; and that he saw no preparation in his organization for an overseas movement (R. 9-14).

6. The Specification, Charge I, alleges that the accused, "* * * being on guard and posted as a sentinel, at Fort Dix, N.J. on or about June 2, 1942, did leave his post before he was regularly relieved". The accused pleaded guilty to this Specification and the evidence presented by him in explanation of the offense is not inconsistent with his plea. On the other hand, the evidence presented by the accused corroborates his plea of guilty. The prosecution presented no evidence upon this Charge.

The evidence shows that the accused while posted as a sentinel on a post which required him to walk around certain buildings, left his post and entered the boiler room of one of the buildings and there went to sleep. According to the test as set forth by the Board of Review in CM 222856, Stevenson, a sentinel has left his post within the meaning of the 86th Article of War when "he has so far removed himself from his normal position or area of duty as to be unable adequately to perform his duties". Clearly the accused in the present case had so far removed himself from his normal position of duty as to be unable adequately to guard the buildings.

7. The Specification, Charge II, alleges that the accused deserted the service by "absenting himself without proper leave from his organization, with intent to shirk important service, to wit: embarkation for duty at an unknown foreign destination, * * *". The evidence, however, fails to sustain this allegation. There is proof that the organization to which the accused was attached had been transferred from Virginia Beach to San Francisco and had been given the address of APO 901, Port of Embarkation, San Francisco, California. There is also evidence that the accused had been required to pack two bags, one with one type of equipment and one with another type of equipment. There is also evidence that there were rumors in the organization of the accused that the organization might leave for foreign service, but there were also rumors that it might be stationed on the west coast. There is no evidence, however, that the accused was informed that his organization was to embark for foreign service or that he knew of its impending departure. The conclusion cannot, therefore, be legally drawn that the accused absented himself from his organization in order to avoid embarkation with it. There is, accordingly, no proof of desertion in order to avoid important service.

8. Although there is evidence in the record which may indicate that the accused left his organization with the intent not to return, the allegation of the Specification, Charge II, did not present such an issue before the court, and accordingly a finding of guilty of desertion based thereon is not authorized. In CM 224765, Butler, the statement is made that -

> "The offense of desertion is defined as ' * * * absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service' (M.C.M., 1928, par. 130). Thus it is apparent that desertion is an offense requiring a specific intent of mind. It is equally clear that the word 'desert' is a broad, inclusive term and when used in a specification is susceptible of attributing to the accused any one of the three intents of mind described above. When, therefore, the word 'desert' in a specification is modified, as in the present case, by the phrase '* * * in order to avoid hazardous duty * * *', its meaning is narrowed and the justiciable issues of the Specification are accordingly restricted. Furthermore, when a Specification alleges desertion with an intent to avoid hazardous duty, the proof must show such an intent. If the proof shows no such intent, but rather an intent not to return to the service, there is a fatal variance between the allegata and the probata and a finding of guilty of desertion based on such proof cannot be approved."

The plea of guilty to absence without leave under the above Specification as well as the evidence shows, however, that the accused absented himself without leave from December 26, 1941, to January 12, 1942, a period of seventeen days. The maximum punishment for this period of absence without leave is confinement at hard labor for one month and twenty-one days and forfeiture of two-thirds of his pay per month for a like period (par. 104 c, M.C.M., 1928). There is no limit of punishment prescribed for the offense of a sentinel leaving his post before being relieved, in violation of the 86th Article of War.

9. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and the Specification thereunder, legally sufficient to support only so much of the findings of guilty of Charge II and the Specification thereunder as involve findings that the accused at the time and place alleged absented himself without leave from his organization on December 26, 1941, and remained absent without leave until he surrendered himself on January 12, 1942, in violation of the 61st Article of War, and legally sufficient to support the sentence.

Nesto E. Kneck Jr., Judge Advocate.

Chas. L. Gresson, Judge Advocate.

Abner E. Lifscomb, Judge Advocate.

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

SPJGH
CM 223517

UNITED STATES	)	SEVENTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Francis E. Warren, Wyoming, June 23, 1942. Dishonorable discharge (suspended) and confinement for one and one-half ($1\frac{1}{2}$) years. Disciplinary Barracks.
Private MIKE REBRACA (35007091), Company E, 128th Infantry.	)	

N.D.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

1. The record of trial in the case of the soldier named above having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part, 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 58th Article of War.

Specification: In that Private Mike Rebraca, Co. E, 128th Infantry, did, at Fort Ord, California on or about April 21, 1942 desert the service of the United States and did remain absent in desertion until he was apprehended at Cheyenne, Wyoming on or about April 22, 1942.

The accused pleaded not guilty to and was found guilty of the Charge and its 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 for five years. The reviewing authority approved the sentence, but reduced the confinement adjudged to one and one-half years, ordered the execution of the sentence as modified, but suspended the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confine-

ment. The result of the trial was published in General Court-Martial Orders No. 228, Headquarters Seventh Corps Area, July 11, 1942.

3. It was stipulated that a properly authenticated extract copy of the morning report of Company E, 128th Infantry, Fort Ord, California, if introduced in evidence, would show the entry "Private Mike Rebraca, 35007091, duty to AWOL, April 21, 1942" (R. 5).

The only witness introduced by the prosecution was Sergeant Raymond F. Sullivan, Military Police Detachment, Fort Francis E. Warren, who testified that he saw the accused in uniform at 7 p.m., April 22, 1942, standing on a corner in Cheyenne, Wyoming, and noticedthe Infantry braid on his cap. When he found that accused had no furlough papers, he took accused into custody and turned him over to the guard at Fort Francis E. Warren, Wyoming (R. 5-6).

4. The accused made an unsworn statement as follows:

> "I was in the 37th Division and had applied for furlough. About three days before my furlough came up and three days before pay day they transferred me to the 32nd Division. I asked the Captain if I could get a furlough and he said I could about the 10th of the next month. He said I'd get paid then too. When I got to the 32nd, I asked them about the furlough and they said they couldn't give it to me. My mother was sick and I wanted to see my brother before he went into the army. I couldn't get any money in the army in California and I tried to borrow from the Red Cross, but I couldn't get it there. I tried to borrow some from home, but I didn't hear from them for a month and a half, so I decided to go home and borrow some money and come back" (R. 7).

5. The evidence thus shows that accused, at Fort Ord, California, absented himself without leave for one day, terminated by apprehension in Cheyenne, Wyoming. He was traveling in uniform to his home to see his sick mother, and to see his brother before the brother went into the Army. As he could not get any money from the Army, the Red Cross, or his home, from which he had not heard for a month and a half, he decided to go home, borrow some money, and come back. The record fails to show that he was dissatisfied with his station, organization, or the service generally. His statement of his destination and explanation of his purpose negative an intent not to return. The Board of Review finds nothing in the absence or attendant circumstances to justify a reasonable inference that accused intended to desert, i.e., intended to quit the service of the United States.

The facts in this case are substantially identical with those in the companion case, CM 223489, Madison, in which the Board of Review, on August 1, 1942, expressed a similar opinion.

In CM 213817, Fairchild, where accused was apprehended after an absence without leave of 22 days, during which he lived openly near his post, the Board of Review stated:

> "* * * The Manual for Courts-Martial states that -
> "'If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent * * *.'
>
> Determination of the question as to whether absence is 'much prolonged' or satisfactorily explained, within the meaning of the quoted clause, must depend upon the circumstances of the absence. An arbitrary yardstick of time may not be applied. The absence must be so prolonged that, considered in the light of proved causes and motives or in the light of a lack of rational explanation, it leads in sound reason to a conclusion that the soldier did not intend to return. The absence in the instant case, so considered, is not of such duration as to justify an inference of intent not to return."

6. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification, as involve findings that accused, at the place alleged, absented himself without proper leave from his organization from April 21, 1942, to April 22, 1942, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three days and forfeiture of two days' pay.

Walter E. Hall Jr. Judge Advocate.

Basil Dawson Judge Advocate.

(Dissent), Judge Advocate.

(18)

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

SEP 18 1942

SPJGH
CM 223517

UNITED STATES	)	SEVENTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Francis E. Warren, Wyoming,
Private MIKE REBRACA	)	June 23, 1942. Dishonorable
(35007091), Company E,	)	discharge (suspended) and con-
128th Infantry.	)	finement for one and one-half ($1\frac{1}{2}$)
	)	years. Disciplinary Barracks.

DISSENTING OPINION by LIPSCOMB, Judge Advocate.

The record of trial in the case of the soldier named above is substantially the same as the record of trial in the case of CM 223489, Madison, and for the reasons expressed in the dissenting opinion in that case, I respectfully dissent in this case, and conclude that the record of trial is legally sufficient to support the findings of guilty of the Charge and the Specification thereunder, and to support the sentence.

Abner E. Lipscomb Judge Advocate.

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

SPJGK
CM 223554

AUG 8 1942

UNITED STATES)	8TH ARMORED DIVISION
)	
v.)	Trial by G. C. M., convened at Fort Knox, Kentucky, July 15, 1942. Dismissal.
)	
Second Lieutenant ROBERT H. THOMAS (0-450497), Infantry, Headquarters Company, 2nd Battalion, 36th Armored Regiment.)	

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and SIMPSON, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: (Nolle prosequi)

Specification 2: In that 2nd Lieut. Robert H. Thomas, Hq. Co., 2nd Bn., 36th Armd. Regt., being indebted to Kamargo Furniture Co., 132 Court St., Watertown, N. Y., in the sum of Fifty-one dollars and thirty-five cents ($51.35), for furniture, which amount became due and payable on or about February 1, 1942, did, at Fort Knox, Ky., from February 1, 1942 to June 29, 1942, dishonorably fail and neglect to pay said debt.

Specification 3: In that 2nd Lieut. Robert H. Thomas, Hq. Co., 2nd Bn., 36th Armd. Regt., being indebted to Officers' Club, Fort Knox, Ky., in the sum of Fourteen Dollars ($14.00), for sundry items, which amount became due and payable on or about May 1, 1942, did, at Fort Knox, Ky., from May 1, 1942, to

June 29, 1942, dishonorably fail and neglect to pay said debt.

Specification 4: In that 2nd Lieut. Robert H. Thomas, Hq. Co., 2nd Bn., 36th Armd. Regt., being indebted to Post Signal Officer, Fort Knox, Ky., in the sum of Eight Dollars and Eighty-Five cents ($8.85), for sundry items, which amount became due and payable on or about June 1, 1942, did, at Fort Knox, Ky., from June 1, 1942 to June 29, 1942, dishonorably fail and neglect to pay said debt.

Specification 5: In that 2nd Lieut. Robert H. Thomas, Hq. Co., 2nd Bn., 36th Armd. Regt., being indebted to Miss Clarise Bickett, c/o Post Exchange, Fort Knox, Ky., in the sum of Thirteen Dollars ($13.00), for sundry items, which amount became due and payable, on or about April 1, 1942, did, at Fort Knox, Ky., from April 1, 1942, to June 29, 1942, dishonorably fail and neglect to pay said debt.

Specification 6: In that 2nd Lieut. Robert H. Thomas, Hq. Co., 2nd Bn., 36th Armd. Regt., being indebted to J. W. Loevenhart and Co., Louisville, Ky., in the sum of Three Hundred and Twelve Dollars ($312.00), for wearing apparel, which amount became due and payable, on or about October 1, 1941, did, at Fort Knox, Ky., from October 1, 1941 to June 29, 1942, dishonorably fail and neglect to pay said debt.

Specification 7: In that 2nd Lieut. Robert H. Thomas, Hq. Co., 2nd Bn., 36th Armd. Regt., being indebted to Officers' Mess, Pine Camp, N. Y., in the sum of One Dollar and Seventy Cents ($1.70), for meals thereat consumed amounting to One Dollar and Fifty Cents ($1.50), and a chit amounting to Twenty Cents ($0.20), which amount became due and payable, on or about May 1, 1942, did, at Fort Knox, Ky., from May 1, 1942 to June 29, 1942, dishonorably fail and neglect to pay said debt.

Specification 8: In that 2nd Lieut. Robert H. Thomas, Hq. Co., 2nd Bn., 36th Armd. Regt., being indebted

to J. W. Loevenhart, Louisville, Ky., in the sum of Five Dollars ($5.00), as a personal loan, which amount became due on or about September 30, 1941, did, at Fort Knox, Ky., from September 30, 1941 to June 29, 1942, dishonorably fail and neglect to pay said debt.

Specification 9: In that 2nd Lieut. Robert H. Thomas, Hq. Co., 2nd Bn., 36th Armd. Regt., being indebted to Friedman and Co., Louisville, Ky., in the sum of Fifteen Dollars and Twenty-Five Cents ($15.25), for wearing apparel, which amount became due on or about October 1, 1941, did, at Fort Knox, Ky., from October 1, 1941, to June 29, 1942, dishonorably fail and neglect to pay said debt.

Specification 10: In that 2nd Lieut. Robert H. Thomas, Hq. Co., 2nd Bn., 36th Armd. Regt., being indebted to Rodes-Rapier Co., Louisville, Ky., in the sum of One Hundred Eleven Dollars and Thirty-Three Cents ($111.33), for wearing apparel, which amount became due on or about October 1, 1941, did, at Fort Knox, Ky., from October 1, 1941, to June 29, 1942, dishonorably fail and neglect to pay said debt.

Specification 11: In that 2nd Lieut. Robert H. Thomas, Hq. Co., 2nd Bn., 36th Armd. Regt., being indebted to Woodruff Hotel, Watertown, N. Y., in the sum of One Hundred Forty Dollars ($140.00), for sundry items, which amount became due on or about December 16, 1941, did, at Fort Knox, Ky., from December 16, 1941, to June 29, 1942, dishonorably fail and neglect to pay said debt.

Specification 12: In that 2nd Lieut. Robert H. Thomas, Hq. Co., 2nd Bn., 36th Armd. Regt., having on or about September 15, 1941, become indebted to J. W. Loevenhart, Louisville, Ky., in the sum of Five Dollars ($5.00) for personal expenditures, and having failed without due cause to liquidate said indebtedness, and having on or about September 15, 1941, promised said J. W. Loevenhart that he would on or about September 30, 1941 settle such indebtedness in full, did, without due cause, at Fort Knox, Ky., on or about September 30, 1941, fail, dishon-

orably, to keep said promise.

Specification 13: In that 2nd Lieut. Robert H. Thomas, Hq. Co., 2nd Bn., 36th Armd. Regt., being indebted to the Post Exchange, Fort Knox, Ky., in the sum of Eighty Dollars ($80.00), for sundry items, which amount became due and payable on or about June 1, 1942, did, at Fort Knox, Ky., from June 1, to June 29, 1942, dishonorably fail and neglect to pay said debt.

Specification 14: In that 2nd Lieut. Robert H. Thomas, Hq. Co., 2nd Bn., 36th Armd. Regt., did, at Fort Knox, Ky., on or about June 12, 1942, with intent to deceive Commanding Officer, 36th Armd. Regt., officially report to the said Commanding Officer that he was indebted in the sum of Five Hundred Fifty-Two Dollars and Eight Cents ($552.08), which report was known by the said 2nd Lieut. Robert H. Thomas to be untrue in that at that time he was indebted in the sum of Seven Hundred Fifty Two Dollars and Forty Eight Cents ($752.48).

Specification 15: (Nolle prosequi)

A nolle prosequi was entered with respect to Specifications 1 and 15 of the Charge. Accused pleaded guilty to and was found guilty of the Charge and Specifications 2 to 14 thereunder, inclusive. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial, including in his action the following:

"Pursuant to Article of War 48 the order directing execution of the sentence is withheld."

The record of trial has been treated as if forwarded for action under Article of War 48.

3. Under Specifications 2 to 11, inclusive, and Specification 13 accused was found guilty of dishonorable failures and neglects, up to

June 29, 1942, to pay debts as follows:

Spec.	Creditor	Date payment fell due	Amount
2	Kamargo Furniture Co.	Feb. 1, 1942	$ 51.35
3	Officers' Club, Ft. Knox	May 1, 1942	14.00
4	Signal Officer, Ft. Knox	June 1, 1942	8.85
5	Clarise Bickett	Apr. 1, 1942	13.00
6	J. W. Loevenhart & Co.	Oct. 1, 1941	312.00
7	Officers' Mess, Pine Camp	May 1, 1942	1.70
8	J. W. Loevenhart	Sept. 30, 1941	5.00
9	Friedman Company	Oct. 1, 1941	15.25
10	Rodes-Rapier Co.	Oct. 1, 1941	111.33
11	Woodruff Hotel	Dec. 16, 1941	140.00
13	Post Exchange, Ft. Knox	June 1, 1942	80.00
		Total-	$ 752.48

Under Specification 12 he was found guilty of dishonorable failure to keep a specific promise to pay the debt of $5 owing to J. W. Loevenhart. Under Specification 14 he was found guilty of making a false official report that his total indebtedness was $552.08 when in fact, as he knew, the total was $752.48.

The only evidence introduced was a written stipulation (R. 9; Ex. 1) in which it was agreed that the allegations of Specifications 2 to 14, inclusive, were true and in which certain specific facts relating to Specifications 5, 6, 10 and 14 were set forth.

As to Specification 5 it was stipulated that in the presence of two other officers accused falsely denied that he was indebted to Clarise Bickett (par. 5, Stip.).

As to Specification 6 the stipulation, together with attached correspondence and a statement of account, shows that between September 18, 1941, and September 27, 1941, just prior to his graduation from an officers' candidate school at Fort Knox, Kentucky, accused purchased on credit from J. W. Loevenhart & Co., Louisville, Kentucky, civilian and uniform clothing and accessories at prices aggregating $312, and agreed to make payments on account at the rate of $50 per month. Accused did not make any payment prior to July 5, 1942. Several letters requesting payment were sent to accused and on November 27, 1941, a complaint of nonpayment was made by the creditor by letter to the commanding officer,

Pine Camp, New York, where accused was stationed. On January 30, 1942, accused wrote a letter to the creditor wherein accused falsely asserted that he had forwarded to the concern two $50 payments (pars. 2, 3, Exs. A-E, Stip.).

Concerning Specification 10 the stipulation shows that between September 27, 1941, and October 2, 1941, accused purchased on credit from the Rodes-Rapier Company, Louisville, Kentucky, clothing and accessories at prices aggregating $111.33, and did not thereafter make any payment on account. Between May 13 and June 15, 1942, he repeatedly declined to accept from the mails a registered letter from the creditor relating to the account (par. 4, Exs. F-H, Stip.).

As to Specification 14 the stipulation shows that on June 12, 1942, the commanding officer, 36th Armored Regiment, addressed to accused, a member of that regiment, an official indorsement requiring accused to submit a report embodying a complete and accurate list of all his debts incurred following his entry on active duty and remaining unpaid. On the same day accused submitted by indorsement to the regimental commander a list of four items of indebtednesses aggregating $551.83. His total debts at that time exceeded the amount reported by about $200 (par. 6, Exs. I-J, Stip.).

Accused did not testify or make an unsworn statement.

4. The findings of guilty are supported by the pleas of guilty. There is nothing in the stipulation inconsistent with the pleas of guilty.

5. War Department records show that accused is 25 years of age. He is a high school graduate. He served as an enlisted man from June 29, 1935, to June 28, 1938; from July 11, 1938, to October 2, 1939; and from January 21, 1941, to September 30, 1941. He was a member of the Regular Army Reserve from October 2, 1939, to August 24, 1940. He graduated from the Armored Force Officers' Candidate School, Fort Knox, Kentucky, and was commissioned a second lieutenant, Army of the United States, on September 30, 1941. He was ordered to active duty on October 1, 1941.

While serving as an enlisted man he was convicted of unlawfully driving away an automobile, the property of an officer, without the consent of the owner, on November 18, 1938, and was sentenced to

confinement at hard labor for one month and forfeiture of $14. In May, 1942, a delinquent commissary account in the amount of $1.30 owing by him was made the subject of official correspondence. The account was paid on May 22, 1942.

On July 27, 1935, the director of the Federal Bureau of Investigation reported to the War Department that accused had been arrested by the sheriff's office of Duncan, Oklahoma, on August 28, 1934, on a charge of petty larceny. Disposition of the case was not reported.

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

Robert H. Hoane, Judge Advocate.
James H. Baugh, Judge Advocate.
Gordon Simpson, Judge Advocate.

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

SPJGK
CM 223574

AUG 1 1942

UNITED STATES)	93RD INFANTRY DIVISION
)	
v.)	Trial by G. C. M., convened at
)	Fort Huachuca, Arizona, June
Private JAMES ROWE)	30-July 1, 1942. To be hanged
(34204378), Company A,)	by the neck until dead.
318th Engineer Battalion.)	

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and SIMPSON, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that James Rowe, Private, Company "A" 318th Engineer Battalion, did, at Fort Huachuca, Arizona, on or about June 9, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Joseph Shields, Private, Company "A", 318th Engineer Battalion, 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 of previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all members of the court present concurring in the findings of guilty and in the sentence (R. 74). The reviewing authority approved the sentence and forwarded the record of trial, stating that "pursuant to Article of War 50½" the order directing execution of the sentence was withheld. The record has been treated as if forwarded for action under Article of War 48.

3. The accused, the deceased, and all witnesses mentioned by name herein were members of Company A, 318th Engineer Battalion (colored), stationed at Fort Huachuca, Arizona. The uncontradicted evidence, including the testimony of the accused who was sworn and testified in his own behalf, shows that the accused did, at Fort Huachuca, Arizona, on June 9, 1942, at about 7:55 p.m., (R. 4) stab Private Joseph Shields with a pocket knife in the left side of the neck just behind the angle of the jaw (R. 39, 59), partially severing the common carotid artery and causing the death of Shields from hemorrhage about fifteen minutes thereafter (R. 4, 8; Ex. A). A medical officer who saw the wound testified that it was "about a centimeter long and very deep" and that "it would have taken a great amount of force" to inflict it with a sharp pointed instrument (R. 8). Shields was of athletic build and weighed about 180 pounds (R. 54). Accused testified that he weighed 144 pounds when he entered the Army (on May 2, 1942) (R. 66) and that Shields was "a way bigger" than accused (R. 67).

On the day in question some cigarettes belonging to Private Thomas Rose had been wrongfully taken from the barracks of the company while the men were at drill (R. 53). Shields was latrine orderly during the day (R. 54). At about 7:30 p.m., in front of the company barracks and directly across the street from the 318th Engineer Battalion dispensary, Shields walked past a group of men which included Rose, Private Harry N. Reed, Private Harry Roach and accused. Accused remarked that Shields had cigarettes and made related remarks suggesting the possibility that Shields had stolen the cigarettes belonging to Rose (R. 9, 18, 53, 58). Shields turned about, walked up to accused and admonished him against

> "making any statements like that about cigarettes, about me, it will make the fellows around here think I am a thief" (R. 54).

Shields asserted his innocence of any wrongdoing in connection with the disappearance of the cigarettes (R. 18, 19). Reed testified that Shields appeared at this time to be "pretty mad" (R. 13), but Roach testified that Shields did not appear to be angry (R. 22). Roach intervened with some placating statements. Warned that he might get in trouble Shields exclaimed, "To Hell with the guard-house" but later said,

> "Forget about it, I don't want him to signify no more that somebody stole his cigarettes, if he signifies that again, he will see what happens" (R. 10).

Rose testified that he believed Shields made "a motion with his hands, as though he was bawling Private Rowe out" (R. 54). The "argument" stopped, accused sat down on a sawhorse and Shields walked about nine paces away and sat down alone on another sawhorse (R. 10, 18, 19). Reed and Roach testified that shortly thereafter, within one to ten minutes (R. 10, 19), accused left the scene and walked "around in front of the Day Room" (R. 10).

Accused returned to the scene in or near the day room of the barracks at about 7:55 p.m., from ten to twenty-five minutes after the dispute had terminated (R. 4, 14, 19, 55), walked up to Shields who was still seated on the sawhorse or on a "mop rack" (R. 27) and stopped within two feet or less in front of Shields. Accused had his hands in his pockets (R. 11, 24, 33) and renewed the discussion concerning the cigarettes. What then transpired was related by an eyewitness, Private Richard L. Page, who was standing about four feet from accused (R. 25), as follows:

> "I heard Shields tell Rowe, 'I don't want nobody to accuse me of nothing he didn't see me do,' and Rowe told Shields, 'You want to whip my ass,' and Shields said, 'Man, forget about it,' and Rowe kept saying, 'You want to whip my ass,' and Shields said, 'What are you going to do about it'" (R. 28).

The concluding remark by Shields was made in a louder tone than he had used before (R. 28). Witness testified that Shields remained sitting with his hands on the sawhorse and made no movement of any kind (R. 27) except that he "started to lean forward, he was sitting straight up" (R. 28). As the last remark by Shields was uttered (R. 27), accused drew his right hand from his pocket, holding an open knife, and "all in one motion" (R. 26) stabbed Shields in the neck on the left side (R. 26, 27). Another eyewitness to the assault, Private Benjamin H. Peterson, who was sitting on the sawhorse beside and within "arm's reach" of Shields, after testifying that Shields was seated when stabbed and had made no threats, gestures or movements (R. 29, 42), related the occurrence as follows:

> "The only thing is they were talking there a while and Private Shields said, 'Forget about it,' and they were talking there for a while longer, and Private Shields said, 'What are you going to do about it?' and when he got the last word out, he was stabbed" (R. 39).

Peterson also testified that Shields told accused "a couple of times", with rising inflection "as if he wanted him to leave him alone" (R. 38), to "forget about it" (R. 37). Shields further raised his voice when he asked accused "What are you going to do about it" (R. 42). Witness looked at both Shields and accused (R. 38, 39) but did not see anything to cause him to anticipate serious trouble (R. 41). Witness turned his head away and "before I looked back again the blood was flying" (R. 38). Blood spurted on witness' legs and shoulder (R. 39), and witness then saw accused stepping back from Shields, with an open knife in his hand, the point of the blade down and with the sharp edge of the blade nearest his body (R. 38). Reed testified that he saw accused and Shields after the return of accused to the scene and observed that the two were talking together while standing (R. 11, 14). Witness did not hear any threats by Shields and did not see him make any motions toward accused (R. 11, 12). Witness thought it was "just another argument" and turned away (R. 16). He did not see the assault but heard a "scuffle", turned about and saw accused with the knife in his hand and saw Shields on his feet staggering (R. 14, 15). Witness thought the knife was of medium size, an "ordinary knife" which was "possibly longer than my finger" (R. 15).

Following the assault accused was heard to say, "I done what I wanted to, I am satisfied" (R. 21). After making this remark accused walked away a few feet, closed his knife and walked toward the company orderly room (R. 33). Shields was taken to the dispensary (R. 15, 21), thence to the station hospital, where he died at about 8:10 p.m. (R. 58; Ex. A).

Sergeant Roosevelt McCloud and 1st Sergeant Ruby L. Bennett each testified that he saw and talked to accused, near the company orderly room, soon after the assault (R. 43, 49). McCloud stated that upon seeing accused witness "ran up and asked him what had happened". Accused replied:

> "a soldier had accused him of taking cigarettes and he didn't want to bear the name of a thief

> for stealing cigarettes, and I asked him what he did, and he replied, 'I cut the soldier,' and I said 'Whereabouts?' and he said, I don't know, but I tried to kill him'" (R. 44).

Bennett stated that as he approached the orderly room accused walked toward him and gave Bennett a closed knife bearing blood stains. Bennett asked him what he had done and accused replied that "a boy came down to whip him" and that accused "tried his best to kill him". Accused made the statement "like he meant it" (R. 49).

Accused testified that in the course of the first controversy Shields told him, "I will knock your teeth down your throat" and that accused stated that he did not intend to insinuate that Shields had stolen the cigarettes (R. 58). Accused did not leave the scene but remained seated near Shields (R. 59, 64). After a few minutes had passed (R. 59) - "it wasn't so awful long" (R. 64), accused and Shields had further words in which Shields,

> "told me he didn't like the remarks I made and I told him I thought he had forgot about those cigarettes, that I wasn't insinuating he stole the cigarettes, and he jumped up to hit me, and I cut him" (R. 59).

Concerning the second exchange of words and assault accused testified further that Shields said,

> "'I don't like what you said about those cigarettes,' and I said, 'I thought you had forgot about the cigarettes,' I said, 'I didn't accuse you of stealing the cigarettes, it is not enough to fight about, and I don't want you to jump on me about that,' and he said 'I don't like it,' and I said, 'It ain't any use for you to whip me about that,' and when I said that, I don't know what got into the fellow, but all of a sudden he got up and grabbed at me, and I cut him; I got the knife out of my pocket and cut him" (R. 61).

He testified that the second dispute "didn't last any time, only just a

few words" (R. 60), and that during the dispute Shields "got up and started to me and I got up about the same time he did" (R. 64). Accused did not run away because he believed Shields would attack him in any case and because accused had not said anything which should have prompted a fight (R. 60). Shields seized accused "in the collar" with his left hand and drew back his other hand to strike accused (R. 62). In self-defense, to prevent the expected blow (R. 60, 62, 63), accused, at this point, drew his knife from his pocket, opened the knife by using his left hand and struck at Shields (R. 61, 72). Accused "didn't have any certain place in mind to cut him" (R. 61). Accused testified that Peterson, who stated that he was sitting close to Shields at the time of the assault, "wasn't no where around there. There wasn't no one but me and Private Shields around there" (R. 66). Accused had previously used a knife in fights and knew how to use one "in a case of that kind" (R. 63). Although Shields was considerably the larger man accused was not afraid of him (R. 67). The knife used was an ordinary pocket knife with a blade about two inches long. The blade stayed partly open at all times but accused had not manipulated it into this condition (R. 70, 71). The knife was received in evidence to be withdrawn at the close of the trial (R. 69; Ex. B). Accused did not intend to kill Shields. After the assault accused did not talk to anyone other than 1st Sergeant Bennett. When he saw Bennett accused gave him the knife and told him he had been in a fight and had cut the soldier (R. 60).

4. It is undisputed that at the place and time alleged, without legal justification, accused stabbed Shields with a knife and thereby killed him.

The stabbing followed disputes between the two. There can be no doubt that the first dispute was precipitated by remarks of accused suggesting that Shields may have stolen another soldier's cigarettes. This Shields resented. The dispute was composed and quiet was restored. All of the prosecution evidence was to the effect that after the first dispute accused left the scene, returned later, sought out Shields and, with a knife in or near his hand in readiness for instant use, renewed the dispute. The first exchange of words commenced at about 7:30 p.m. Shields was not stabbed until about 7:55 p.m. A considerable period thus intervened between the first dispute and the renewal and it is clear that ample time was afforded for the subsidence of whatever heat of passion the first dispute may have aroused. There was adequate time for reflection and recovery by accused of his composure.

While Shields was seated and with no provocation other than the disputes and the final query by Shields, "What are you going to do about

it?" accused assaulted Shields by striking him with great force with the deadly point of a knife. The blow reached a vulnerable spot at which it was, to all appearances, aimed. The eyewitnesses were positive that Shields had made no threatening gestures toward accused prior to the assault. One witness who did not see the actual assault testified that Shields was standing just before he was stabbed but the witnesses who were nearest and who closely observed the assault were positive that Shields remained seated. The statements by accused immediately following the stabbing that, "I done what I wanted to, I am satisfied", and that he tried to kill Shields, were admissions which, together with all the other circumstances, evidenced an aggressively wicked mind and a deliberate and inexcusable plan to kill.

In his testimony accused denied any intent to kill Shields and, in effect, denied that he made statements evidencing such intent. His denials are entitled to no credence in the face of the uncontradicted proof of what he did and the testimony of credible witnesses as to what he said. Malice is, moreover, presumed from the use of the deadly weapon (par. 112a, M.C.M.). Although a pocket knife may not inherently be a deadly weapon it becomes one when so used that it is likely to cause death or serious bodily injury (Wharton's Criminal Law, 11th Ed., sec. 850). Where such a weapon is used in a manner likely to, and does cause death, the law presumes malice from the act.

The assertion by accused that immediately prior to the stabbing Shields arose and while standing seized accused by the collar for the apparent purpose of striking him with his fist, was not wholly consistent with accused's contention that he struck Shields when the latter "jumped up to hit me", and was in essence contrary, in any case, to all the disinterested testimony. Accused's statement that he tried to placate Shields by disavowing any insinuation that Shields had stolen the cigarettes was at variance with the other witnesses and with his own declaration to McCloud, soon after the assault, that Shields had charged accused with being the thief. His assertions that Shields threatened to knock his teeth down his throat and that accused and Shields were the only persons present at the scene cannot, in the light of the positive statements of the other witnesses, be accepted as accurate. Taken as a whole the testimony of accused, in so far as it is suggestive of a theory that he acted in self-defense, is quite unworthy of belief. Even were the testimony of accused in this particular accepted as true, he did not state facts which would constitute a legal excuse for the killing. No danger to accused more serious than might result from a fist fight was claimed. He testified

that he was not afraid. He had previously used knives in fights. He made no effort to retreat. As stated in paragraph 148a of the Manual for Courts-Martial:

> "To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty ***."

In the opinion of the Board of Review the evidence as a whole leaves no doubt that accused was the persistent aggressor and that he suddenly and unexpectedly attacked Shields without any adequate provocation or necessity of self-defense and with preconceived design. The record establishes beyond reasonable doubt that the homicide was committed by accused with malice aforethought, willfully, deliberately, unlawfully and with premeditation, as alleged. This was murder in violation of Article of War 92.

5. The defense offered in evidence testimony as to the contents of W.D.A.G.O. Form 20 (Soldier's Qualification Card) relating to Private Benjamin H. Peterson, for the purpose of showing "the comparative status of these men by their Classification Test records with a view to the weight that will have upon their credibility". An objection to the offer was sustained (R. 73). Although the contents of the form were not described it may be assumed that they may have included remarks indicative of a comparatively low intelligence rating in Peterson's case. Expert testimony bearing upon the powers of observation and memory of the witness might have been competent for the purposes of impeachment, but it does not appear that the contents of the form were of this expert quality and no predicate for admission of the offered testimony was otherwise laid. No error was committed. The weight to be given Peterson's testimony was a matter to be determined by the court upon observing and hearing him testify. He was examined and cross-examined

at length. There is nothing in the record which indicates that he is of subnormal intelligence or otherwise reflects adversely on his credibility.

6. The charge sheet shows that accused is 36 years of age and that he was inducted into the military service at Camp Blanding, Florida, on May 2, 1942.

7. The court was legally constituted and had jurisdiction of the person and offense 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 sentence and to warrant confirmation of the sentence. The death penalty is authorized upon conviction of violation of Article of War 92.

Robert E. Hawes, Judge Advocate.
James H Baugh, Judge Advocate.
Gordon Simpson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., AUG 21 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private James Rowe (34204378), Company A, 318th Engineer Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Accused murdered a fellow soldier by deliberately, viciously and without warning plunging a knife blade in the victim's neck while the victim was peaceably seated on a bench at his barracks. Accused had previously provoked a dispute in the course of which the victim had, in effect, demanded retraction of slanderous remarks by accused. After a cooling period of about half an hour accused renewed the dispute despite efforts by the victim to placate him. The victim was larger than accused but made no threatening movement toward accused. Immediately after the assault accused expressed satisfaction with his act and declared that he had intended to kill. At the trial he contended that he struck with the knife to prevent the victim striking accused with his fist. This contention was at variance with overwhelming direct and circumstantial evidence to the contrary. I find no extenuating or mitigating circumstances and accordingly recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

WAR DEPARTMENT
Services of Supply
IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

Board of Review

CM 223648

AUG 5 1942

UNITED STATES v. Private VINCENT A. NUGENT (32009238), Company C, 4th Reconnaissance Battalion	SECOND SERVICE COMMAND SERVICES OF SUPPLY Trial by G.C.M., convened at Fort Jay, New York, June 26, 1942. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence .

[illegible], Judge Advocate.
Chas. L. Cresson, Judge Advocate.
Abner E. Lipscomb, Judge Advocate.

SPJGJ CM 223648 1st Ind.

War Department, SOS, J.A.G.O., 31 1942 - To the Secretary of War.

1. The record of trial and the accompanying papers in the case of Private Vincent A. Nugent (32009238), Company C, 4th Reconnaissance Battalion, together with the opinion of the Board of Review are transmitted herewith pursuant to Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), for the action of the Secretary of War.

2. The opinion of the Board of Review finds that the record is legally sufficient to support the findings as to both Charges and Specification 2 of Charge I and the Specification of Charge II and the sentence. I do not concur in this opinion, but, for reasons hereinafter set forth, I am of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and Specification 2 thereunder as involves a finding of guilty of absence without leave, in violation of Article of War 61, and to support the findings of guilty of Charge II and the Specification thereunder involving failure to obey, in violation of Article of War 96.

3. The accused, now twenty-seven years of age, when thirteen years old suffered an accident wherein he fractured his right foot, lost one toe and part of another, and has sensation in but one toe of that foot. Continuous pain and limited use of his foot contributed to accused being unable to hold a job prior to his entry into the Army. Inducted according to the charge sheet, but having volunteered according to the testimony of accused, on February 26, 1941, he was stationed at Fort Benning, Georgia, and assigned to compass and map work. Transferred to Camp Gordon, Georgia, in November, 1941, and exposed to regular training, he fell out on long marches and could not drill. Accused went absent without leave on March 4, 1942, and traveled by bus to his home in New York City where he "rested up" and voluntarily surrendered at Fort Jay, New York, on March 14, 1942. Released on March 19, 1942, and ordered to return to Camp Gordon, accused failed to obey orders and returned to his home in New York City. When asked why he went home the second time, he testified that he felt it was impossible to carry on. However, accused remained in uniform and on April 12, 1942, voluntarily surrendered in New York City, and testified, "I came back to see what I could do. I was removed from the hospital. I wanted to find what I could do. Whether or not I could do some kind

of duty". A medical officer who examined accused upon surrender recommended his return to his proper station for action on a certificate of disability for discharge because of a defective right foot. The record indicates that the accused was examined by other medical officers who believed he should be discharged for physical disability. The court recommended, as a matter of clemency, that the accused go before a medical board to be discharged for physical disability before approval of the sentence.

4. The evidence taken in its aspect most unfavorable to him shows accused failing to obey orders to return to Camp Gordon and going absent without leave and saying he felt it was impossible to carry on. There is no substantial evidence in this record that accused intended to desert the service. His absence was not prolonged (24 days); he remained in uniform; and he voluntarily surrendered.

The following, from a holding by the Board of Review in a case of alleged desertion in which accused had been absent without leave for twenty-two days, is pertinent:

> "* * * The Manual for Courts-Martial states that:
>
> 'If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent. * * *' (Par. 130a, M.C.M.)
>
> "Determination of the question as to whether an absence is 'much prolonged' or satisfactorily explained, within the meaning of the quoted clause, must depend upon the circumstances of the absence. An arbitrary yardstick of time may not be applied. The absence must be so prolonged that, considered in the light of proved causes and motives or in the light of a lack of rational explanation, it leads in sound reason to a conclusion that the soldier did not intend to return. The absence in the instant case, so considered, is not of such duration as to justify an inference of intent not to return." (CM 213817, Fairchild)

In CM 205916, Williams, accused, who left Fort McArthur, California, on September 6, 1936, and surrendered himself at Fort Hayes, Ohio, 2500 miles away, on September 23, 1936, was found guilty of desertion by the court, the Board of Review said:

"The only evidence introduced by the prosecution shows that accused absented himself without leave from his organization and station at Fort McArthur, California, on September 6, 1936, and remained so absent without leave until he surrendered himself in uniform at Fort Hayes, Ohio.

* * * * *

"In the absence of any other proof, it seems clear that, without regard to accused's explanation the foregoing evidence, showing merely an absence of seventeen days terminated by surrender in uniform at the military post nearest the accused's home, where he must have known he was in danger of apprehension, is in itself, insufficient to establish any intention to abandon entirely the military service.

* * * * *

"* * * The burden of proof to the contrary was upon the prosecution throughout, and inasmuch as it had introduced no evidence inconsistent with the entire innocence of the accused of desertion, it is the opinion of the Board of Review that the evidence of record is legally insufficient to support the finding of guilty of that offense".

There must be substantial evidence of accused's intention not to return to the service.

"The record of trial therefore presents the question of law whether the evidence is legally sufficient to support the findings that accused deserted. Desertion is absence without leave from the service with the concurrent intent not to return thereto. In order to sustain a conviction of desertion there must be substantial evidence tending to show the necessary intent not to return to the service.* * *" (CM 198750, Knouff)

Accused's absence is amply explained by the record, his absence was of relative short duration, distance is not a controlling factor and accused's intention not to desert the service is shown by his statement that he did not intend to desert, and on the contrary, when asked, "Did you come back to this station to obtain an honorable discharge?", accused answered, "I came back to see what I could do. I was removed from the hospital. I wanted to find what I could do. Whether or not I could do some kind of duty". No dissatisfaction with the service was expressed. Accused testified that he liked the Army and wanted to be in it because his father is an old Army man. He did map work and compass work at Fort Benning, but because

of his injured foot couldn't do marches and ordinary duty. There is nothing in the record to rebut the testimony of accused that he didn't intend to desert, that he wanted to carry on in some duty, although because of his foot he could not carry on ordinary duty, and that he didn't report the trouble he had with his foot because he was afraid he would be discharged from the Army. The evidence shows that the foot condition cannot be corrected by an operation, and that a certificate of disability discharge was recommended by a board of officers. The evidence in its entirety shows an inconsistency with guilt of desertion and a consistency with innocence. There is a complete lack of substantial evidence upon which an intent not to return can be inferred. On the contrary, there is ample substantial evidence showing an intent to return.

The record, as to Charge I and Specification 2 thereunder is legally sufficient to support only a finding of guilty of absence without leave from March 19, 1942, to April 12, 1942, in violation of Article of War 61. The maximum punishment listed by paragraph 104c, Manual for Courts-Martial for this offense is two months and twelve days of confinement at hard labor and forfeiture of two-thirds of accused's pay per month for a like period. Upon the finding of guilty as to Charge II and the Specification thereunder of failure to obey, in violation of Article of War 96, the maximum punishment is six months of confinement at hard labor and forfeiture of two-thirds of accused's pay per month for a like period.

5. In the interest of substantial justice, I recommend that only so much of the finding of guilty as to Charge I and Specification 2 thereunder be approved as involves a finding that accused was absent without leave from March 19, 1942, to April 12, 1942, in violation of Article of War 61. As to Charge II and the Specification thereunder, I recommend approval of the finding of guilty of failure to obey, in violation of Article of War 96. I recommend approval of only so much of the sentence as involves confinement at hard labor for six months and the forfeiture of two-thirds of accused's pay per month for a like period.

6. Inclosed are two forms of action prepared for your signature. Draft A will accomplish the approval of the findings and sentence in accordance with my views, and draft B will accomplish the approval of the findings and sentence in accordance with the views of the Board of Review.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

2 Incls.
1 - Draft A-E.O.
2 - Draft B-E.O.

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

(45)

SPJGH
CM 224049

AUG 25 1942

UNITED STATES v. Second Lieutenant LEWIS CLAIRE BURNHAM (0-385309), Army Air Forces.	GULF COAST ARMY AIR FORCES TRAINING CENTER Trial by G.C.M., convened at Lubbock Army Flying School, Lubbock, Texas, July 23, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

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

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

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

Specification 1: (Withdrawn).

Specification 2: In that Second Lieutenant Lewis C. Burnham, Army Air Forces, Lubbock Army Flying School, then and now on active duty as an officer in the Army of the United States, did at Lubbock Army Flying School on or about June 27, 1942, with intent to deceive the Commanding Officer of the Lubbock Army Flying School, officially report to the said Commanding Officer that he made an inspection of the guard posts at 1:30 a.m., on June 27, 1942, which report was known by the said Lewis C. Burnham to be untrue, in that said inspection was not made.

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

Specification 1: In that Second Lieutenant Lewis C.

Burnham, Army Air Forces, Lubbock Army Flying School, then and now on active duty as an officer in the Army of the United States, did on June 27, 1942, after having taken over the duties of the Officer of the Day, wilfully fail to perform the duties of the Officer of the Day by leaving the limits of the Lubbock Army Flying School, Lubbock, Texas, going to the city of Lubbock, Lubbock County, Texas, at 12:01 a.m.

Specification 2: (Withdrawn).

He pleaded not guilty to Specification 2, Charge I, and Charge I, guilty to Specification I, Charge II, and Charge II, and was found guilty of both Charges and Specifications. He was sentenced to be confined at hard labor for a period of two years and to be dismissed the service without honor. The reviewing authority approved only so much of the sentence as provides for dismissal from the service, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence shows that the accused assumed the duties of officer of the day at the Lubbock Army Flying School, Lubbock, Texas, at 11 a.m. on June 26, 1942 (R. 14). On four previous occasions the accused had served as officer of the day and knew the rules and regulations concerning the duties of the assignment (R. 18). The pertinent paragraphs of published orders affecting these duties are as follows:

"4. The O.D. will not leave the limits of the post during his tour of duty.

* * *

"6. The O.D. will make at least one complete guard inspection, including fire station, between dark and midnight, and at least one complete inspection, including fire station, between midnight and dawn.

* * *

"10. The O.D. will fill in and sign the O.D. Report and see that it is delivered to the Security Officer at completion of his tour of duty" (Ex. 3). (This paragraph was later amended verbally to provide that the O.D. would deliver the report to the adjutant instead of the security officer (R. 8).)

On the evening of June 26, 1942, the accused made a complete inspection of the guard. At about 11:45, after finishing his inspection and advising the sergeant of the guard as to how he might be reached by telephone, the accused requested Corporal William F. Putnam to drive him to the city of Lubbock in an official car (R. 20, 28). Corporal Putnam drove

the official car to a place near the Union Bus Station in the city of Lubbock, where the accused left him. After about an hour the accused returned to the car and he and Corporal Putnam started back to the camp. Before leaving the city, however, the accused stopped at an eating place called the Spinning Wheel, and remained there about 45 minutes eating a meal. Two girls then got into the official car and Corporal Putnam drove to a nearby drugstore. At about 1:30 a.m., while the car was parked in front of the drugstore, the accused admitted to the provost marshal that he was the officer of the day, and knew that he should be on the post. The provost marshal advised the accused to get back to the post. Thereupon, Corporal Putnam and the accused left at once and reached the field at about 2 a.m. (R. 20-22, 25).

The following morning at 11 o'clock the accused submitted his report as officer of the day to the assistant post adjutant and was relieved by the new officer of the day. The entire report is as follows:

"HEADQUARTERS
THE AIR CORPS ADVANCED FLYING SCHOOL
LUBBOCK, TEXAS

REPORT FROM OFFICER OF THE DAY

Date 6/26 To date 6/27

"In inspected each guard post including fire station at 9:30 P.M. AND 1:30 A.M.
"Report of anything unusual: Nothing
"Recommendations: None
(sgd.) Lewis Burnham"

As originally submitted, the letters p.m. and a.m. were not included after the figures 9:30 and 1:30. Shortly after the report was submitted, the accused was called in by the assistant post adjutant and informed that the commanding officer directed him to fill in the letters a.m. or p.m. after the figures 9:30 and 1:30 (Ex. 5; R. 14-16, 18).

The corporal of the guard testified that he did not make an inspection with the officer of the day between 12 midnight and 4 a.m. of June 27, and the guards on Posts No. 1, No. 3, No. 8, No. 9, No. 10, and No. 11 testified that they did not see the accused during that time (R. 29, 35, 37, 30-31, 33-34, 32, 36). In addition, it was stipulated that the accused did not make an inspection between 4 a.m. and 8 a.m. of June 27, 1942 (R. 38). In a statement made prior to the trial, the accused admitted that a walk which he had taken about the post after 2 a.m. was insufficient to warrant the making of a statement that he had inspected the guard posts at that time (R. 40).

4. The accused testified that on June 27, 1942, at about 2 a.m. he returned to the guardhouse from a visit in the city of Lubbock. After ascertaining that all was quiet and that no calls had been made for him, he drove to the bachelor officers' quarters. On the way there he passed the fire station, but since it appeared to be quiet he did not stop. After arriving at the bachelors' quarters he decided to make an inspection of the guard. He thereupon walked about the field and observed several of the guards on their posts. He assumed that he inspected about one-fourth of the posts. After this walk he returned to his quarters and went to bed (R. 58-65). The accused testified that as officer of the day he had very definitely satisfied himself that the post was entirely secure and that there was nothing wrong with the functioning of the guard. Furthermore, he testified that at the time he turned in the certificate (Ex. 5), he did not know that he had stated specifically that he had inspected each and every guard post (R. 65).

5. Since the accused pleaded guilty to Charge II and Specification 1 thereunder, and the uncontradicted evidence established the offense as therein charged, the only question for determination is whether the accused did -

> "* * * on or about June 27, 1942, with intent to deceive the Commanding Officer of the Lubbock Army Flying School, officially report to the said Commanding Officer that he made an inspection of the guard posts at 1:30 a.m., on June 27, 1942, * * *,"

as alleged in Specification 2, Charge I.

The evidence shows that the accused was in the city of Lubbock at 1:30 a.m. on June 27, 1942, and that he did not make an inspection of the guard at that time. Furthermore, the evidence shows that the accused did not make an inspection of each guard post at any time between 12 midnight and 8 a.m. of June 27, 1942. It necessarily follows that the statement of accused that he had inspected the guard at 1:30 a.m. was false.

Although the written report was not addressed to the commanding officer and was not delivered by the accused to him in person, judicial notice may be taken of the fact that such a report, when delivered to the post adjutant or his assistant, is designed to inform the commanding officer that the duties of the officer of the day have been faithfully performed. Knowledge of this fact is elementary among all officers.

Further proof that this report was made by the accused to his commanding officer is presented by the evidence showing that when the report was first delivered to the assistant adjutant the letters a.m. and p.m. were omitted after the figures 9:30 and 1:30, and that the accused, when he was called in by the assistant post adjutant and informed that it was the instruction of the commanding officer that he fill in a.m. and p.m. after those figures, completed the report by the insertion of the letters p.m. after 9:30 and a.m. after 1:30. These facts show that the false claim concerning an inspection at 1:30 a.m. was made with a knowledge that the report was officially designed for the commanding officer and with an intent to deceive him, as alleged in the Specification. The making of such a false representation concerning an important and official duty is clearly conduct unbecoming an officer and a gentleman within the intent and meaning of the 95th Article of War.

In the case of First Lieutenant Hauptman (CM 217098), a case involving a false entry of the date of an officer's departure on leave, the Board of Review in expressing the opinion that such conduct violated the 95th Article of War, made the following statement:

> "* * * The intent to deceive the commanding general is patent since the false statements of the accused were made while he was being formally questioned about the very acts involved in the statements. Such conduct on the part of the accused in an official capacity, in dishonoring the accused as an officer, seriously compromises his character and standing as a gentleman and is in violation of the 95th Article of War" (Winthrop's Laws and Precedents, Reprint, 1920, p. 713).

The Manual for Courts-Martial, 1928 (par. 151), in presenting examples of conduct considered as unbecoming an officer and a gentleman, in violation of the 95th Article of War, lists "Knowingly making a false official statement; * * *".

6. The accused is 26 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed second lieutenant, Infantry, Army of the United States, November 3, 1939; transferred to Inactive Reserve, Officers' Reserve Corps, because physically disqualified, September 16, 1940; appointed second lieutenant, Infantry, Army of the United States, to date from November 3, 1939, December 30, 1940; extended active duty, August 22, 1941.

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

[illegible], Judge Advocate.

Chas. L. Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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

SPJGK
CM 224100

[illegible] 1942

UNITED STATES v. Second Lieutenant MAX E. HUTCHINS (0-427319), Air Corps.	GULF COAST ARMY AIR FORCES TRAINING CENTER Trial by G. C. M., convened at Randolph Field, Texas, July 24, 1942. Dismissal and confinement for fifteen (15) years.

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and SIMPSON, Judge Advocates.

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

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

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

Specification: In that Second Lieutenant Max E. Hutchins, Army Air Forces, did in Bexar County, Texas, on or about June 25th, 1942, with intent to commit a felony, viz, rape, commit an assault upon Norma Lorene Smith, by wilfully and feloniously, by the use of force and threats and against her will attempt to have carnal knowledge with the said Norma Lorene Smith.

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

Specification 1: In that Second Lieutenant Max E. Hutchins, A.A.F., Randolph Field, Texas, did at Bexar County, Texas, on or about June 20th, 1942, with intent to defraud wrongfully and unlawfully make and utter to George A. Schuwirth, San

Antonio, Texas, a certain check in words and figures as follows, to wit:

SAN ANTONIO, TEXAS, 6-20- 1942 No.___
NATIONAL BANK OF FT. SAM HOUSTON
at San Antonio
PAY TO THE
ORDER OF Cash $10.00
NO
ten and 100 Dollars
Randolph Field
B.O.Q., P.B. 845 LT. MAX E. HUTCHINS

and by means thereof did fraudulently obtain from George A. Schuwirth, the sum of $10.00, he, the said Second Lieutenant Max E. Hutchins, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of said check.

Specification 2: (Nolle prosequi)

Specification 3: In that Second Lieutenant Max E. Hutchins, A.A.F., Randolph Field, Texas, did in Bexar County, Texas, on or about May 26th, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Koronado Kourts, Bexar County, Texas, a certain check in words and figures as follows: to wit:

SAN ANTONIO, TEXAS, 5/26 1942 No. ___
NATIONAL BANK OF FT. SAM HOUSTON
at San Antonio
PAY TO THE
ORDER OF Cash $10.00
NO
ten and 100 Dollars
Randolph Field, Texas
B.O.Q. LT. MAX E. HUTCHINS

and by means thereof did fraudulently obtain

from Koronado Kourts, Bexar County, Texas, the sum of $10.00, he, the said Second Lieutenant Max E. Hutchins, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of said check.

Specification 4: (Nolle prosequi)

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

Specification 1: In that Second Lieutenant Max E. Hutchins, A.A.F., Randolph Field, Texas, did at Alamo Heights, Texas, on or about June 8th, 1942, with intent to defraud, wrongfully and unlawfully make and utter to James J. Montanio, San Antonio, Texas, a certain check in words and figures as follows, to wit:

Documents Attached	BROADWAY NATIONAL BANK of Alamo Heights	
	SAN ANTONIO, TEXAS	6/8 1942
Pay To The Order Of	Cash	$10.00
	NO	
	Ten and100	Dollars
Randolph Field, Texas		
B.O.Q.	LT. MAX E. HUTCHINS	

and by means thereof did fraudulently obtain from James J. Montanio, the sum of $10.00, he, the said Second Lieutenant Max E. Hutchins, then well knowing that he did not have and not intending that he should have sufficient funds in the Broadway National Bank of Alamo Heights, San Antonio, Texas, for the payment of said check.

Specification 2: In that Second Lieutenant Max E. Hutchins, A.A.F., Randolph Field, Texas, did at San Antonio, Texas, on or about June 17th, 1942, with intent to defraud wrongfully and unlawfully make and utter to P. H. Cauthorn, San Antonio,

Texas, a certain check in words and figures as follows, to wit:

NO._____

SAN ANTONIO, TEXAS, 6/17 1942

Pay To The
Order Of Cash $10.00

ten and NO/100 Dollars

To The NATIONAL BANK OF
FORT SAM HOUSTON
at San Antonio
SAN ANTONIO, TEXAS
B.O.Q. Randolph Field LT. MAX E. HUTCHINS

and by means thereof did fraudulently obtain from P. H. Cauthorn, the sum of $10.00, he, the said Second Lieutenant Max E. Hutchins, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of said check.

Specification 3: In that Second Lieutenant Max E. Hutchins, A.A.F., Randolph Field, Texas, did at San Antonio, Texas, on or about June 5th, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Gunter Hotel, San Antonio, Texas, a certain check in words and figures as follows, to wit:

SAN ANTONIO, TEXAS, 6-5 1942 NO._____
NATIONAL BANK OF FORT SAM HOUSTON
Pay To The
Order Of Gunter Hotel $20.00

twenty and NO/100 Dollars

Randolph Field, Texas
B.O.Q. PB 845 LT. M. E. HUTCHINS

and by means thereof did fraudulently obtain from the Gunter Hotel, the sum of $20.00, he, the said Second Lieutenant Max E. Hutchins, then well knowing that he did not have and not intending that he should have

sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of said check.

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

Specification: In that Second Lieutenant Max E. Hutchins, AAF, Randolph Field, Texas, being indebted to the Randolph Field Officers' Mess in the sum of $54.00 for services rendered, which amount became due and payable on April 10, 1942, did at Randolph Field, Texas, on April 10, 1942, and subsequent to April 10, 1942, dishonorably fail and neglect to pay the said debt.

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

Specification 1: In that Second Lieutenant Max E. Hutchins, AAF, Randolph Field, Texas, did at Austin, Texas, on or about May 20, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Stephen F. Austin Hotel, Austin, Texas, a certain check in words and figures as follows, to wit:

San Antonio, Texas 5/20 1942
NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio
Pay to the order of — Stephen F. Austin $10.00
Ten and no/100 Dollars
Randolph Field, Texas
B.O.Q. LT. MAX E. HUTCHINS

and by means thereof did fraudulently obtain from the Stephen F. Austin Hotel the sum of $10.00, he, the said Second Lieutenant Max E. Hutchins, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of said check.

Specification 2: In that Second Lieutenant Max E. Hutchins, AAF, Randolph Field, Texas, did at Austin, Texas, on or

about May 21, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Stephen F. Austin Hotel, Austin, Texas, a certain check in words and figures as follows, to wit:

San Antonio, Texas 5/21 1942
NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio
Pay to the order of — Stephen F. Austin $20.00
Twenty and no/100 Dollars
Randolph Field, Texas
B.O.Q. Lt. M. E. Hutchins

and by means thereof did fraudulently obtain from the Stephen F. Austin Hotel the sum of $20.00, he, the said Second Lieutenant Max E. Hutchins, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of said check.

A nolle prosequi was entered with respect to Specifications 2 and 4, Charge II. Accused pleaded guilty to Additional Charge I and its Specification, and not guilty to the remaining Charges and Specifications. He was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to "be dishonorably dismissed the service", to forfeit all pay and allowances due or to become due and to be confined at hard labor for fifteen years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence relating to Charge I and its Specification, alleging an assault with intent to rape, is substantially as follows:

Between 4 and 5 p.m., June 25, 1942, accused, who was on duty at Randolph Field, Texas, went to the home of Norma Lorene Smith, an unmarried 16-year-old orphan girl living with her aunt and uncle in South San Antonio, Texas (R. 36, 37, 42). Accused had met this girl in the latter part of May, 1942, at "Prince's drive-in" in San Antonio, Texas (R. 36). It was a "chance meeting" (R. 43), accused having invited Miss Smith and her cousin, a Miss Roberts, to join

accused and a third young lady in an automobile in which accused and the third young lady were sitting. On a later date, at the same place, Miss Smith had introduced accused to her "folks". On June 6 and 19, at the same place, accused had asked the girl for evening engagements but she had declined. He had seen her casually at other times, usually at Prince's drive-in (R. 36, 43, 44), where Miss Roberts was employed (R. 43). From their first meeting Miss Smith addressed accused as "Max" (R. 45).

When accused came to her home on June 25, the girl invited him in and again introduced him to her "folks", including her uncle and aunt. Miss Roberts was present. Accused asked all present to "go down for a coke" but the older people declined. At about 5:30 p.m., accused, Miss Smith and Miss Roberts went in accused's car, a two-door Oldsmobile coupe, to "Megg's, on Nogalitos". They stayed at this place for about half an hour. While there accused produced a pint bottle of whiskey (R. 45, 47) and "mixed two drinks". He drank one and Miss Smith and Miss Roberts together drank the other (R. 37, 45). From Megg's the three went to Prince's drive-in. At the latter place accused went to a nearby automobile, introduced himself to an occupant, a Lieutenant Swan whom he had not apparently previously known (R. 46), and brought Lieutenant Swan to accused's car where the two joined the girls and talked with them (R. 37, 46). Lieutenant Swan produced a bottle containing rum, from which he drank. Accused had three drinks of whiskey mixed with ice and other contents in beer glasses. Each of the girls had a glass of the mixed drink (R. 37, 45). At about 11 p.m., accused, Miss Smith and Miss Roberts left Prince's drive-in and went to the "Victory Club" for dancing (R. 37), Lieutenant Swan agreeing to meet them at the latter place at about 11:30 p.m. (R. 37, 46). At Lieutenant Swan's request accused took the rum bottle with him. At the Victory Club accused "had one drink". Lieutenant Swan appeared at about 11:45 p.m., and asked for liquor but accused said the supply was exhausted. The four left the Victory Club in search of liquor but failed in their search (R. 38, 47). At about 12:30 a.m. (R. 51) the party separated, Miss Roberts going with Lieutenant Swan and another couple in his car. Miss Smith asked accused to take her home and the two drove away in accused's car (R. 38, 48).

Miss Smith testified that while at Megg's accused asked her to marry him, and that he repeated the proposal at Prince's drive-in

and at the Victory Club (R. 53). When the party arrived at the Victory Club, while accused and Miss Smith were in the front seat of the car and the other two were in the rear seat, accused kissed Miss Smith twice. He had not kissed her previously. She did not "fight him" (R. 48) for "he had acted the perfect gentleman before" (R. 50). She danced with accused once at the Victory Club (R. 37). She did not believe he was drunk (R. 49).

When accused and Miss Smith left the vicinity of the Victory Club in accused's car accused drove toward the girl's home, but on reaching the street on which she lived drove by it. She told him that he had passed her street (R. 38) but accused looked at her, laughed and drove on. She kicked his foot, attempting to knock it off the accelerator. He remarked that if she repeated this act "he'd wreck the car" (R. 38, 49). In response to a question as to where he was going he said, "Down the road a piece". They proceeded along the highway for some little distance. Accused said that a car was following and thereupon stopped and let the car pass, remarking "I guess I fooled them". He later turned off the highway and came to a stop but, apparently finding that he was in a driveway to a house, turned and drove on. The girl asked him to take her home but he "merely looked at" her (R. 38). He then turned into a dirt road on which he drove for about half a mile, the girl repeating her request that accused take her home. Accused finally stopped the car and asked the girl to kiss him. She replied, "Why should I?". In explanation of her refusal she testified:

> "I'm not in the habit of going around with men asking me to marry them the first time and I didn't approve of it" (R. 49).

Miss Smith testified that upon her refusal to kiss accused,

> "He put his fingers around my throat and threw me down on the seat and he ripped my pants off and I asked him what in the world he was doing and he said he was 'going to rape' me. And I asked him if he knew what he was doing. And he said: 'Yes', he said. 'You may have been a virgin before tonight but', he said, 'you won't be after tonight because I'm going to fuck the hell out of you'" (R. 38, 39).

She testified that a struggle ensued, she on the seat of the car on her back with her head under the steering wheel and accused "on top of" her (R. 39, 51). She "kicked him in his groin" (R. 52). He tore the strip of her underwear passing between her legs and tried to tear the upper part of her dress (R. 41, 51). In the course of the struggle he told her that if he did not "get what he wanted he was going to knock me out or kill me but he was going to get it" (R. 50). His trousers were completely unbuttoned and his sexual organs were exposed (R. 39, 40). She pressed the horn button with her left elbow. He told her to stop sounding the horn and when she did not comply he struck her in the eye. She screamed repeatedly. She testified:

> "When I screamed, he'd knock me and hit my head against the car door and choke me and I had bumps on the back of my head *** and he hit me on my left eye, threw my head over and threw it against the car door and then I also screamed every time. When I'd scream, he'd choke me, and I'd honk the horn and he'd hit me and he said: 'Be quiet, I hear someone coming'. And as he said that I let out another scream. I had worked to get the car door open before that because every time he'd hit my head on it, it hurt and so I finally got, or managed to get the car door open behind me and it had one of those lights that when you open the door the lights turn on and the light was on and the first thing I knew somebody walked up and said: 'What's going on here?'" (R. 39).

Accused did not have intercourse with her (R. 52).

Mr. Tom Edwards, a farmer, testified that he heard the horn and screams and went to the scene, armed with a loaded shotgun (R. 54). He stated:

> "I looked through the left window of the car. There was a lady 'n a man there and he was laying on top of her, one leg all bare up there, and she was jes a fussin' and a fightin' and a kickin' and he had her by the throat ***. The girl was layin' on the cushion, here, kinda under the steerin' wheel 'n one leg up and she was a 'kickin' 'n a 'hollerin' and screamin' 'n groanin' and looked like her shoulders was off the cushion about four inches and he was a'chokin' her" (R. 54).

Edwards shouted and presented his weapon. Accused straightened up and the girl rolled or fell from the car, but "lit on her feet" and stepped behind Edwards. She appeared to be dazed and said, in a "mumbled" tone, "This man's tryin' to rape me. I'm only 16 years old". Accused said, "I thought it was all right the way you was actin' that night, all night". She said, "You're a damn liar". Accused then aked her whether she wished accused or Edwards to take her home and she asked Edwards to do so (R. 55). Edwards took her to his home, thence to her home. He observed that her eye and jaw were swollen, that she had some blood on her chest and that her hair and dress were disarranged (R. 56). She "moaned and groaned and cried" while she was being taken home,

> "it was just 's if you choked a calf down with a rope and the calf was gettin' wind, you'd say the calf was beginnin' to get his wind" (R. 57).

A medical officer examined Miss Smith at about 5 p.m., June 26. At this time her left eye was completely closed with a blood clot. Contusions about her neck, head, left thigh and left groin were found. She also had small lacerations on one hand and on her lip (R. 60).

Accused did not testify or make an unsworn statement. His counsel made a statement in his behalf in which it was said that accused was 23 years of age, that he came from a small town of Arkansas, and that he had attended junior college and college on football scholarships. Upon being commissioned in the Air Corps in February, 1942, he found his position a glamorous one. Counsel stated:

> "The glamor of it all, the fact that the girls ... thought there were certain liberties attached to his rank and doubtless he had heard stories from others as to their activities with the fairer sex and their accomplishments ***. It may be that he, on one occasion, has gone astray; that he has tried to take, by force, something which should never be gotten that way. But, the fact of the matter is that he had been drinking — it was shown the girl involved had been drinking. She had, at least, gone a little way towards him, towards permitting, at least, some amorous solicitation on his part, at least had permitted some without any remonstrance" (R. 62, 63)

The defense introduced in evidence a report of a board of medical officers appointed to examine and determine the sanity of accused. The report, dated July 20, 1942, shows findings of a

> "Constitutional psychopathic state, inadequate personality type"

but that accused was sane and "accountable for his acts" (R. 7; Def. Ex. A).

4. The uncontradicted evidence thus shows that at the place and time alleged in the Specification, Charge I, accused committed an assault upon Norma Lorene Smith by seizing and striking her and otherwise seeking to overpower her. Intent to rape, that is, to have carnal knowledge of her by force and without her consent, is plainly inferable from the brutality with which he acted and from his express declaration of his unlawful purpose and of his determination to accomplish his purpose. All of the elements of the offense of assault with intent to rape, in violation of Article of War 93, as charged, are established beyond reasonable doubt.

Accused had been drinking but there is no evidence that he was drunk at the time of the assault. There is nothing in the record of trial to suggest that he was incapable of entertaining the specific intent involved in his offense. The report of the board of medical officers indicates that accused is a constitutional psychopath of inadequate personality type. The report states, however, that accused is sane and responsible for his acts. There is nothing in the evidence suggestive of insanity or of mental irresponsibility.

5. The evidence as to Charge II and Specifications 1 and 3 thereunder, Charge III and its Specifications, and Additional Charge II and its Specifications, relating to fraudulent check transactions, may be summarized as follows:

Between May 20, 1942, and June 20, 1942, at or near San Antonio, Texas, or at Austin, Texas, accused drew and uttered a series of his checks on the National Bank of Fort Sam Houston at San Antonio, Texas, obtaining, in each case, from the person to whom the check was uttered, the amount of the check in the form of cash, merchandise or services. The dates and amounts of the checks, the payees and the

persons to whom the checks were uttered, were as follows:

Date	Amount	Payee	Uttered to	
May 20, 1942	$10	Stephen F. Austin	Stephen F. Austin Hotel, Austin, Texas.	(Pros.Exs.2,4 (Spec.1,Add. Chg.II)
May 21, 1942	$20	Stephen F. Austin	Stephen F. Austin Hotel, Austin, Texas.	(Pros.Exs.2,5) (Spec.2,Add. Chg.II)
May 26, 1942	$10	Cash	Koronado Kourts, San Antonio, Texas.	(R.12,13;Pros. Ex. 6) (Spec.3, Chg.II)
June 5, 1942	$20	Gunter Hotel	Gunter Hotel, San Antonio, Texas.	(R.15;Pros.Ex. 7) (Spec.3, Chg.III)
June 17, 1942	$10	Cash	Paul H. Cauthorn, San Antonio, Texas.	(R.22;Pros.Ex. 9)(Spec.2, Chg.III)
June 20, 1942	$10	Cash	George Schuwirth, San Antonio, Texas.	(R.23;Pros.Ex. 10)(Spec. 1, Chg.II)

On May 20 accused's account with the National Bank of Fort Sam Houston was overdrawn $6.31. The overdraft continued and, through service charges for handling returned checks, had increased to $10.31 on June 5 (R. 25, 26). Because of the overdrafts the account was closed by the bank on June 17 (R. 28). All of the checks listed above were returned unpaid by the drawee bank on account of insufficient funds on deposit to pay them (R. 26-28). The check made to the Gunter Hotel was returned marked "Pay Check Not In" (R. 27). On June 6 and 16 the Stephen F. Austin Hotel addressed letters to accused advising him that the checks given to that concern had been returned unpaid (Pros. Ex. 2). On June 18 accused wrote to the hotel, stating:

> "My Army pay check is held up and it will be a few days before I get it. They send the check

> directly to bank so I thought it was already there. I will wire you the money as soon as possible" (Ex. 4 of Ex. 2).

About June 24 Schuwirth, after unsuccessfully attempting to reach accused by telephone, reported to the Provost Marshal, Randolph Field, that the check given to Schuwirth by accused had been returned unpaid (R. 24).

On June 8, 1942, at Alamo Heights, Texas, accused drew and uttered to James J. Montanio his check for $10 on the Broadway National Bank of Alamo Heights, San Antonio, Texas, payable to cash, and received from Montanio the proceeds of the check in cash or in cash and merchandise (R. 17; Ex. 8). On February 25, 1942, accused had opened a checking account with this bank with a deposit of $300 borrowed from the bank. Deposits of $241.57, $100 and $216.83 were made in the account on April 30, May 3 and June 1, respectively. No further deposit was made. The last deposit was in the form of a Government check. $200 was withdrawn on June 2. On June 8 the balance in the account was $4.60 (R. 19-21). The check in question was presented to the drawee bank but payment was refused because of insufficient funds (R. 20). After payment of the check had been refused Montanio addressed to accused a letter advising him as to what had occurred, but Montanio did not receive a reply (R. 17).

None of the checks described above had been paid at the time of the trial (R. 13, 15-17, 22, 24; Ex. 2). On a date not stated the executive officer, Randolph Field, discussed with accused the issuance of the worthless checks. Accused stated to him:

> "that the reason for his signing these bad checks was due to the fact that after he had a few drinks he simply lost control of himself and wrote checks and he didn't 'remember writing them' or words to that effect. I asked him, at that time, how many checks he had out that he remembered signing and he said about two hundred and fifty or three hundred dollars' worth. I told him I was not going to report the matter to the Post Commander and give him an opportunity to make these checks good. Then I gave him a lecture concerning the indebtedness of young officers" (R. 32-33).

In the course of his statement in behalf of accused the defense counsel, in reference to accused's conduct in the check transactions, said:

> "In February of 1942, he received his wings and commission as a Second Lieutenant in the United States Army. He never had any money of consequence. He had lived a normal, quiet, sedentary life with his football activities. Suddenly found himself in the glamorous position of a Second Lieutenant in the Army of the United States, a pilot of air planes with an income of over two hundred dollars a month which was far more than any money he had ever dreamt of — without doubt, more money than his father had ever made. He found himself in a position where, he thought, that there was no end to his finances — that he could just write checks and he didn't know that two hundred dollars could go so fast as it did because he had never seen that much money in his life" (R. 62).

6. Again, the uncontradicted evidence shows that at the places and times alleged in Specifications 1 and 3, Charge II, and in the Specifications under Charge III and Additional Charge II, accused made and uttered the checks described in the Specifications and obtained the proceeds of the checks in cash or its equivalent in merchandise or services. When the checks were presented to the drawee banks there were insufficient funds on deposit to pay them. Accused's account with the National Bank of Fort Sam Houston was overdrawn when the first of the series of checks drawn on that institution, a check for $10, was made and uttered. No further deposit was made but further checks on this bank, aggregating $70, were drawn and uttered. An amount approximating accused's monthly pay was deposited in another bank, the Broadway National Bank of Alamo Heights, on June 1. It does not appear that accused had any income other than his pay. His balance with the Broadway National Bank of Alamo Heights had been reduced to $4.60 prior to June 8, when he made and uttered the check to Montanio drawn on that bank. Accused admitted to the post executive officer that he had uttered worthless checks in amounts aggregating $250 or $300. Accused's knowledge of the state of his accounts is implicit in the circumstances under which the checks were made and uttered and in his admissions. There can be no real doubt that in making and uttering the checks accused knew that he did not have and did not intend

to have funds on deposit sufficient to pay them and that his acts in the premises were fraudulent, as charged.

The fraudulent making and uttering and the fraudulent obtaining of the proceeds of the checks described in Specifications 1 and 3, Charge II, were dishonorable acts violative of Article of War 95. The similar acts charged in the Specifications under Charge III and Additional Charge II, were violative of Article of War 96. All the Specifications relating to worthless checks were substantially of the same form, and no cogent reason appears for the pleader to have laid part under Article of War 95 and part under Article of War 96. Inasmuch, however, as the acts charged constituted offenses under either article, no legal impropriety resulted.

7. The evidence relating to Additional Charge I and its Specification, alleging dishonorable failure and neglect to pay a debt owing to the Randolph Field Officers' Mess, in violation of Article of War 95, shows that accused's account with the mess in the amount of $54, covering the month of March, 1942, became delinquent on April 10, 1942. Bills were sent to accused but the account was not paid (R. 31). When the executive officer of Randolph Field discussed the worthless checks with accused, the indebtedness to the mess was also discussed (R. 33). The evidence, together with the pleas of guilty, fully supports the findings of guilty of this Charge and Specification.

8. Following the discussion between the executive officer of Randolph Field, Texas, and accused, above described, reclassification proceedings were instituted with respect to accused. Accused thereafter was afforded an opportunity to resign from the Army. He submitted his resignation about June 18, 1942, effective 10 days after submission. In so far as appears no action by the War Department was taken on the resignation.

9. War Department records show that accused is 23 years of age. He graduated from Northeast Junior College, Monroe, Louisiana, and attended Hardin-Simmons College, Abilene, Texas, for one year. He graduated from the Advanced Flying School, Kelly Field, Texas, on February 13, 1942, and was on that date appointed a second lieutenant, Air Corps Reserve. He entered upon active duty on February 14, 1942.

10. There is attached to the record of trial a recommendation by the defense counsel, Major Alvin P. Hammett, Air Corps, that the dismissal and so much of the confinement as is in excess of one year be suspended. The recommendation is based upon statements by counsel that accused is relatively young; that he turned over his pay check for June, 1942, and that he intended to turn over his check for July, for application to his debts; that he is a well qualified pilot, having been assigned as an instructor at Randolph Field; that he was drunk at the time of the assault upon Miss Smith; that his drunkenness had continued for more than a week prior to the assault; and that his use of intoxicants had been induced by worry over his finances.

11. There is attached to the record of trial a letter from Honorable David D. Terry, House of Representatives, dated August 21, 1942, inclosing a copy of a communication from Mr. Rolland A. Bradley of Conway, Arkansas, dated August 8, 1942, requesting clemency. Mr. Bradley's letter contains statements that accused comes of a respected and law-abiding family and that his judgment may have been affected by conditions resulting from his successful athletic activities in high school and college. He suggests that the term of confinement be reduced to a term of from three to five years. Mr. Terry requests consideration of Mr. Bradley's suggestion as to reduction of the sentence to confinement.

12. Three letters from individuals attesting to the previous good reputation of accused in his home community, have been forwarded by the Staff Judge Advocate, Gulf Coast Army Air Forces Training Center, at the request of accused, and are attached to the record of trial.

13. Inclusion of the word "dishonorably" in that part of the sentence relating to dismissal, was superfluous (CM 218520, Coone).

14. The court was legally constituted. 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 of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized for conviction of violation of Articles of War 93

and 96. Confinement in a penitentiary is authorized by Article of War 42 for the offense of assault with intent to rape, alleged under Charge I and its Specification, this offense being recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 276 of the Criminal Code of the United States.

Richard H. Stevens, Judge Advocate.

James H. Baugh, Judge Advocate.

Harold [illegible], Judge Advocate.

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

SPJGH
CM 224109

SEP 9 1942

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UNITED STATES	SIXTH SERVICE COMMAND
v.	Trial by G.C.M., convened at Fort Sheridan, Illinois, July 24, 1942. Dishonorable discharge (suspended) and confinement for one (1) year.
Private VIRGUS MEDLOCK (36020106), 41st Engineers.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE: Violation of the 69th Article of War.

Specification: In that Private Virgus Medlock, 41st Engineers, having been duly placed in confinement in the Post Guardhouse at Fort Bragg, North Carolina, on or about March 4, 1942, did, at Fort Bragg, North Carolina, on or about April 20, 1942, escape from said confinement before he was set at liberty by his proper authority.

He pleaded guilty to the Specification of the Charge except the words "from said confinement", substituting therefor the words, "while properly away from said confinement without guard on an assigned duty", and guilty to the Charge. He was found guilty as charged. Evidence of seven previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence, ordered it executed, but suspended

the dishonorable discharge and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 187, Headquarters Sixth Service Command, August 6, 1942.

3. The only evidence introduced by the prosecution was an extract copy of the guard report of the 41st Engineers, Fort Bragg, North Carolina, showing the entry on April 20, 1942, "Pris. Medlock, Virgus AWOL" (R. 6; Ex. 1), and the testimony of two Chicago, Illinois, police officers that accused came into the station and surrendered on a date, variously given as April 20, May 13 and May 15, 1942. The accused stated to the police that he was absent without leave and overdue about ten days.

4. For the defense the accused testified and thereafter made an unsworn statement through his counsel. The accused, a prisoner in the post guardhouse, Fort Bragg, was sent by Sergeant Singleton down to the lake with another prisoner to wash some pails, and bring them back to the guardhouse. At the lake accused was about 50 or 75 yards from the guardhouse and out of sight of any sentry. He left because his mother wrote that she wanted him home because there had been serious trouble. He turned himself in later in Chicago with the intention of going back to Fort Bragg.

5. In CM 191766, Gilchrest, accused left the stockade to go to the mess hall, 150 or 200 yards away to get some ice for the prisoners, failed to return, and was tried under Article of War 69. The Board of Review said:

> "Although the facts in the present case may show the commission by accused of some other offense, they do not establish the offense charged, that is, escape from confinement, for the physical restraint which is the essence of confinement did not exist."

In CM 201493, Smith, accused, a general prisoner, detailed to work within the limits of the reservation without armed guard, left the guardhouse on a work assignment and failed to return. He was tried under Article of War 69. The Board of Review said:

> "* * *There is no evidence in the record of trial to

> show that accused broke away from any physical restraint. On the contrary, the record shows that he was detailed to work outside of the guardhouse without an armed guard and left his post without authority. The proof fails to establish an essential element of the offense charged, that is, breaking away from some physical restraint. CM 191766, Gilchrest; 191693, Boudreau; 191403, Evans".

In CM 219725, Lowry, accused, a prisoner, was sent to the hospital for treatment in an open ward where there was no sentry and no restraint, and left the hospital without permission. The Board of Review said:

> "* * * Confinement imports some physical restraint, and the definition of escape in violation of Article of War 69, as laid down in paragraph 139 b, Manual for Courts-Martial, 1928, is intended to exclude the case of a prisoner 'paroled to work in certain limits' who, when not under physical restraint, leaves his place of duty and the station where he is serving his sentence (sec. 1524, p. 754, Dig. Ops. J.A.G., 1912-1930)."

6. The proof offered by the prosecution shows only that accused, a prisoner, absented himself without leave on April 20, 1942, and later surrendered himself to the civil police in Chicago.

The testimony and unsworn statement of accused furnish no proof that accused escaped from confinement. Accused stated that he was sent down to the lake accompanied only by another prisoner to wash some pails and while there, 50 or 75 yards from the guardhouse and out of sight of any sentry, he left and went to his home in Chicago.

The record shows that accused was directed to leave the guardhouse and go to the lake where he was under no physical restraint. Proof of absence without leave does not support a charge of escape from confinement. The proof entirely fails to establish any breaking away from physical restraint, an essential element in the offense charged.

7. Although the evidence shows that accused committed an offense analagous to breach of parole in violation of Article of War 96 (par. 139 a, M.C.M., 1928) he cannot be punished therefor in this case because he has not been charged with such an offense. Breach of parole

is not a lesser included offense under a specification alleging escape from confinement (CM 201493, Smith; CM 191766 Gilchrest; CM 191693, Boudreau; CM 189830, Walcher).

8. The Board of Review is, therefore, of the opinion that the record of trial is not legally sufficient to support the findings of guilty and not legally sufficient to support the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
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Washington, D. C.

AUG 22 1942

UNITED STATES v. Private EDWARD C. COLLOPY (15102196), Attached Unassigned - Company A, 40th Infantry Training Battalion, Camp Croft, South Carolina.	CAMP CROFT, SOUTH CAROLINA Trial by G.C.M., convened at Camp Croft, South Carolina, July 27, 1942. Dishonorable discharge.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

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

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

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

Specification: In that Private Edward C. Collopy, Company "A", Fortieth Infantry Training Battalion, Camp Croft, South Carolina, did, at Camp Croft, South Carolina, on or about June 26, 1942, in the execution of a conspiracy to desert the service of the United States, entered into with Private Thomas J. Atkins, Company "D", Twenty-eighth Infantry Training Battalion, Camp Croft, South Carolina, attempt to desert the service of the United States by furnishing a uniform to Private Atkins, then in Station Hospital, Camp Croft, South Carolina, and did depart therefrom, together, with intent to absent himself without proper leave from his organization in order to shirk important service, to wit, scheduled training as a volunteer paratrooper.

CHARGE II: Violation of the 59th Article of War.

Specification: In that Private Edward C. Collopy, Company "A", Fortieth Infantry Training Battalion, Camp Croft, South Carolina, did, at Camp Croft, South Carolina, on or about June 26, 1942, by furnishing a uniform to Private Thomas J. Atkins, Company "D", Twenty-eighth Infantry Training Battalion, Camp Croft, South Carolina, then in Station Hospital, Camp Croft, South Carolina, knowingly assist Private Atkins to desert the service of the United States at Camp Croft, South Carolina on or about June 26, 1942.

CHARGE III: Violation of the 84th Article of War.

Specification: In that Private Edward C. Collopy, Company "A", Fortieth Infantry Training Battalion, Camp Croft, South Carolina, did, at Spartanburg, South Carolina, on or about June 26, 1942, wrongfully dispose of military clothing by giving to civilians of the value of $11.44 issued for use in the military service of the United States.

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

Specification: In that Private Edward C. Collopy, Company "A", Fortieth Infantry Training Battalion, Camp Croft, South Carolina, did, at Spartanburg, South Carolina, on or about June 26, 1942, without authority, appear in civilian clothing.

The accused pleaded not guilty to all Specifications and Charges. He was found of the Specification, Charge I -

> "'Guilty' except the words 'in order to shirk important service, to wit, scheduled training as a volunteer paratrooper' and substituting therefor, respectively, the words 'permanently' of the excepted words, 'Not Guilty' of the substituted words 'Guilty'",

and guilty of Charge I, and of Charges II, III, and IV, and their respective Specifications. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined

at hard labor for five years. The reviewing authority approved the sentence but in view of the physical disabilities of the accused remitted the confinement and forwarded the record of trial for action under Article of War 50½.

3. The only question requiring consideration is the legal effect of the finding of guilty by exception and substitution of the Specification, Charge I.

That Specification alleges that accused, in the execution of the conspiracy to desert, attempted to desert by departing from his station with intent to shirk important service, to wit, scheduled training as a volunteer paratrooper. The court found accused guilty, excepting the words "in order to shirk important service, to wit, scheduled training as a volunteer paratrooper", substituting therefor the word "permanently".

In order to support a conviction of attempting to desert, it is required, in part, that there be shown an intent at the time to desert by proof that "he then entertained an intent not to return, or the intent to avoid hazardous duty or to shirk important service,, as alleged" (par. 130 b, M.C.M., 1928). The Specification alleges an intent to avoid hazardous duty, whereas the finding has substituted an intent not to return. The Specification alleges a specific intent but the court has found accused guilty of an entirely distinct specific intent and has substituted for the offense alleged a new offense, not a lesser offense included within the offense charged. There is in the Specification no other allegation which would support the specific finding in this case.

Such a variance between the Specification and the finding of guilty is a fatal error in that it finds accused guilty of an offense which is different from and not included in the offense charged. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of the Specification, Charge I, and Charge I.

4. There is no limit of punishment upon conviction of violation of Article of War 59, committed after February 3, 1942 (Executive Order No. 9043, Feb. 3, 1942).

5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the findings of

guilty of Charges II, III, and IV, and the Specifications thereunder, and legally sufficient to support the sentence.

Martin S. Hellz, Judge Advocate.

Charles B. Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

WAR DEPARTMENT
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SPJGH
CM 224142

SEP 4 1942

UNITED STATES v. Second Lieutenant JOHN L. SWEET (O-450513), 35th Armored Regiment.	4th ARMORED DIVISION Trial by G.C.M., convened at Pine Camp, New York, July 28, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

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

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

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

Specification: In that Second Lieutenant John L. Sweet, 35th Armored Regiment, did, without proper leave, absent himself from his organization at Pine Camp, New York, from about 7:15 A.M. June 16, 1942, to about 1:00 P.M. June 16, 1942.

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

Specification: In that Secomd Lieutenant John L. Sweet, 35th Armored Regiment, having been duly placed in arrest in quarters at Pine Camp, New York, on or about June 16, 1942, did, at Pine Camp, New York, on or about June 16, 1942, break his said arrest before he was set at liberty by proper authority.

CHARGE III: Violation of the 85th Article of War.

Specification: In that Second Lieutenant John L. Sweet,

35th Armored Regiment, was, at Pine Camp, New York, on or about June 15, 1942, drunk on duty as a company officer.

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

Specification 1: In that Second Lieutenant John L. Sweet, 35th Armored Regiment, having received a lawful order from his Company Commander, 1st Lieutenant Vincent J. Meyer to "Go to your quarters and be on hand to move out with the Company at 7:15 A.M. tomorrow morning", the said Company Commander, being in the execution of his office, did, at Pine Camp, New York, on or about June 16, 1942, fail to obey the same.

Specification 2: (Nolle Prosequi entered).

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution may be summarized as follows:

Early on the morning of June 15, 1942, the accused came to the office of the Headquarters Company, 35th Armored Regiment, of which he was a junior officer. It was a "working holiday", a day to be off duty if one had no specific duty to perform. The accused requested permission of the company commander, First Lieutenant Vincent J. Meyer, to go to the Finance Office to get a partial payment as the accused was to leave on a cadre in a short time. Lieutenant Meyer gave accused permission and told him to come back as soon as he received the money as the three officers were to hold a council meeting to go over funds. The accused used the car of Lieutenant Meyer that day and returned it in good condition (R. 6,7,9).

The accused was not again seen in the company area until he came into the office between 2:30 and 2:45 p.m., and was there when Lieutenant Meyer came in at about 3 p.m. As the accused appeared to be intoxicated, or under the influence of liquor, Lieutenant Meyer ordered him to go to his quarters at once and be ready for duty at 7:15 the next morning as the company was moving out on a bivouac. The accused did not

complain of any physical ailments at that time. At Lieutenant Meyer's direction, Sergeant J. F. McNeff escorted accused to his quarters and saw him enter the quarters (R. 8, 9, 14).

Lieutenant Meyer expressed the opinion that accused was under the influence of liquor and intoxicated because of his complexion and his glassy eyes, because he seemed rather talkative, and because liquor had affected accused in that way on occasions (R. 9-10). Staff Sergeant E. P. Devany, the acting first sergeant, based his opinion that the accused was apparently under the influence of liquor when accused came in between 2:30 and 2:45 p.m., upon the garbled speech of accused and the fact that accused repeated things over and over and because he smelled liquor on the breath of accused. When a military policeman came in and asked for a man by name, the accused kept repeating that they did not have a man by that name (R. 17-18). Sergeant T. F. Shafer saw accused in the orderly room of Headquarters Company, 35th Armored Regiment, at 3 p.m., June 15, 1942, under the influence of liquor. The breath of accused smelled of liquor and he was mumbling some words in a loud voice (R. 11-12). Sergeant J. F. McNeff based his statement that accused was apparently intoxicated on his actions which were more or less joyful (R. 14-15).

Upon direct examination, Lieutenant Meyer stated that to the best of his knowledge and understanding the accused was on duty when he returned in the afternoon of June 15, 1942. Upon cross-examination in response to the question whether accused when he returned to the company was actually commanding any part of the company or performing any official duty, Lieutenant Meyer replied in the negative and stated that the only duty "we had that day was to go on council duty" and that the council was not held because there were only two of the required three left (R. 22).

The accused was not present for duty at 7:15 a.m., June 16, 1942. He had not been given permission to be absent at that time. Lieutenant Meyer saw him sleeping in his quarters at approximately 11 a.m. The accused was not present in the company area at any time on that day (R. 8, 14, 17).

At the direction of Lieutenant Colonel Sears, commanding officer of the regiment, the adjutant, Captain W. H. Hunt, went to the quarters of accused between 11 a.m. and 12 noon, June 16, 1942, to place accused in arrest. Accused was not in his quarters either just before or just after lunch. Captain Hunt did find accused in his

quarters sitting on his bed at about 1:10 p.m., placed accused in arrest and explained to him that the limits of his arrest were Building OQ 5, in which his quarters were located, with authority to leave three times a day for meals only. Captain Hunt testified that those limits did not include the Officers' Club. Accused appeared to understand his arrest. When Captain Hunt asked if he had any questions, accused said that there were none (R. 19-21).

At about 10 p.m., June 16, 1942, Captain Hunt entered the Officers' Club and saw accused seated in the barroom with another officer and two ladies. Captain Hunt told accused that he should go to his quarters, but accused made no move to go. The accused was apparently sober and understood the order to go to his quarters. When Captain Hunt left and informed Colonel Sears of the facts, Colonel Sears detailed Lieutenant Colonel Mansifled to place accused in his quarters. Captain Hunt and Colonel Mansfield did not find accused in the club nor in his room, but did find him in a coupe outside of OQ 5. Accused got out of the car and went to his room upon the order of Colonel Mansfield (R. 20-21).

4. For the defense the accused testified that on June 15, 1942, he went to the company about 7:15 a.m. and found the other company officers there. It was a "working holiday" and they were going to work on the council on the funds. Accused was on cadre and asked permission of Lieutenant Meyer to go over to the Finance Office to get a partial payment. He borrowed Lieutenant Meyer's car and secured his partial payment. He had a headache when he left the Finance Office and did not feel well on the 16th. As he was told by another officer, also on the cadre, that he was to be a motor maintenance officer, he drove down to the motor park to get some material and forms. Accused did not recall anything after that. He did remember on the 16th Captain Hunt coming into the room while accused was sitting on the edge of his bunk. The accused, in February, had a previous lapse of memory, had a headache, and did not feel well. He was accused of being drunk at that time, but upon examination was found not drunk. He was kept in the hospital 7 days and felt all right when he left (R. 24-26).

Upon cross-examination and upon examination by the court, accused testified that he had not been drunk 24 hours prior to going to the Finance Office nor had anything to drink when he went there. He had been on bivouac with his battalion over the previous week end. Lieutenant Meyer gave him no instructions about returning from the Finance Office except that they were going to hold a council on funds, which he

already knew. He was going down to the motor shed to get any available forms and material for investigations, but does not remember getting any. He thought that he did not go to the motor shed because he did not have any forms around in his room. He did not recall being in the orderly room in the afternoon of the 15th nor did he hear Lieutenant Meyer tell him to return to his quarters. From the time he left the Finance Office up to 3 p.m. he did not know where he was except that he was in his room for awhile. He did not think that he had supper that night and did not recall anything from the time he left the Finance Office until Captain Hunt spoke to him on the 16th. Captain Hunt came in, read the arrest, of which accused remembered a part, and signed it. Accused knew it was the 16th because it seemed to him that he had slept a long while and knew that he was being put in arrest as it was just sinking in on him. He knew that the restriction of his arrest was to his building, and over to the messhall in the OQ area, but did not know that he was not to go into the bar. Accused was in the bar about 9:30 or 10 p.m. with some people who came to see him. He recalls that Captain Hunt ordered him to his quarters, whereupon he sat down again, started to think and then went to his quarters. He did not intentionally disobey Captain Hunt (R. 26-29).

First Lieutenant James A. Taylor, Medical Corps, indentified an original Station Hospital record pertaining to accused, which was received in evidence as Exhibit A. The record showed that when accused was admitted at 6:30 p.m., February 2, 1942, his chief complaint was that he was exhausted, tired out, and in a run-down condition, that he had been tired out physically and mentally for at least a month and was unable to get satisfactory sleep. The record showed that the company commander stated that accused appeared to be intoxicated when he returned to the company on that afternoon, that two regimental medical officers had examined him and declared that he was not intoxicated with alcohol. The final diagnosis upon discharge, February 9th, was "Anaphylaxis - Yellow fever vaccine. 1:00 PM 1/31/42 35th Armd Regt Dispensary - Reaction (Amnesia), moderately severe". The record recited that his amnesia could follow injection of yellow fever vaccine, " a long shot diagnosis". In view of other negative clinical and neuropsychiatric findings, accused was signed out under that diagnosis. Lieutenant Taylor thought that there was no evidence of any mental disorder (R. 29,30; Ex. A).

Lieutenant Taylor stated that amnesia was not a disease but a symptom, a state of forgetfulness or loss of impairment of memory, which may be caused by a severe physical blow, organic disease, by various toxic agents, or by emotional trauma in a susceptible individual. A man who demonstrates hysterical symptoms may have a recurrence through stress or

other causes. He would not necessarily have the outward appearance of intoxication, but could appear confused, not oriented, and not know his name or where he was. Amnesia is a symptom of an emotional state and in any hysterical state one may simulate any type of reaction. He would not diagnose as suffering from amnesia, a person who remembers certain things but forgets certain other things, but would consider it as confusion of thought. He had found cases where the amnesia is imaginary and there is no way to tell except to examine the patient and try to balance those findings with what can be learned of the previous life of the patient (R. 30-35).

5. The Specification, Charge III, alleges that the accused was, on June 15, 1942, drunk on duty as a company officer.

The evidence shows that accused, a junior officer of the Headquarters Company, was drunk in the orderly room of his company between about 2:30 and 3 p.m. on June 15, 1942, in the presence of his commanding officer and three sergeants of this company. They expressed the opinion that accused was under the influence of intoxicating liquor, because of his complexion, his glassy eyes, his garbled and mumbling speech in a loud voice, the fact that he repeated things over and over, his more or less joyful actions, because liquor had affected him in a similar way on occasions, and because his breath smelled of liquor.

Such proof excludes any reasonable doubt that accused was drunk. Although accused stated that he had not been drunk 24 hours prior to going to the Finance Office and denied that he had anything to drink when he went there, the evidence shows that he was at about 3 p.m. at his company office under the influence of intoxicants sufficient sensibly to impair the rational and full exercise of his mental and physical faculties (M.C.M., 1928, par. 145).

The further question is whether accused was drunk on duty as a company officer. The evidence shows that accused went to the company office early in the morning upon a day which was a "working holiday". He asked and received permission of his company commander, Lieutenant Meyer, to go to the Finance Office to get a partial payment as he was to leave on a cadre shortly. Lieutenant Meyer instructed accused to return as soon as he received his money to assist on the council to go over funds. The accused returned to the company orderly room between 2:30 and 2:45 p.m. When Lieutenant Meyer came in about 3 p.m. he ordered accused to go to his quarters at once, because accused appeared intoxicated, and to be ready for duty at 7:15 the next morning as the company was moving out on a bivouac. The accused was thereupon escorted to and entered the building OQ 5, in which he had a room.

In discussing the question of being found drunk on duty, the Manual for Courts-Martial, 1928 (par. 145), states in part:

> "Under this article it is necessary that accused be found to be drunk while actually on duty, but the fact that he became drunk before going on duty while material in extenuation is immaterial on the question of guilt. A person is not found drunk on duty in the sense of this article, 'if he is simply discovered to be drunk when ordered, or otherwise required, to go upon the duty, upon which, because of his condition, he does not enter at all.' (Winthrop.) But the article does apply although the duty may be of a merely preliminary or anticipatory nature, such as attending an inspection by a soldier designated for guard, or an awaiting by a medical officer of a possible call for his services.
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> * * *
>
> "The commanding officer of a post, or of a command, or detachment in the field in the actual exercise of command, is constantly on duty. In the case of other officers, or of enlisted men, the term 'on duty' relates to duties of routine or detail, in garrison or in the field, and does not relate to those periods when, no duty being required of them by orders or regulations, officers and men occupy the status of leisure known to the service as 'off duty.' (See Davis.)"

In the opinion of the Board of Review the record fails to support the allegation that accused was drunk on duty. The company commander stated that the day was a "working holiday", that when the accused returned to the company from the Finance Office the accused did not actually command any part of the company nor perform any official duty, that the only duty accused had that day was to go on "council duty", and that the council was not in fact held.

With respect to Charge III and its Specification, the Board of Review is of the opinion that the record of trial fails to support the finding of guilty of being drunk on duty, in violation of Article of War 85, but does support the lesser included offense of being drunk in station at the time and place alleged, in violation of Article of War 96.

6. The Specification, Charge IV, alleges failure to obey the order of Lieutenant Meyer to go to his quarters and be on hand to move out with

the company at 7:15 a.m., June 16, 1942; and the Specification, Charge I, alleges absence without leave from his organization from about 7:15 a.m. to about 1 p.m., June 16, 1942.

The company commander, at about 3 p.m., June 15, 1942, ordered accused to be ready for duty at 7:15 the next morning as the company was moving out on a bivouac. The accused did go to his quarters escorted by Sergeant McNeff. He was not, however, present with his company at 7:15 a.m. nor at any other time on June 16, 1942. Lieutenant Meyer saw accused asleep in his quarters at about 11 o'clock. After Captain Hunt had been directed to place accused in arrest, he went to the quarters of accused between 11 a.m. and 12 noon, and again after lunch, but failed to find accused. At about 1:10 p.m. Captain Hunt found accused in his room sitting on his bed and placed him in arrest.

Although accused complied with that portion of the order to go to his quarters, he was not on hand to move out at 7:15 a.m., June 16, 1942, and therefore failed to obey the order given him. Accused was absent without leave from his organization for the period stated.

The record, accordingly, supports the findings of guilty of Charge I and Charge IV, and the respective Specifications thereunder.

7. The Specification, Charge II, alleges breach of arrest on June 16, 1942.

The record shows that accused was placed in arrest while in quarters at about 1:10 p.m. on June 16, 1942, by Captain Hunt, upon the instructions of the regimental commander, and was informed that the limits of his arrest were the building OQ 5, in which his room was located, with authority to leave three times a day for meals only. The accused appeared to understand his arrest, stated that he had no questions, and talked coherently. The limits did not include the Officers' Club. At about 10 p.m. that evening accused was sitting in the barroom of the Officers' Club with an officer and two ladies. He had not been given permission to leave his quarters. He failed to comply when Captain Hunt told him to go to his quarters. Shortly thereafter Colonel Mansfield found accused sitting in a coupe outside his quarters. When Colonel Mansfield ordered accused to his room immediately, the accused went to his room.

The record clearly supports the findings of guilty of breach of his arrest.

8. The accused sought to avoid responsibility for the three offenses of absence without leave (Chg. I), and of being drunk on duty (Chg. II),

and of failure to obey (Chg. IV), by his testimony that he recalled nothing from the time he left the Finance Office on June 15, 1942, until Captain Hunt placed him in arrest about 1:10 p.m., June 16, 1942, and that he had a prior attack of amnesia in the previous February, and by the testimony of Lieutenant Taylor, Medical Corps, and the introduction of the hospital record as to the hospitalization of accused at that time. The testimony of accused that he was not responsible for his actions alleged in those Charges is not convincing in view of the proof that accused was intoxicated at about 3 p.m. on June 15th, and particularly in view of the testimony of two sergeants that they smelled liquor on the breath of accused at that time. The only explanation offered by accused as to the breach of arrest (Chg. II), is that he understood that he was restricted to his building and over to the mess hall in the OQ area, but did not know that he was not to go into the bar, an obviously unsatisfactory explanation.

9. The accused is 25 years of age. The records of the Office of The Adjutant show his service as follows:

Enlisted service, private to technical sergeant, Regular Army, June 11, 1936, to September 30, 1941; graduated Officers' Candidate School, Armored Force, and appointed second lieutenant, temporary, Army of the United States, September 30, 1941; extended active duty October 1, 1941.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Charge III and its Specification, in violation of Article of War 85, as involves a finding that the accused was at the time and place alleged guilty of the lesser included offense of being drunk in station, in violation of Article of War 96; legally sufficient to support the findings of guilty of Charges I, II, and IV, and the respective Specifications thereunder; legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of the 61st, 69th, or 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., OCT 12 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John L. Sweet (0-450513), 35th Armored Regiment.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charges I, II, and IV and the respective Specifications thereunder, and legally sufficient to support the sentence and to warrant confirmation of the sentence.

I do not, however, concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge III and its Specification - alleging that accused was found drunk on duty - in violation of Article of War 85, as finds that accused was drunk in station in violation of Article of War 96. It is my opinion that accused was on duty when he reported at the office of his company on the morning of June 15, 1942, and that he was not relieved from a duty status while he went to the Finance Office to attend to a personal matter with the permission of his company commander, who directed him to return as soon as he received his money for a council meeting to go over the company fund. When he returned about 3 p.m. he was intoxicated and his company commander ordered him to his quarters. The council meeting was not held.

3. Following his action upon the record of trial and upon the recommendation of his staff judge advocate, the Commanding General, 4th Armored Division, transferred accused to the Lovell General Hospital, Fort Devens, Massachusetts, for observation and diagnosis of his mental condition. After observation for a period of one month the Disposition Board reported that no disease was found, that accused is physically qualified for full military service, and that he be returned to his status prior to hospitalization. The Commanding Officer, Lovell General Hospital, approved this report.

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

5. Inclosed herewith are a draft of letter for your signature, transmitting the record to the President for his action and a form of Executive action, marked "A", carrying into effect my recommendation above made, confirming the sentence and directing that it be carried

into execution. There is also inclosed a form of Executive action, marked "B", confirming, in accordance with the opinion of the Board of Review, only so much of the findings of guilty of Charge III and its Specification, in violation of Article of War 85, as finds that accused was at the time and place alleged, drunk in station in violation of Article of War 96, confirming the sentence and directing that it be carried into execution.

Myron C. Cramer,
Major General,
The Judge Advocate General.

4 Incls.
Incl.1-Record of trial.
Incl.2-Dft.ltr.for sig.
Sec.of War.
Incl.3-Form of action "A".
Incl.4-Form of action "B".

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

SPJGH
CM 224280

SEP 9 1942

U N I T E D S T A T E S	)	NINTH SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Fort Ord, California, June 11, 12, 13, 15, and 17, 1942. Dismissal and confinement for one (1) year. Disciplinary Barracks.
First Lieutenant WILFRED GARFINKLE (O-371347), Ordnance Department.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

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

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

CHARGE I: Violation of the 83rd Article of War.

Specification 1: In that Wilfred Garfinkle O-371347, 1st Lt., Ordnance, CASC 1962, did at Fort Ord, California, on or about January 15, 1942, willfully suffer one tire of the value of about $17.00, Military property belonging to the United States, to be wrongfully disposed of by allowing one Harold B. Niles to convert said tire to his own use.

Specification 2: In that Wilfred Garfinkle, O-371347, 1st Lt., Ordnance, CASC 1962, did at Fort Ord, California, on or about January 20, 1942, willfully suffer one tire of the value of about $17.00 Military property belonging to the United States, to be wrongfully disposed of by allowing one Harold B. Niles to convert said tire to his own use.

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

Specification: In that Wilfred Garfinkle 0-371347, 1st Lt., Ordnance, CASC 1962, did at Fort Ord, California on or about January 10, 1942 feloniously take, steal and carry away four tires of the value of about $35.00, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to Charges I and II and the Specifications thereunder. He was found guilty of Specifications 1 and 2, Charge I, and of Charge I; guilty of the Specification, Charge II, except the words "on or about January 10th, 1942", substituting therefor "during the period from about January 1, 1942, to about February 10th, 1942", and guilty of Charge II. He was sentenced to be dismissed the service and to be confined at hard labor for one year. The reviewing authority approved only so much of the findings of guilty of Specification 1, Charge I, as involves a finding of guilty of willfully suffering one tire of some value, military property belonging to the United States, to be wrongfully disposed of; only so much of the finding of guilty of Specification 2, Charge I, as involves a finding of guilty of willfully suffering one tire of some value, military property belonging to the United States, to be wrongfully disposed of; only so much of the finding of guilty of the Specification, Charge II, as involves a finding of guilty of the felonious taking, stealing, and carrying away of one tire of the value of about $8.31, property of the United States, furnished and intended for the military service thereof; and the sentence.

3. The evidence shows that the accused, during the period involved in this case, was an assistant to the post ordnance officer at Fort Ord, California (R. 59-60). On one occasion between December 1941, and March 1942, Corporal Boyce Blevins, a driver in charge of a Government truck, reported to the accused that a new spare tire on his Government truck had been removed and an old tire substituted in its place (R. 30-33). Between the dates of March 5 to 10, 1942, Sergeant Alvin Schmoyer made a similar report to the accused concerning the loss of a new spare tire on another Chevrolet panel truck which he drove (R. 25, 26). The accused admitted to the investigating officer that Corporal Blevins reported to him the exchange of one of the tires, that he did not report the matter to the officer accountable for the trucks, and that he took no steps to investigate the matter (R. 50). At the same time the accused also admitted that Harold B. Niles, a former civilian employee of his organization, discussed with him the possibility of exchanging Niles' old tires for new Government

tires. The accused admitted that he made the statement to Niles that -

> "* * * personally it didn't make much difference with me but that they weren't mine and that Lieutenant Hahn was signed with the vehicles.
> "* * * that I wasn't responsible for the tires and couldn't make the swap, but I can't say for him (R. 49-51).

The accused also admitted that the tires on his car came with the car at the time of its purchase.

Harold B. Niles, a former Ordnance Department machinist, testified that he was employed in the Ordnance Department from October 21, 1940, until the latter part of February 1942; that in January 1942, he practically destroyed two tires on his private car while using it on Government business (R. 142); that he asked the accused, who was his superior officer, whether he could exchange his old tires for new ones which were on Government trucks; that in reply the accused told him that he, the accused, had four tires on his private car which he had obtained from 37 mm. gun carriages, which tires the accused showed to Niles (R. 150); that the next evening the accused and Niles removed a spare tire from a truck and put it in Niles' car and substituted one of Niles' tires for the truck tire; that three or four evenings later Niles and the accused went through the same operation in exchanging another of Niles' tires for a tire on one of the Government trucks; that on this second occasion Technical Sergeant William Tubbs came in and talked to him (Niles) and the accused while they were removing the tire from the wheel of a Government truck (R. 152).

The witness further testified that one of these tires was stolen from him and the other was removed by the F.B.I. men from his basement; that he was charged with a felony in the United States Court (R. 159); that while in jail he was visited by Captain Allison J. Haun, the accuser in the present case, and that he told Captain Haun of the connection of the accused with the exchange of his tires for the Government tires; that he pleaded guilty in the Federal Court to taking the tires; and that thereafter he applied for and was granted probation (R. 163).

Staff Sergeant William Tubbs testified that in the early part of January 1942, between 8:30 and 9 in the evening, he entered the shop of the 82nd Ordnance Company to inspect batteries and saw the accused and Niles inflating a tire which they had just mounted on a wheel. There was a panel Chevrolet truck in the garage at that time (R. 193).

The tire which was taken from the home of Harold B. Niles was

introduced in evidence (Ex. C; R. 62). Four Goodrich Silvertown 6-ply tires of the same size and make as those on the 37 mm. gun carriages were taken from the car of the accused (R. 65; Ex. A). Three of these tires had marks or spots on them resembling olive drab paint. In this connection it was shown that many of the tires on gun carriages have olive drab paint marks on them (R. 71). Each of the four tires was valued at $8.31 (R. 82).

First Lieutenant Leslie M. Lincoln testified as a witness for the court that he was on duty at Fort Ord as a motor officer of the 80th Ordnance Company from December 23, 1941, to February 8, 1942, and during that time forty or fifty 37 mm. gun carriages were unloaded at Fort Ord. These gun carriages were put in the Ordnance shop and the compound (R. 262). Some time between January 28, and February 8, 1942, he observed the accused and one or more enlisted men changing a tire from a 37 mm. gun carriage alongside the unloading ramp. The wheel of the carriage with a new tire on it was taken into Warehouse 2033. Lieutenant Lincoln went into the warehouse and saw the accused placing a new tire on a gray wheel which was not an olive drab Government wheel. He asked what was going on and the accused replied to the effect that he was getting himself some tires (R. 270). Lieutenant Lincoln testified that Private Blevins and Sergeant Schmoyer were present at the time (R. 286). Both soldiers testified, however, that they never saw the accused remove a tire from a 37 mm. gun carriage in Warehouse 2033 (R. 275, 281). Later in the day the carriage had a tire on one of its wheels which was far from being new, had about two-thirds of the tread worn off, and was mud-stained (R. 268).

4. The evidence presented by the defense shows that 6-ply Goodrich Silvertown tires were for sale in the vicinity of Salinas, California, on December 1, 1941, when the tire-freezing order went into effect and that two dealers in the vicinity of Salinas were under investigation for selling tires without authority from the rationing board (R. 206). The father of the accused testified that he gave the accused an automobile and that about the first of 1942 he purchased four Goodrich 6-ply tires for his son. He refused to state from whom the purchase was made, on the ground that such a statement might incriminate him (R. 242).

Warrant Officer Reynold L. Reim testified that Captain Haun, the accuser in this case, told him that he, Captain Haun, would get information concerning the stolen tires "* * * out of someone if I have to beat it out of them" (R. 218).

The accused made an unsworn statement that he had become friendly with Niles in a business way at the Presidio of Monterey; that he and Niles were both relieved from duty at the Presidio of Monterey and assigned to duty at Fort Ord, California, on November 1, 1941; that on one occasion Niles remarked to him that he (Niles) wished that he could "swap" his tires for some new ones on Army trucks; and that the accused told Niles that he had no authority to make such an exchange. The accused denied that he allowed Niles to take Government tires or aided Niles in any way. The accused also denied that the tires on his car were Government tires or that he had ever told Niles that he (the accused) procured his tires from gun carriages. The accused stated that on the occasion when Sergeant Tubbs came into the shop and saw him working with a tire, that he was repairing one of his own tires. The accused admitted that he did not tell Captain Haun the truth as to the origin of his tires on his car because he did not want his father involved in an illegal purchase of tires (R. 252-254).

5. Specifications 1 and 2 of Charge I allege that the accused did, on January 15, and on January 20, 1942, respectively, willfully suffer one tire of the value of $17, the property of the United States, to be wrongfully disposed of by allowing Harold B. Niles to convert it to his own use.

The evidence concerning these two Specifications shows that the accused was an assistant to the post ordnance officer at Fort Ord, California, and that between December 1941, and March 1942, he was informed that new spare tires had been removed from two Government trucks under his care, and old tires substituted. The evidence shows further that the accused failed to take any action in reference to the loss of these tires, or to report the matter to his superior officer. The accused admitted that Harold B. Niles, a former civilian employee of his organization, had discussed with him the possibility of such an exchange of tires, but he maintained that he did not give Niles permission to make the suggested exchange and that he had no connection therewith.

On the other hand, Niles, who had confessed in the Federal Court to the taking of the tires, testified that the accused assisted him in removing the two tires from Government trucks and helped him place them in his car. Niles also testified that on one of the occasions, Technical Sergeant William Tubbs talked to him and to the accused while they were removing one of the tires which Niles had taken from the wheel of a Government truck.

This direct testimony of Niles is corroborated by several circumstantial factors. The testimony of Sergeant Tubbs that he saw Niles and

the accused exchanging a tire, corroborates the testimony of Niles that he and the accused were seen by Sergeant Tubbs when in the act of exchanging one of the tires. Then, the fact that the accused failed to report the loss of the tires shows an attitude of mind inconsistent with a faithful discharge of his duties as an ordnance officer and tends as a circumstance to corroborate Niles' testimony. Furthermore, the admission of the accused that Niles had presented to him the suggestion of an exchange of tires, and his reply that he personally had no objection to such an exchange, but that he had no authority to make it, combined with the facts showing the subsequent exchange, are factors which are inconsistent with the innocence of the accused, and tend to corroborate the direct testimony as presented by Niles.

The fact that the tires which were taken by Niles with the sufferance or assistance of the accused were the property of the United States, is shown both by the testimony of Niles and the circumstantial factors surrounding the transaction. Although no direct testimony of the value of the two tires was presented, the evidence shows that the tires were new and the court was warranted, therefore, in taking judicial notice of the fact that they were of some value.

6. The Specification, Charge II, alleges that the accused did "* * * on or about January 10, 1942 feloniously take, steal and carry away four tires of the value of about $35.00, the property of the United States, * * *".

Concerning this Specification, the testimony of Harold B. Niles shows that the accused admitted to Niles that he, the accused, had taken four tires from 37 mm. gun carriages for his private car. This evidence as to the taking of one of the four tires mentioned by Niles, is corroborated by the testimony of Lieutenant Lincoln and by several circumstantial factors. Lieutenant Lincoln testified that he saw the accused take one tire from a 37 mm. gun carriage and carry it into Warehouse 2033, that he went into the warehouse and saw the accused placing a tire on a gray wheel, that when he asked the accused what he was doing, the accused replied that he was getting himself some tires, and that later Lincoln saw an old tire on the 37 mm. gun carriage from which the tire had originally been taken.

The testimony of Niles and Lieutenant Lincoln is corroborated by the fact that the tires on the car of the accused were of the same make and ply as those used on the 37 mm. gun carriage and by the fact that they had marks or spots on them resembling olive drab paint, similar to paint marks on tires used on the gun carriages. Furthermore, when the accused was first questioned concerning the origin of the tires on his car, he stated that they were the original equipment on his car, whereas he later

stated that they were given to him by his father. Although Sergeant Schmoyer and Private Blevins failed to corroborate the testimony of Lieutenant Lincoln that they were present when the tires were changed, the evidence in its entirety is of such probative force as to exclude any reasonable doubt as to the guilt of the accused.

There is some variation in the testimony of the witnesses as to the dates upon which the alleged acts occurred. In view, however, of the fact that the witnesses were not certain as to the exact dates in question, and since considerable time had intervened between the alleged acts and their testimony, such minor discrepancies are not deemed to be material.

7. The Board of Review has given careful consideration to a brief submitted by Myron W. Tilden, of the law firm of Mandl & Tilden, Salinas, California, civilian counsel for the accused, and to a second brief and an oral argument submitted by Richard A. Tilden of Washington, D.C.

8. The accused is 25 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed second lieutenant, Ordnance Department, Army of the United States, August 8, 1938; extended active duty, November 15, 1940; appointed first lieutenant, Ordnance Department, Army of the United States, November 14, 1941.

Four efficiency reports have been rendered upon accused. In two reports covering a period of four months he received a general rating of very satisfactory. In two reports covering a period of nine months he received a general rating of excellent.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal and confinement at hard labor are authorized upon conviction of the 83rd or the 94th Article of War.

Austin S. Hill Jr., Judge Advocate.

Thorsten Sjoberg, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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

SPJGK
CM 224286

SEP 5 1942

UNITED STATES v. Second Lieutenant HERMAN D. HIGHTOWER (O-450192), Cavalry.	76TH INFANTRY DIVISION Trial by G. C. M., convened at Fort George G. Meade, Maryland, August 4, 1942. Dismissal and confinement for one (1) year.

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 2nd Lieutenant Herman D. Hightower, Cavalry, did, at Halethorpe, Maryland, on or about May 23, 1942, with intent to defraud, wrongfully make and utter to Mohr Motor Company, Halethrope, Maryland, a certain check in words and figures as follows, to-wit:

"Lt. Herman D. Hightower No.
Phone Arbutus 707 Baltimore, Md. May 23rd-1942
Pay to the order of Mohr Motor Company $10.00
Dollars
Central National Bank
Junction City, Kansas. Lt H.D.Hightower
Pres."

and by means thereof did fraudulently obtain from the said Mohr Motor Company the sum of $10.00, in cash, he, the said Lt. Hightower, then well knowing that he did not have, and not intending that he should have, sufficient funds in the said Central National Bank for the payment of said check.

Specification 2: *** did, at Halethorpe, Maryland, on or about May 27, 1942, with intent to defraud, wrongfully make and utter to Mohr Motor Company, Halethrope, Maryland, a certain check in words and figures as follows, to-wit:

"Phone Arbutus 707 No.
Baltimore, Md., May 27, 1942
Pay to the order of Mohr Motor Company ___$12.50
Twelve Dollars and fifty cents _____Dollars
Junction City, Kans, Central National Bank
Lt.H.D.Hightower
Pres."

and by means thereof did fraudulently obtain from the said Mohr Motor Company the sum of $12.50 in cash, he, the said Lt. Hightower, then well knowing that he did not have, and not intending that he should have, sufficient funds in the said Central National Bank for the payment of said check.

Specification 3: (Finding of not guilty)

Specification 4: *** did, at or near Fort George G. Meade, Maryland, on or about June 8, 1942, willfully and wrongfully commit an indecent assault upon 2nd Lieutenant Dorothy Louise Brown, Army Nurse Corps, by grasping and fondling her breasts, against her will and without her consent.

Specification 5: *** did, at or near Fort George G. Meade, Maryland, on or about June 8, 1942, wrongfully use the following abusive, threatening and obscene language to 2nd Lieutenant Dorothy Louise Brown, Army Nurse Corps, to-wit: "I'll pull your titty off. You little devil, you aren't going to get me in any jam. I'll choke you to death if you scream again;" or words to that effect.

He pleaded not guilty to the Charge and Specifications. He was found guilty of Specifications 1 and 2 except, in each case, the words "did fraudulently obtain", substituting therefor the words "did wrongfully

obtain", and except the words "with intent to defraud" and "not intending that he should have", of the excepted words, in each case, not guilty, of the substituted words, in each case, guilty, and guilty of Specifications 4 and 5; not guilty of Specification 3; not guilty of the Charge "as to Specifications 1 and 2" but guilty, with respect to these Specifications, of violation of Article of War 96; and guilty of the Charge "as to Specifications 4 and 5". Evidence of one previous conviction for wrongfully kicking an enlisted man and for using abusive and contemptuous language to an enlisted man, in violation of Article of War 96, 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 for action under Article of War 48.

3. The evidence relating to Specifications 1 and 2, alleging the wrongful making and uttering of checks, shows that on May 23, 1942, at Halethorpe, Maryland, accused, stationed at Fort George G. Meade, Maryland, entered the place of business of the Mohr Motor Company and asked Mr. Carl Robert Mohr, of the concern, to cash a check for him. Mohr agreed to do so and accused thereupon made in his own name and uttered to Mohr his check for $10, dated May 23, 1942, payable to the Mohr Motor Company, drawn on the Central National Bank, Junction City, Kansas, with which bank he had an account. Accused obtained from Mohr the cash proceeds of the check. On May 27 accused returned and made and uttered to Mohr a similar check for $12.50, dated May 27, 1942. Mohr also paid accused the amount of this check. (R. 5, 6, 22, 23; Exs. 1, 2) Both checks were deposited but were returned unpaid by the drawee bank (R. 6, 7). The check for $10 was again deposited but was again returned unpaid (R. 6). On April 28, 1942, accused's account had been overdrawn $8.93 and on May 1 a further overdraft of $20 had been paid by the bank. Between May 1 and May 8, 1942, accused had made deposits aggregating $316. No additional deposit was made in May and on May 9 the balance had been reduced to $14.25. On May 11 the account had been debited 25¢, an apparent service charge. On May 15 the balance had been reduced to $1. On May 20 the balance had been reduced, through a service charge, to 75¢. On May 29 the balance was reduced, through two service charges of 25¢ each, to 25¢. A deposit of $50 was made on June 6, but on the same day the balance was reduced, through a withdrawal, to $16.67. (Ex. 4)

After the checks of May 23 and 27 had been uttered but before either had been returned unpaid accused went to the Mohr Motor Company's place of business and told a salesman that he thought the first check would "come back" (R. 6, 26). He suggested that the check be redeposited and expressed the view that it would be paid. Thereupon, as stated, the check was redeposited and returned unpaid a second time (R. 6). Mohr attempted to get in touch with accused and, in apparent response to Mohr's inquiry, accused again called at the Mohr Motor Company's place of business and left a message for Mohr to the effect that accused would take care of the two checks but that he was returning to Kansas (R. 7, 27). Mohr then went to Fort George G. Meade and later, on the basis of information obtained there as to accused's address, wrote to the Cavalry Replacement Center at Fort Riley, Kansas, about the checks (R. 7). Mohr received payment in full about July 1 (R. 7, 8).

Accused testified that when he gave the two checks to the Mohr Motor Company he did not know what his balance was and did not know he did not have sufficient money in the bank to pay the checks. The bank had paid small overdrafts by accused in April and May and had never refused finally to pay any check which overdrew his account (R. 23). After the checks to the Mohr Motor Company were cashed accused cashed a small check at a service station which was returned unpaid because of insufficient funds (R. 23, 26). Upon hearing of the refusal of payment of the service station check accused went to the Mohr Motor Company and told a representative,

> "that I sent one check off and it came back and these might come back too, and if they did tell Mr. Mohr to send them back to the bank and they will make them good and he said he would" (R. 26).

Accused was ordered from Fort Meade to Fort Riley, Kansas, about June 12, and he believed that he left a note for Mohr in which he gave his new address. He did not know Mohr had tried to contact him (R. 27). Mohr's inquiries were first brought to accused's attention when he was requested by the executive officer of the Replacement Center at Fort Riley "to reply by indorsement" why he did not pay the checks (R. 28). He disclaimed any intention of defrauding the motor company (R. 24).

The evidence, including the testimony of accused, thus shows that the checks described in Specifications 1 and 2 of the Charge were made and uttered by accused as alleged and that he obtained the cash proceeds of the checks as alleged. His balance in bank was insufficient to cover the checks and they were dishonored. Accused testified that when he made the checks he did not know the state of his account and did not know that his balance was insufficient to meet the checks.

Although accused asserts his lack of guilty knowledge of the character of his acts the circumstances do not support his assertion. The account was relatively small and it had previously been overdrawn. On May 9 the balance had been reduced to $14.25. On May 15 it had been reduced to $1. No further deposits had been made. As early as May 11 a service charge, apparently for handling a dishonored check, had been debited against the account. A similar charge had been debited on May 20. Accused asked a stranger to cash the checks and before they were returned unpaid he advised the payee that one of them might be dishonored. The Board of Review has no doubt that in making and cashing the checks accused knew he did not have funds in bank to pay them. The court found that he did not intend to defraud and it is possible that accused believed that overdrafts sufficient to meet the checks would be allowed by the bank, but even in this case the negotiation of the checks was conduct of a nature to discredit accused in the eyes of the payee and in the eyes of the bank and was, consequently, of a nature to bring discredit upon the military service (CM 202027, McElroy; CM 208870, Moore; CM 220160, Faulkner). The findings of guilty under these Specifications, as violations of Article of War 96, were justified.

4. The evidence relating to Specifications 4 and 5, alleging an indecent assault upon and the use of abusive, threatening and obscene language toward 2nd Lieutenant Dorothy Louise Brown, Army Nurse Corps, is substantially as follows:

Miss Brown was introduced to accused at the Nurses' Home at Fort George G. Meade, and was invited to accompany him and others to a dance at the Officers' Club on the post on the evening of June 6, 1942. She went to the dance and the evening passed without untoward event. Accused talked very little, "wouldn't dance", and the two did not become well acquainted. On June 8, a Monday,

accused telephoned to and invited her to go "to a show in Baltimore or some place like that" and she accepted. She testified that he called for her in his car that night at about 8 p.m., and that the two drove away. She did not accurately know the directions at the time, but believed that accused drove in a direction away from Baltimore. After about five minutes driving, after they had passed from the post, accused stopped the car, put his arm around her and started to "get fresh" (R. 13) by attempting to touch her breast (R. 14). She was wearing a slip under her dress but was not wearing a brassiere. She told him to desist and take her home but he refused. She tried to get out of the car but accused pulled her "back in". While stopped accused produced a bottle of rum and asked her to drink from it but she refused. He did not take a drink but "kept" insisting that she drink. It did not appear that he had been drinking. He started the car and drove "further off the road". From the time he first stopped the car until they got "away out in the country" (R. 14), over a period of about two hours (R. 14, 15), he stopped a number of times. She testified that at each stop he acted as he did "the first time, trying to pull me over and touching my body". He swore at her at times and "he was touching me on all parts of my body and trying to put his hand up under my jacket and I was pleading with him to take me home" (R. 15). She also testified that:

> "he kept asking me where did I ever get the idea that I was too good to be touched, and he was just bickering back and forth most of the time, and he said he knew what nurses were like and I needn't think I was any different from the rest of them" (R. 18).

Miss Brown testified that finally, as the car stopped, she succeeded in getting out of the vehicle and starting down the road. Accused followed, seized her arms, pulled her back and pushed her into the car. She resisted but was afraid to strike him on account of his apparent anger. She stated:

> "he was trying to attack me and I was trying to fight him off and it made him so furious that he threatened me and told me he wasn't going to take me home he would drive out another ten miles and let me walk back and I might make it by morning" (R. 14).

She also testified that during the struggle accused "grabbed my breast and pulled it real hard ***. He told me he would pull my titty off" (R. 14, 15). At about this point Miss Brown changed her tactics and told accused that she was menstruating at the time but would go out with him again if he would take her home (R. 15, 16). Accused seemed to accept her proposal and drove toward the post. En route he obtained two bottles of beer at a filling station and she drank a bottle of the beer with him. They then went on toward the post. After passing the entrance to the post accused turned off on a side road, stopped and started the "whole thing over again". Miss Brown testified that at this time accused put his hand under her jacket, in direct contact with her breast, and that he put his hand under her skirt and on her thigh (R. 17, 18). She screamed (R. 16, 17). Accused told her that he "would choke" her to death if she screamed again, and that "she wasn't going to get him into any jam" (R. 16). Accused desisted from his advances and drove hurriedly to the nurses' quarters, arriving at about 10:30 p.m. (R. 16, 18). The following day, shortly after noon, Miss Brown reported her experience to another nurse (R. 19, 21). This nurse testified that Miss Brown cried "a little", that she appeared to be nervous and emotionally upset and that she continued "that way" for several days (R. 20, 21).

Accused testified that when he telephoned to Miss Brown they talked for about 30 minutes. She suggested that he take her to Baltimore but, on his arrival at her quarters, said she had changed her mind and remarked, "We will find something to do". They started toward Baltimore. While driving he made efforts to put his arm around her and she did not object "any more than any other person would" (R. 25) -

> "she is a woman and I am a man - and nobody seen us to know what came about, and she didn't object any more than anybody else" (R. 30).

He stopped the car and attempted to caress her. Asked if she protested against his advances, he testified:

> "It wasn't nothing unusual. She didn't resist so very much I didn't think ***. The only thing she said she wanted to go home. She started out of the car and I started to let her walk home and I

> decided I would not do that and I went out and put her in the car and she didn't resist and came back herself and she didn't try to run or holler or resist in any way".

He testified that at times she pushed his hand away (R. 25). He did not place his hand under her dress. He did place his hand underneath her jacket but not on her naked breast -

> "the only thing I know I did not touch her breast in person. If she had on a brassiere I would have had to taken it off to get to it and if she had on a slip I was on the outside of the slip" (R. 29).

He kissed her and she did not resist (R. 28). He did not swear, but used the word "damn". He did not "threaten" her but told her he could choke her to death and leave her

> "lying in the bushes and nobody would come along and find it before a day or two, or words to that effect. That's all I said" (R. 29).

When she tried to get out of the car and walk he told her, "I'll pull your damn titty off you little devil" (R. 29).

The evidence thus shows, without material contradiction, that at the place and time alleged accused committed an indecent assault, as alleged, upon the woman described in Specification 4, and that he used abusive, threatening and obscene language toward her as alleged in Specification 5. Accused suggested by his testimony that he was led to believe that Miss Brown's resistance to his advances was only perfunctory, but his admitted language and conduct confirm the testimony of Miss Brown that she did not give her consent to his acts and that the fondling was entirely against her will. Accused's behavior in the premises was conduct unbecoming an officer and a gentleman within the purview of Article of War 95.

5. War Department records show that accused is 22 years of age. He graduated from high school and attended a junior college for six months. He enlisted in the Regular Army on March 21, 1939. Upon graduation from an Officers' Candidate School he was appointed a second lieutenant in the Army of the United States September 27, 1941, and was ordered to active duty as of that date.

6. The only punishment authorized by Article of War 95 for violation of that Article is dismissal. See Article of War 95 and Winthrop's Military Law and Precedents (Reprint), page 719. It follows that punishment greater than dismissal may not legally be imposed for the assault and the use of improper language found as violations of Article of War 95. Inasmuch as the check transactions involved in Specifications 1 and 2 were charged as violations of Article of War 95 it would likewise be legally improper to punish the lesser offenses as found by the court under these Specifications with penalties not authorized for the offenses charged. To hold otherwise would be to permit a court-martial, by exceptions and substitutions, to find an offense greater, that is, more serious, than that charged. This is not permissible (sec. 451 (46), Dig. Op. J.A.G. 1912-40). The record is therefore legally sufficient to support only so much of the sentence as involves dismissal.

7. The court was legally constituted. Except as noted above, 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 of guilty, legally sufficient to support only so much of the sentence as involves dismissal, and legally sufficient to warrant confirmation of the sentence to dismissal. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 96.

Herbert H. O. Kaaren, Judge Advocate.
James H. Baugh, Judge Advocate.
Geo. H. Hardy, Judge Advocate.

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

SPJGH
CM 224287

AUG 24 1942

UNITED STATES N.D.	)	40th INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Lewis, Washington, August 8, 1942. Dismissal and confinement for six (6) months.
First Lieutenant RALPH E. NAYLOR (0-415061), Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, 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 1st Lieutenant Ralph E. Naylor, 160th Infantry, did, at or near Fort Lewis, Washington, on or about the 19th day of July, 1942, falsely represent to his friends and associates that Gladys Myrtle Tucker was his lawful wife when he then well knew that his wife, Minnie M. Canzona Naylor, was still living and not divorced from him.

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

Specification: In that 1st Lieutenant Ralph E. Naylor, 160th Infantry, did, knowingly and wilfully, at Olympia, Washington, on or about the 25th day of May 1942, contract an unlawful bigamous marriage with Gladys Myrtle Tucker of Los Angeles, California, without first being divorced from his lawful wife, Minnie Canzona Naylor, she being still living; the said lawful marriage having been entered into at Lancaster, Missouri, on or about the 19th of July 1941.

The accused pleaded 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 hard labor for six months. The court directed that the findings and sentence be not announced. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The prosecution offered in evidence a signed stipulation, which was received as Exhibit A (R. 3). This document stipulated, in substance, that Minnie M. Naylor of Tajunga, California, formerly Minnie M. Canzona, a widow, if present in court, would testify that she and the accused were married in Schuyler County, Missouri, on July 19, 1941; that their marriage has not been dissolved by divorce or annulment and that she is the wife of accused; that Gladys Myrtle Naylor, also known as Gladys Myrtle Tucker, of Glendale, California, if present in court, would testify that she and accused were married in Olympia, Washington, on or about May 25, 1942, and lived together as man and wife in Olympia, from May 25, 1942, until June 22, 1942; that since their marriage no divorce or annulment proceedings have been instituted by either party, and that accused is the same person who contracted a former marriage with Minnie M. Canzona; and that the records of marriage of Ralph E. Naylor and Gladys Myrtle Tucker, in Olympia, Washington, and the true copy of a certified copy of the marriage of Ralph E. Naylor and Minnie M. Canzona, be admitted in evidence as originals (R. 3-4).

The marriage records referred to in the stipulation appear attached to the record as Exhibits B and C without further introduction. These records support the statements as to the marriages contained in the stipulation.

4. For the defense, Mrs. Minnie M. Naylor testified that she married the accused on July 19, 1941, and was his lawful wife. The accused, since their marriage, had been the sole support of herself and her three children by a former marriage, and had taken out life insurance in her behalf. If accused were acquitted she would continue to live with him as his wife. Their marriage was full and complete, without any limitation or agreement that accused could live as he pleased as long as he supported her children (R. 5-6).

The accused elected to remain silent.

5. Bigamy is defined as follows:

"Bigamy is willfully and knowingly contracting a second marriage where the contracting party knows that the first marriage is still subsisting; also the state of a man who has two wives or of a woman who has two husbands, living at the same time." (10 C.J.S. 359.)

"The criminal offense of willfully and knowingly contracting a second marriage (or going through the form of a second marriage) while the first marriage, to the knowledge of the offender, is still subsisting and undissolved. * * *." (Black's Law Dictionary, Third Edition, p. 215.)

"BIGAMY DEFINED - HOW PUNISHED - EXCEPTIONS. Every person who, having a husband or wife living, shall marry another person, or continue to cohabit with such second husband or wife in this state, shall be guilty of bigamy and be punished by imprisonment in the state penitentiary for not more than five years: Provided, that this section shall not extend to a person (1) Whose former husband or wife has been absent for five years exclusively then last past, without being known to him or her within that time to be living, and believed to be dead; or, (2) Whose former marriage has been pronounced void, annulled or dissolved by a court of competent jurisdiction." (Remington's Revised Statutes of Washington, Sec. 2453.)

6. The pleas of the accused as well as the evidence fully establish the commission of the offense of bigamy by accused, as alleged in the Specification, Charge II. His marriage with Minnie M. Canzona was still subsisting at the time of his marriage to Gladys Myrtle Tucker on May 25, 1942.

The plea of accused and the proof of bigamy establish the falsity of representations of accused that Gladys Myrtle Tucker was his lawful wife, as alleged in the Specification, Charge I. The fact that such representations were made to his friends and associates is established by the plea of guilty.

The record contains no proof inconsistent with the pleas of guilty entered by accused.

7. The conduct of accused in falsely representing to his friends and associates that Gladys Myrtle Tucker was his lawful wife, as alleged in the Specification, Charge I, is a serious offense against good morals, public decency, and propriety, and seriously compromises his position as an officer, and is, therefore, cognizable under the 95th Article of War (Winthrop's Military Law and Precedents, reprint 1920, pp. 713, 718).

Bigamy is punishable under the laws of the State of Washington by confinement in a penitentiary for not more than five years (Sec. 2453, Remington's Revised Statutes).

8. The accused is 27 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed second lieutenant, Infantry, National Guard of the United States (California), March 3, 1941; active duty March 3, 1941, pursuant to the order of the President, 14 January 1941; appointed (temporary) first lieutenant, Infantry, Army of the United States, August 14, 1941.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of violation of the 95th Article of War and authorized upon conviction of violation of the 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGK
CM 224318

29

UNITED STATES)	III ARMY CORPS
)	
v.)	Trial by G. C. M., convened at Camp Forrest, Tennessee, July 24, 1942. Dismissal and total forfeitures.
)	
Second Lieutenant ROBERT S. LONG (0-415899), Field Artillery, 810th Tank Destroyer Battalion.)	

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and SIMPSON, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Robert S. Long, 810th Tank Destroyer Battalion, did, at Camp Forrest, Tennessee, on or about April 24, 1942, feloniously take, steal and carry away four (4) tires, of the value of EIGHTY-FIVE DOLLARS ($85.00) and four (4) sixteen inch Disc wheels, of the value of THIRTY DOLLARS ($30.00), all the property of the United States of America.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification except the words "Eighty-Five ($85.00)" and "Thirty Dollars ($30.00)", substituting therefor, respectively, the words "Twenty-Four Dollars and Eighty-Five Cents ($24.85)" and "Twelve Dollars ($12.00)", of the excepted words not guilty, of the substituted words guilty, and guilty of 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 and forwarded the record of trial stating "Pursuant to Article of War 48 the order directing execution is withheld". The record has been treated as if forwarded for action by the President under Article of War 48.

3. The evidence shows that on April 24, 1942, there was parked in the rear of a shop of a motor transport district motor pool, within an area known as Area S, at Camp Forrest, Tennessee, a 1939 model Plymouth station wagon, the property of the United States, so painted and marked as to evidence its ownership (R. 9, 36, 38, 39). The area in which it was located was restricted (R. 9), kept under guard (R. 11), and no one other than those assigned to operate the motor pool was permitted to enter it, except in case of fire or on pass issued by the motor transport officer, the district property officer or the shop officer (R. 9, 10; Ex. A).

The station wagon had four 6.00 x 16 tires on it, two of Ford manufacture, one Atlas and one Goodyear (R. 16) of the aggregate market value of about $24.85, mounted on disc wheels of the aggregate market value of about $12 (R. 67, 68). No one had been given permission to remove them (R. 12). At about 9:30 or 10 a.m. (R. 36), accused, then company motor officer of Company B, 775th Tank Destroyer Battalion, came to a garage where Private First Class Jack E. Tymon of that company was working as a mechanic, and directed Tymon to drive with him in a weapons carrier to Area S, where accused pointed out to Tymon the Plymouth station wagon and "ordered" Tymon to take the wheels and tires off (R. 23). Tymon then drove back to his battalion motor pool, got Private George A. Smith of his company and together, under direction of accused, the two drove to Area S, following accused, who rode ahead of them on a motorcycle (R. 24, 35, 42). At the area they removed the wheels with the tires from the station wagon as again "ordered" by accused (R. 42), took them to the company garage, dismounted the tires, put the tires and tubes in a little "shack" as directed by accused, and the wheels in a box outside of the garage (R. 25). Accused was "up the road a little ways riding a motorcycle" while Tymon and Smith were removing the wheels from the station wagon (R. 24).

Later that morning accused took two of these tires out of the "shack" in which they had been placed and "ordered" Tymon (R. 25)

and Smith (R. 52) to put them on a Captain Farnsworth's private car, which they did, placing one on the left rear wheel and one on the right front wheel (R. 25; Ex. B). The accused then gave Tymon the other two tires, one of which had a bad cut on the side and was of little value (R. 27). Tymon sold them to Smith for $5 (R. 27, 43, 47). Smith took the two tires that afternoon to a filling station on the highway between Sewanee and Manchester, Tennessee, and left them there until the next afternoon when he returned and placed them on his own car (R. 44; Exs. C, D). The four tires were later recovered by a Government agency and were received in evidence (R. 55-60, 64).

The only testimony as to the immediate circumstances under which the tires and wheels were taken and as to the participation by accused in the transaction, was that of Tymon and Smith. Both testified that they had been charged and confined in connection with the transaction described, and that they had been released from confinement and informed by the trial judge advocate that, under directions of the Commanding General, Headquarters III Army, they would not be prosecuted upon the charges (R. 34, 35, 48, 53).

The accused elected to remain silent (R. 70).

4. It was proved without contradiction that at the place and time alleged Tymon and Smith, acting under direct instructions by accused, removed and carried away the tires and wheels described in the Specification, property of the United States. The articles were delivered into the control and constructive possession of accused, who disposed of them in such manner as to manifest a fraudulent intent on his part permanently to deprive the United States of its property therein. Accused did not physically assist in removal of the tires and wheels, but this circumstance did not relieve him from liability as a principal in the commission of the offense. He directed and "ordered", in the language of the soldiers, the wrongful removal of the tires and wheels, took possession of them after their removal, gave two of them to one of the soldiers who acted for him and directed disposition of the other two. It must be inferred that accused was keeping watch when the tires and wheels were being removed from the vehicle. Clearly he commanded and aided in the acts constituting the offense, and consequently became a principal (sec. 454 (24), Dig. Op. J.A.G., 1912-1940; sec. 332, Criminal Code of U.S.; Wharton's Criminal Law, 12th Ed., secs. 255, 286).

5. Though accused elected to remain silent upon the trial, after it was concluded and before the record thereof was acted upon

by the reviewing authority, he addressed a sworn statement to the Commanding General, III Army Corps, "for the information and consideration of the Reviewing Officer ***", which is attached to the record of trial. In it the accused charges, among other things, that his counsel, "due either to lack of experience or knowledge of the facts", did not fully protect his rights at the trial, particularly in that counsel did not introduce for impeachment purposes statements made by witnesses Tymon and Smith to the investigating officer. Accused asserts that these statements contradicted the testimony of the witnesses at the trial. The record shows that the defense counsel attempted to prove the contents of a statement by Tymon made to the investigating officer, but that an objection to the offer of such proof was sustained by the court (R. 30-33). The foundation for introduction of the alleged inconsistent statement, required by paragraph 124b of the Manual for Courts-Martial, was not laid, and the action of the court was not, therefore, erroneous.

Copies of the statements of Tymon and Smith to the investigating officer are attached to the statement by accused. A comparison of the attached statements with the testimony of the witnesses exhibits some slight differences with respect to the circumstances attending the larceny, but discloses no variance or conflict with respect to the actual taking of the property or as to the commands given to the soldiers by accused. Such variance as appears is immaterial and it is not conceivable that introduction of the inconsistent statements for purposes of impeachment could have changed the result of trial or could in any manner have affected the substantial rights of the accused.

By the remainder of accused's sworn statement he asserts that in telling Tymon and Smith to put tires on Captain Farnsworth's car he did not know that the tires had been stolen and did not know where they had been obtained. He did not give any orders with respect to the other two tires. His assertions amount only to a denial of any guilty knowledge of the theft of the tires. In the light of the evidence of record the denial is unconvincing.

6. War Department records show that accused was 24 years of age at the time the offense was committed. He enlisted in the National Guard of Tennessee on January 12, 1941. He was commissioned a second lieutenant, Field Artillery, National Guard of the United States, on February 24, 1941, and entered upon extended active duty on the same date.

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

[illegible], Judge Advocate.
James H Baugh, Judge Advocate.
Gordon Simpson, Judge Advocate.

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

SPJGK
CM 224325

SEP 1 8 1942

UNITED STATES	FORT BRAGG, NORTH CAROLINA.
v.	Trial by G. C. M., convened at Fort Bragg, North Carolina, July 30, 1942. Dishonorable discharge (suspended) and confinement for three (3) years. Disciplinary Barracks.
Private JAMES A. MICHAEL (14000913), Battery "A", 14th Field Artillery Battalion.	

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

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

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

Specification 1: In that Private James A. Michael, Battery "A", 14th Field Artillery Battalion, did, at Fort Benning, Georgia, on or about September 3, 1940 desert the service of the United States and did remain absent in desertion until he was apprehended by Civil Authorities at Lexington, North Carolina on or about August 4, 1941.

Specification 2: In that Private James A. Michael, Battery "A", 14th Field Artillery Battalion, Fort Benning, Georgia, did, at Fayetteville, North Carolina, on or about March 7, 1942 desert the service of the United States and did remain absent in desertion until he was apprehended by Civil Authorities at Lexington, North Carolina, on or about April 4, 1942.

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

Specification: (Finding of not guilty)

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specifications and not guilty of Charge II and its Specification. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for seven years. The reviewing authority approved the sentence, reduced the period of confinement to three years, directed execution of the sentence as thus modified, suspended the dishonorable discharge and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 72, Headquarters Fort Bragg, North Carolina, August 14, 1942.

3. The evidence is legally sufficient to support the findings of guilty of Charge I and Specification 1 thereunder. The only question requiring consideration is whether the evidence is legally sufficient to support the finding of guilty of Specification 2, Charge I, which Specification alleges desertion on March 7, 1942, terminated by apprehension April 4, 1942.

4. The evidence shows that accused absented himself without leave from Fort Benning, Georgia, on September 3, 1940, and remained absent until he was apprehended by the civil authorities at Lexington, North Carolina, on August 4, 1941 (R. 7; Ex. 1). Following such apprehension he served a sentence to confinement adjudged by a civil court and was thereupon released from a prison camp in Carthage, North Carolina, on February 27, 1942 (R. 7). There was received in evidence, following a statement by the defense counsel that he had no objection to it (R. 6), an entry from the morning report of accused's battery, then stationed at Fort Benning, Georgia, as follows:

> "Mar 13/42 *** Pvt Michael DS Ft Bragg NC enroute to Jd since Mar 7/42 to AWOL 7:30 AM since Mar 7/42."

On April 4, 1942, accused was again apprehended by the civil authorities in Lexington, North Carolina, and was returned to military control on the same date. He was dressed in civilian clothes when so apprehended (R. 7).

5. Thus the only substantial proof that accused absented himself without leave or deserted in March, 1942, consists of the morning report entry set forth above.

The recital in the entry on the morning report of accused's organization at Fort Benning, Georgia, to the effect that he was on detached service at Fort Bragg, North Carolina, and that he absented himself without leave while en route from Fort Bragg to join his battery, were obviously not matters within the personal knowledge of the officer making the entry, but were hearsay and therefore incompetent to prove the facts recited (par. 117a, M.C.M.; sec. 395 (18), Dig. Op. J.A.G. 1912-1940). Paragraph 117a of the Manual for Courts-Martial specially provides, among other things, that a failure to object to a document on the ground that the information therein is compiled from other original sources may be regarded as a waiver of the objection. There is, however, nothing in the record of trial to show that the entry here under consideration was compiled from original sources as distinguished from secondary hearsay sources, and this special rule of waiver may not therefore be invoked. Neither may the general rule of waiver of objections, set forth in paragraph 126c of the Manual, be invoked. It is stated in this latter paragraph that if it "clearly appears" that the defense understood its right to object, any clear indication on its part that it did not desire to assert that right may be regarded as a waiver of the objection. It does not appear in any fashion, from the remarks by counsel or otherwise, that the defense understood its right to object to the entry because it was of hearsay origin. Counsel's statement that he did not object did not constitute a waiver of the rights of accused in the premises. In so far as the competent evidence shows, the original absence of accused commencing on September 3, 1940, continued without interruption until his return to military control on April 4, 1942.

The evidence is legally insufficient to support the finding of guilty of Specification 2 of the Charge.

6. The charge sheet shows that accused enlisted July 23, 1940, without prior service. The maximum punishment that may be imposed for his desertion on September 3, 1940, that is, for desertion in peacetime, after less than six months service at the time of desertion, is dishonorable discharge, total forfeitures and confinement at hard labor for one and one-half years (par. 104c, M.C.M.).

7. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and Specification 1 thereunder, legally insufficient to support the finding of guilty of Specification 2, Charge I, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGH
CM 224395

SEP 11 1942

UNITED STATES v. Captain DENNY K. FARNSWORTH (0-331353), Field Artillery, Company B, 775th Tank Destroyer Battalion.	III ARMY CORPS Trial by G.C.M., convened at Camp Forrest, Tennessee, July 25, 1942. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Captain Denny J. Farnsworth, Commander, Company "B", 775th Tank Destroyer Battalion, Camp Forrest, Tennessee, did, at Camp Forrest, Tennessee, on or about April 5, 1942, feloniously embezzle by fraudulently converting to his own use two (2) tires of the value of FORTY-FIVE DOLLARS ($45.00), the property of the United States of America, entrusted to him by the said United States of America.

Accused pleaded guilty to the Specification and Charge. He was found guilty of the Specification, substituting $19.98 for $45 and of the Charge. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial under Article of War 48.

3. The evidence shows that on April 5, 1942, the accused stated to the supply sergeant of his company that he would like to use two of the tires in the supply room for a day or so (R. 8). The tires were Government property and intended for use on 37 mm guns and of a value of $9.98 each (R. 7-9). On the same day the accused asked Private Maylander of his company to change two tires and to put on the car of accused two tires out of the supply room. Maylander removed two tires from the supply room and put them on the car of accused. The next morning the accused asked Maylander to take the tires off and put his old ones back on, but Maylander did not do it because he was working at the time. The supply sergeant saw the tires again in the supply room on the day after they were taken out (R. 9-13).

During the investigation the accused made a voluntary sworn statement to the investigating officer (R. 13-14), reading in part as follows:

> "On or about April 5th I told Private Maylander to change my two thin tires for the two that were in the supply room and told the supply sergeant to let him have them. I realized immediately that this was not the proper thing to do and the following morning told Pvt. Maylander to change them back again. Pvt. Maylander had to go on duty at the Battalion pool and then I told him to find someone else to do it. I don't remember just who changed them back, but they were changed on April 6th without ever being driven" (Ex. A).

4. No testimony was introduced by the defense. When informed of his rights as a witness, the accused inquired whether the court had enough information from his statement or wanted more information. The president informed him that Exhibit A had been introduced properly as testimony and would be considered by the court. The accused replied that he had nothing more to add thereto, and would remain silent. Defense counsel then stated that the accused had pleaded guilty, but would like to call the attention of the court to the fact that "immediately after taking the tires within a short interval of time realized his offense against the Government and endeavored to correct this offense as soon as possible without making any use of the property" (R. 15).

5. The evidence as well as the plea of guilty and confession

of accused clearly demonstrate that the accused embezzled the tires, for which he was responsible as commanding officer of his company. Although the proof shows a prompt repentance and the return of the tires to their proper place on the succeeding day, the offense of embezzlement was complete at the time of the conversion.

> "* * * the fact that an embezzler offers to return or does return what he has fraudulently converted, or that he or his sureties settle with the owner does not bar a prosecution for embezzlement, the offense being complete at the time of the conversion "(29 C.J.S., p. 702, Embezzlement Sec. 25 b).

6. Among the papers accompanying, but not a part of the record of trial, is a letter from the defense counsel to the reviewing authority, dated three days after the trial, stating that the reason for the plea of guilty was the advice of Lieutenant Colonel Ryder (trial judge advocate) that it would save the time of the court and that an official reprimand would undoubtedly be the extent of the sentence; that in his opinion, based upon paragraph 19, section 451, Digest of Opinions of The Judge Advocate General, 1912-40, the accused had a valid defense to the Charge; that Lieutenant Colonel Ryder had told him on the day of the trial that he (Ryder) had advised accused to plead guilty and by so doing would undoubtedly receive only an official reprimand; and urging disapproval of the findings and action under 104th Article of War or a rehearing to afford accused an opportunity to present evidence in support of his innocence. The letter inclosed an affidavit of accused bearing the same date, stating that when the trial judge advocate, Lieutenant Colonel Ryder, served him with a copy of the charges, accused asked what the procedure would be, Lieutenant Colonel Ryder stated that as two authorities had recommended a reprimand for accused, he should plead guilty and save the time of the court.

The papers also include an indorsement by Lieutenant Colonel Ryder stating that he gave accused no advice as to how he should plead; that after reading the Specification to accused and asking him how he intended to plead, accused stated that he would plead guilty as he had already said in the investigation that he did it; that he said nothing to accused by way of inducement, or promise of leniency in return for a plea of guilty; and that he did not inform defense counsel that he had advised accused to plead guilty in return for leniency.

In view of the patent inability of the trial judge advocate

to control the extent of a sentence to be imposed by the court, it cannot be presumed that an officer of the age and service of accused, or his counsel, did not know or could not readily ascertain that a sentence is adjudged by the members of the court in secret session in which the trial judge advocate does not participate. There is nothing in these accompanying papers which in any manner indicates that any substantial right of accused has been injuriously affected. His rights were well explained to him both upon his plea of guilty and as to being sworn as a witness or making a statement. His answers as to each indicate clearly that he was under no compulsion at either time. In view of the confession which he had made admitting commission of the offense charged, and of the evidence available for the prosecution, it would appear that he was well advised in his apparent intention to throw himself upon the mercy of the court. The opinions cited by defense counsel do not afford accused a valid defense under the facts clearly shown in this case.

7. The accused is 33 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed second lieutenant, Field Artillery, National Guard of the United States (Colorado), April 25, 1935; appointed first lieutenant, Field Artillery, National Guard of the United States, December 20, 1938; federally recognized as second lieutenant, Field Artillery, Colorado National Guard July 29, 1940; appointed second lieutenant, Field Artillery, National Guard of the United States, January 16, 1941; entered upon active duty, February 24, 1941, pursuant to order of the President of January 14, 1941; promoted temporarily, first lieutenant, Field Artillery, Army of the United States, May 21, 1941; promoted temporarily, captain Field Artillery, Army of the United States, February 1, 1942.

One efficiency report rendered for the period February 24 to June 30, 1941, gave accused a general rating of satisfactory.

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. Dismissal is authorized upon conviction of violation of

the 93rd Article of War.

_____, Judge Advocate.

_____(Dissent)_____, Judge Advocate.

_____, Judge Advocate.

N.3.

MEMORANDUM on dissent in the case of Captain Denny K. Farnsworth (0-331353), Field Artillery.

1. In this case I have not signed the opinion for the following reasons:

It is believed that all the errors, irregularities and faults connected with this case should be fully set forth and discussed, so the final authority would be advised as to the reasons for a disapproval of the findings of guilty and the sentence, or for a commutation of the sentence to a reprimand.

Although there is no single error requiring that the record be held not legally sufficient, still all the proceedings, taken as a whole, indicate that they do not disclose that spirit of fair play and justice so necessary in judicial proceedings. It seems that the substantial rights of the accused have been injuriously affected. In the first place the case was sent to Major Plahte as investigating officer, who on July 11 recommended that the charge on which accused was later tried be removed by administrative action, as Captain Farnsworth committed no overt act, and the case be not referred for trial by general court-martial, but he be reprimanded. This investigation was disapproved on July 14, but even before this action, on July 13, the case was sent to Lieutenant Colonel Reed for reinvestigation. This time on July 14 the second investigating officer recommended trial by general court-martial. So the desired result on the second attempt being finally secured, on July 17 the case was referred to trial by a court containing four officers junior to the accused, of whom two participated in the trial. This is not in accord with the provisions of the Manual for Courts-Martial (par. 4 c):

> "Rank of Members.- In no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank (A. W. 16), or by those below him on the promotion list. * * *".

And this court had a Lieutenant Colonel as trial judge advocate, whilst the defense counsel was only a first lieutenant. Although these appointments were not strictly illegal, still they are opposed to general custom, usage and principles.

Later on July 20 the charges were served on the accused by the lieutenant colonel trial judge advocate, who then asked accused how he would plead, thus violating the provision of the Manual for

Courts-Martial, 1928, set forth on page 33, paragraph 41 e, as follows:

> "Ordinarily his dealings with the defense will be through any counsel the accused may have. Thus if he desires to know how the accused intends to plead he will ask the defense counsel or other counsel, if any, of the accused. He should not attempt to induce a plea of guilty."

After the trial closed on July 25 and before the action of the reviewing authority on August 19, an investigation was conducted, statements taken of the trial judge advocate, the defense counsel and the accused. Paragraphs 1 and 2 of the statement of the trial judge advocate of August 10 are as follows:

> "1. Reference basic communication, I served a copy of the charges on Capt. Farnsworth on July 24, 1942. To the best of my knowledge and belief, no intended advice as given to him as to how he should plead. After he read the specification, I asked him how he intended to plead. He answered to this effect, 'I'll plead guilty as I have already said in the investigation that I did it.' He gave me the impression that he wished to admit everything freely as he realized that he had committed a foolish crime. I answered him in words to this effect, 'I think you are wise in pleading guilty in view of this signed statement you made before Col. Reed.' This is not believed to constitute advice or an inducement to plead guilty but rather to protect the rights of the accused as I intended to introduce his signed statement in evidence before the court. I did tell him that a plea of guilty would save court time, in case the court decided not to hear any witnesses. At no time did it ever occur to me to 'make a deal' with the accused as is inferred in the attached correspondence, due to the fact that it was any easy case to prove, practically an open and shut case.
>
> "2. As to Lieut. Mechling's statement that he contacted me and asked me if I had advised Capt. Farnsworth to plead guilty, I do not recall the question as to the advice. I believe I told him

that Capt. Farnsworth had said to me he would plead guilty."

Paragraphs 3, 4 and 5 of the defense counsel's statement of July 28 are as follows:

"3. The reason for pleading guilty was acted upon by the advice of Lt. Col. Ryder who said it would save the time of the court and that an official reprimand would undoubtedly be the extent of the sentence. Attached affidavit signed by Captain Denny K. Farnsworth bears this out. To verify Capt. Denny K. Farnsworth statement as to what Lt. Col. Ryder had advised him to do, I (Lt. Ben F. Mechling, Defense Council) personally contacted Lt. Col. Ryder and asked him on the morning of July 25, 1942, which was the day of the trial, if he had advised Captain Denny K. Farnsworth to plead guilty and by so doing undoubtedly only receive an official reprimand. His answer (Lt. Col. Ryder) to this was yes.

"4. In view of the above representation which induced a plea of guilty we did not urge on behalf of the accused, objections to the personnel of the court which included Junior Officers, namely: 1st Lt. Neil T. Goble 775th Tank Destroyer Battalion and 1st Lt. Fred J. Kile, 12th F. A. Observation Squadron, to the sufficiency of the specification and irregularities which prejudiced the substantial rights of the accused.

"5. In view of the opinion stated in the Digest of Opinions Judge Advocate General of the Army (section 451 paragraph 19, 1912-1940) it is my opinion that the accused had and has a valid defense to the charge and specifications."

The sworn statement and affidavit of accused of July 28 is as follows:

"Before me, the undersigned authority for administering oaths, personally appeared Captain Denny K. Farnsworth, O-331353, Company B, 775th Tank Destroyer Battalion, who, being first duly

cautioned and sworn, made the following statement this 28th day of July, 1942.

"'On July 20, 1942, Lt. Colonel Ryder, 827th Tank Destroyer Battalion, Trial Judge Advocate, served me with a copy of the charges against me.

"I asked Col. Ryder what the procedure would be and he stated that as two authorities had recommended a reprimand for me that I should plead guilty and save the time of the court.'"

From this investigation it appears that the accused was induced to plead guilty by various representations. The statement of the trial judge advocate is evasive and not conclusive, does not positively deny that he induced the plea. He states "no intended advice as given to him as to how he should plead". He admits he asked accused "how he intended to plead" despite the provisions of the Manual on this subject and informed him that he was "wise in pleading guilty in view of this signed statement you made before Col. Reed." He admits further telling the accused "that a plea of guilty would save court time" and also stated further he remembered Lieutenant Mechling's asking him if he had advised accused to plead guilty, but did "not recall the question as to the advice".

However, the statement of Lieutenant Mechling, the defense counsel, which is entitled to the same credit as that of the trial judge advocate, sets out positively that "the reason for pleading guilty was acted upon by the advice of Lt. Col. Ryder (the trial judge advocate) who said it would save the time of the court and that an official reprimand would undoubtedly be the extent of the sentence". Lieutenant Mechling positively states Lieutenant Colonel Ryder informed him on July 25, the day of the trial that Colonel Ryder had advised accused "to plead guilty and by so doing undoubtedly only receive an official reprimand", which representations induced a plea of guilty.

The statement of the trial judge advocate is contradicted and that of the defense counsel is substantiated by the sworn statement of accused setting out Colonel Ryder stated to him "that as two authorities had recommended a reprimand" accused "should plead guilty and save the time of the court". And there is no intimation that the accused was guilty of false swearing in this statement.

That the accused was in doubt as to his plea of guilty is indicated on page 5 of the record as follows:

"Accused: May I have just a moment, sir?
"President: Yes.
"Accused: May I ask a question, sir?
"President: All right.
"Accused: I have some statements I don't know how to state, sir.
"President: You will be allowed to make any statement at the proper time later on.
"Accused: We will let it go at guilty both ways, sir."

Had the accused been well defended with a proper showing the court should have entered a plea of not guilty.

The prosecution introduced as a witness Lieutenant Colonel Reed, the second investigating officer, who recommended trial, and through him offered a statement of accused as Prosecution Exhibit A. However, this should not have been admitted as there was no showing that the accused was fully and properly warned and advised as to his rights in this respect. The statement of this witness that it was "a voluntary statement made by Captain Farnsworth", was not proper and should not have been admitted, as again it is purely the opinion and conclusion of the witness, does not set forth the necessary requirements. With a plea of not guilty and this statement excluded, it is very doubtful whether the court would have found accused guilty and sentenced him to be dismissed and to forfeit all pay and allowances.

He was tried upon a specification that he "did feloniously embezzle by fraudulently converting to his own use two tires". These are harsh words and a severe charge, and the accused does not appear to be a felon. He did misapply a tire for a few hours on April 5, but had it returned on April 6, never having used it. This return was effected three months and eleven days before the charges were referred for trial. The accused did convert the tire for a few hours, as the specification alleges, but did not receive any benefit from it.

The accused before his case was rested stated as follows:

"Accused: May I ask a question, sir?
"President: All right.
"Accused: Does the Court have enough information from my statement or do they want more information?
"President: The Exhibit 'A' has been introduced properly as testimony and will be considered

by the Court.

"Accused: I have nothing more to add thereto, sir. I will remain silent, sir."

This very statement, Exhibit A, should not have been correctly introduced in evidence had there been a proper defense, as it merely states the accused was first duly cautioned, again a mere opinion and conclusion no proper legal showing made to entitle it to be admitted in evidence.

2. Under the above authority and evidence although the record of trial is legally sufficient, the sentence seems too severe. It is, therefore, recommended that the sentence be commuted to the reprimand suggested and expected for the plea of guilty.

Chas. L. Lesson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., SEP 16 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Denny K. Farnsworth (O-331353), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. I recommend that the sentence be confirmed. In view, however, of the fact that the accused had the tires removed from his car and returned to the company storeroom on the day following the embezzlement and made no actual use of the tires, I believe that the sentence is excessive. I recommend that the sentence be commuted to a reprimand to be administered by the Commanding General, III Army Corps, and that the sentence as commuted be carried into execution.

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

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

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

SPJGK
CM 224420

SEP 8 1942

UNITED STATES	)	4TH ARMORED DIVISION
v.	)	Trial by G. C. M., convened at Pine Camp, New York, August 11, 1942. Dismissal and total forfeitures.
Second Lieutenant EDWARD A. THOMPSON (0-450515), 35th Armored Regiment.	)	

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant Edward A. Thompson, Hq & Hq Company, 3rd Battalion, 35th Armored Regiment, did, at Pine Camp, New York, on or about June 2nd, 1942, gamble with Staff Sergeant Michael J. Sansky, Private First Class Maynard W. McDonald, and Technician 5th Grade Lawrence G. Kline, all members of Hq & Hq Company 3rd Battalion, 35th Armored Regiment, Pine Camp, New York.

Specification 2: In that 2nd Lt. Edward A. Thompson, Hq & Hq Company 3rd Battalion, 35th Armored Regiment, did at Pine Camp, New York, on or about June 3rd, 1942, gamble with Technician 5th Grade Harold W. Lawson, Hq & Hq Company, 3rd Battalion, 35th Armored Regiment.

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

Specification: In that Second Lieutenant Edward A. Thompson, 35th Armored Regiment, did, without

proper leave, absent himself from his organization at Pine Camp, New York, from about 7:15 A.M., June 16, 1942, to about 11:00 P.M., June 17, 1942.

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

Specification: In that Second Lieutenant Edward A. Thompson, 35th Armored Regiment, being indebted to Friedman Company, Louisville, Kentucky, in the sum of one hundred fifty ($150.00) dollars for merchandise purchased and services rendered, which amount became due and payable on or about October 6, 1941, did, at Pine Camp, New York, from October 6, 1941, to June 17, 1942, dishonorably fail and neglect to pay said debt.

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

Specification: In that Second Lieutenant Edward A. Thompson, 35th Armored Regiment, having been restricted to the limits of Pine Camp, New York, did, at Pine Camp, New York, on or about June 16, 1942, break said restriction by going to Watertown, New York.

ADDITIONAL CHARGE IV: Violation of the 69th Article of War.

Specification: In that 2nd Lieutenant Edward A. Thompson, 35th Armored Regiment, having been duly placed in arrest of quarters at Pine Camp, New York, on or about June 3, 1942, did at Pine Camp, New York, on or about July 26, 1942, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to the Charge and its Specifications and to Additional Charge II and its Specification and guilty to Additional Charges I, III and IV and their Specifications. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing

authority approved only so much of the findings of guilty of Additional Charge IV and its Specification "as find that the accused, having been duly placed in arrest of quarters on or about July 13, 1942, did, at Pine Camp, New York, on or about July 26, 1942, break his arrest before he was set at liberty by proper authority", approved the sentence and forwarded the record for action under the 48th Article of War.

3. The uncontradicted evidence shows that on the evening of June 2, 1942, while accused was a member of Headquarters Company, 3rd Battalion, 35th Armored Regiment, stationed at Pine Camp, New York, he gambled with Staff Sergeant Michael J. Sansky, Private First Class Maynard W. McDonald and Technician 5th Grade Lawrence G. Kline, all of accused's company, by rolling dice with them for money stakes, and that on the evening of June 3, 1942, he gambled for money, in the same manner, with Technician 5th Grade Harold W. Lawson of accused's company and with other enlisted men of the company (R. 12-22). Accused testified regarding other offenses but did not testify or make an unsworn statement concerning the gambling (R. 47). (Charge I and its Specifications).

4. The evidence, together with the pleas of guilty, shows that following the gambling episodes, about June 3, 1942, accused was by his battalion commander restricted to the limits of Pine Camp, New York, while in garrison (R. 23). At about 7:30 a.m., June 16, 1942, he broke restriction and absented himself without leave from the camp and from his organization. He went to Watertown, New York, and remained absent until about 11 p.m., July 17, 1942. (R. 25, 27, 28; Ex. C) Accused did not testify or make an unsworn statement concerning his breach of restriction and absence without leave. (Additional Charges I and III and their Specifications).

5. The evidence, together with the pleas of guilty, shows that while in arrest accused was advised by letter of July 13, 1942, from the Commanding Officer, 35th Armored Regiment, that the "limits of your arrest are extended" to a defined area within Pine Camp (R. 37; Ex. B). Accused left this area about 2:30 a.m., July 25, 1942, and returned about two hours later. He left again at 9:30 p.m., on the same day (R. 31) and returned around 6:30 a.m., July 26, in company with a woman. He then went into his quarters, came out with a suitcase and proceeded to Watertown, New York, where he and the woman left

the car and entered the Woodruff Hotel (R. 32, 35, 36). Shortly afterward accused was arrested in the hotel and returned to camp (R. 26, 33; Ex. C). Accused did not testify or make an unsworn statement concerning the transactions described (Additional Charge IV and its Specification).

6. The evidence relating to Additional Charge II and its Specification, alleging dishonorable failure and neglect to pay a debt, shows that at Louisville, Kentucky, between September 13 and October 4, 1941, accused purchased from the Friedman Company of that city clothing at prices totaling $301.75. Goods amounting to $11.75 were returned and on October 6 a cash payment of $140 was made, leaving a balance of $150 (R. 29; Ex. A). No further payments were made up to the time of trial. Monthly statements were mailed to accused but never acknowledged. A representative of the creditor telephoned to accused four times prior to May 25, 1942, but accused "failed and neglected to make a payment as promised". The creditor finally complained to accused's division commander (R. 29).

Having been interviewed by his regimental commander about May 25, 1942, accused stated to that officer that he would pay $20 a month on the Friedman account beginning June 1, and said that the sickness of his mother and some trouble involving a younger brother had been the cause of his delinquency (R. 39). The regimental commander testified that accused may have stated that he had an oral agreement with the creditor permitting payments at the rate of $20 per month, but that if such a statement was made witness did not pay any attention to it (R. 40).

Accused testified that when he graduated from the Officers' Candidate School he was in need of uniforms and made the purchases accordingly. He did not have money to pay the account at that time and agreed with "the representative of Friedman Company" that the merchandise he had purchased would be paid for at $20 per month, beginning November 1, 1941, when he received his October pay (R. 47, 48). On October 4 accused made a payment of $140 which he assumed would take care of seven of the monthly payments. No agreement to that effect was made. Because of expenses incident to the intervening sickness and death of his mother and certain troubles involving expenditures of about $200 on account of a younger brother, he was not in a position to make further payments (R. 49). He did not explain his difficulties to the Friedman company because the

payment he "had made the first of November was enough to take care of the payments". He did talk to a representative of the company and asked if accused should write a letter to the company. The representative said he would write himself and accused then promised to begin making payments as soon as possible. His failure to make a payment on June 1 as promised to the regimental commander was due to a "mixup" in his bank account which occurred about the 8th or 10th of June. Being confined to the post after June 3 he had no opportunity to straighten out the bank account (R. 51).

7. The evidence fully supports the findings of guilty of the Charge and its Specifications, and the evidence, together with the pleas of guilty, fully supports the findings of guilty of Additional Charges I, III and IV and their Specifications.

The evidence shows that through the period from October 6, 1941, to June 17, 1942, accused failed and neglected to pay the Friedman Company a balance of $150 he owed them, as alleged in the Specification, Additional Charge II. The creditor repeatedly asked for payments on account and finally reported the matter to the military authorities. Although accused contended at the trial that he believed the lump sum payment in 1941 should have been accepted as extending the time for further payments, it does not appear that the creditor entertained this theory or that accused suggested it to the creditor. On the contrary, accused made promises of early additional payments when pressed by the creditor. Accused also contended that extraordinary expenses made it difficult for him to make payments. His pay was not large but it was substantial, and on two occasions at least he had money to risk in gambling. His contention that extraordinary expenses were incurred in the care of his family was not supported by any tangible evidence of specific expenditures. Whatever his extraordinary expenses were, it appears that he made no effort at all to liquidate the Friedman account. On the contrary, according to his own statement, he ignored the obligation for many months. The Board of Review entertains no doubt that accused's failure and neglect to pay the debt was characterized by such deceit, evasion and indifference as to mark his behavior as dishonest, dishonorable and violative of Article of War 95.

8. The age of accused is shown on the additional charge sheets as 29 years. War Department records show that he completed the course of instruction at the Armored Force Officers' Candidate School, Fort Knox, Kentucky, and was appointed second lieutenant in the Army of the United States September 30, 1941. He was ordered to extended active duty effective October 1, 1941.

9. The court was legally constituted. 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 of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Articles of War 61, 69 and 96.

Walter H. Hamus, Judge Advocate.
James H. Baugh, Judge Advocate.
Harry W. Hardy, Judge Advocate.

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

SPJGK
CM 224443

U N I T E D S T A T E S	)	4TH ARMORED DIVISION
	)	
v.	)	Trial by G. C. M., convened at Pine Camp, New York, August 7, 1942. Dismissal and total forfeitures.
	)	
First Lieutenant VINCENT J. MEYER (0-450536), 35th Armored Regiment.	)	

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

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

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

Specification: In that 1st Lieutenant Vincent J. Meyer, 35th Armored Regiment, did, at Pine Camp, New York, on or about June 18, 1942, and again on June 19, 1942, with intent to deceive Lieutenant Colonel Clayton J. Mansfield, his Battalion Commander, officially state to the said Battalion Commander that he was not in Watertown, New York, at approximately 2:30 A.M., June 12, 1942, which statements were known by the said 1st Lieutenant Vincent J. Meyer to be untrue in that he had been in Watertown, New York, at that time.

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

Specification: In that 1st Lieutenant Vincent J. Meyer, 35th Armored Regiment, did, at Watertown, New York, on or about June 12, 1942, knowingly and willfully apply to his own use and benefit a certain government vehicle, to wit, a ¼-ton truck, serial number W-2081048, of the value of

more than fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

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

Specification: (Finding of not guilty)

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

Specification: In that 1st Lieutenant Vincent J. Meyer, 35th Armored Regiment, having been duly placed in arrest at Pine Camp, New York, on or about June 19, 1942, did, at Pine Camp, New York, on or about July 26, 1942, break his said arrest before he was set at liberty by proper authority.

He pleaded guilty to and was found guilty of Charges I and II and the Specifications thereunder, and of the Additional Charge and its Specification. He pleaded not guilty to and was found not guilty of Charge III and the Specification thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two and one-half years. The reviewing authority approved the sentence, remitted the confinement and forwarded the record of trial for action under the 48th Article of War.

3. The uncontroverted testimony, including a sworn statement made by accused, together with his pleas of guilty, shows that accused was stopped and interrogated at about 2 or 2:30 a.m., June 12, 1942, by civil police on the streets of Watertown, New York, and a few minutes later by Staff Sergeant Ernest C. Bailey, 1209 Corps Area Service Unit, of the military police (R. 9, 29; Ex. I, p. 4). At that time accused was driving a ¼-ton truck belonging to the United States Government and assigned for use to Headquarters Company, 3rd Battalion, 35th Armored Regiment (R. 11). Accused was the commanding officer of this company (R. 9; Ex. A). He was accompanied in the car by a Lieutenant Galvin and two women and was on a private mission (R. 29; Ex. H, Ex. I, p. 3). Staff Sergeant Bailey made a confidential

report of this occurrence (R. 9). In an official investigation of the occurrence by Lieutenant Colonel Clayton J. Mansfield, 35th Armored Regiment, accused's battalion commander, made on June 19, accused stated to Lieutenant Colonel Mansfield that he had not been in Watertown on the night of June 11-12, but had been in camp all night with Lieutenant Galvin, his junior lieutenant. This denial was made several times that day (R. 10; Ex. A). These statements by accused were admittedly false (Ex. I, p. 3). Lieutenant Colonel Mansfield then at 1:40 p.m., June 19, placed accused under arrest in quarters by written order, receipt of which was acknowledged in writing by accused, and prescribed the limits of his arrest (Ex. C). The limits were subsequently enlarged within the camp for specified purposes (Exs. D, E, F and G).

At about 9 or 9:30 p.m., July 25, two enlisted men who had been detailed by the regimental commander to watch accused's movements, saw accused leave his quarters (R. 19, 23). He was next seen at the Woodruff Hotel in Watertown at about 4:30 a.m. the following morning, July 26, in company with a lady (R. 27), and was later arrested by the military police (R. 28) while attempting to leave the hotel in a cab. He was returned to Pine Camp under custody at about 7:30 a.m., and was turned over to the regimental officer of the day (Ex. J).

4. The evidence, in addition to the pleas of guilty, conclusively shows that the accused did knowingly and willfully apply to his own personal use, temporarily, a Government vehicle, furnished and intended for the military service, in Watertown, New York, on the night of June 11-12, 1942. When an official investigation was undertaken, however, he deliberately and with intent to deceive the investigating officer made false statements as to his whereabouts and denied being in Watertown on June 12. This constituted conduct unbecoming an officer and a gentleman, in violation of Article of War 95 (sec. 453 (18), Dig. Op. J.A.G. 1912-1940). After he had been placed in arrest by proper authority and limited to designated areas by written orders, receipt and understanding of which accused acknowledged in writing, he willfully and deliberately broke his arrest in a flagrant manner, before being set at liberty by proper authority, in violation of Article of War 69.

5. War Department records show that accused was 23 years of age on February 13, 1942. He was commissioned a second lieutenant of Infantry from an Officers' Candidate School on September 30, 1941, entered upon active duty October 1, 1941, and received temporary

promotion to first lieutenant on June 1, 1942.

6. 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 mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Articles of War 69 and 94.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

LPJGH
CM 224444

SEP 18 1942

UNITED STATES	AMERICAL DIVISION
v.	Trial by G.C.M., convened at Noumea, New Caledonia, July 23, 1942. Dismissal.
First Lieutenant FREDERIC M. WANNER (O-410784), Infantry.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: Nolle Prosequi.

Specification 3: In that First Lieutenant Frederic M. Wanner, Company "A", One hundred sixty-fourth Infantry, did, at the The Dalles, Oregon, on or about January 17, 1942, with intent to deceive Colonel Earle R. Sarles, Commanding Officer, One hundred sixty-fourth Infantry, officially report to the said Colonel Earle R. Sarles, that a postal money

order has been mailed to, the Officers' Club of Fort Benning, Georgia, which report was known by the said First Lieutenant Frederic M. Wanner to be untrue, in that no postal money order had been mailed to the said Officers' Club by, or for, said First Lieutenant Frederic M. Wanner.

Specification 4: In that First Lieutenant Frederic M. Wanner, Company "A", One hundred sixty-fourth Infantry, with intent to defraud the The Dalles Branch of the United States National Bank of Portland, Oregon, did at the The Dalles, Oregon, on or about January 26, 1942, unlawfully pretend to the The Dalles Branch of the United States National Bank of Portland, Oregon, that there were sufficient monies and credits owing and due the said First Lieutenant Frederic M. Wanner to warrant a short-term loan of two hundred and twenty-five dollars ($225.00), the said First Lieutenant Frederic M. Wanner, well-knowing that said pretenses were false, and by means thereof, did fraudulently obtain from the said The Dalles Branch of the United States National Bank of Portland, Oregon, the sum of two hundred and twenty-five dollars ($225.00).

Specification 5: Nolle Prosequi.

Specification 6: In that First Lieutenant Frederic M. Wanner, Company "A", One hundred sixty-fourth Infantry, with intent to defraud the The Dalles Branch of the First National Bank of Portland, Oregon, did, at The Dalles, Oregon, on or about February 27, 1942, unlawfully pretend to the said bank that as the commanding officer of Company "A", One hundred sixty-fourth Infantry, he was applying to said bank for a short-term loan of one hundred and fifty dollars ($150.00), and that the purpose of the said loan was for the payment of salaries of enlisted "boys", and that the loan would be repaid out of collections to be made at the time the next pay roll was received, the said First Lieutenant Frederic M. Wanner, well-knowing that said pretenses were false, and by means thereof, did fraudulently obtain from the said The

Dalles Branch of the First National Bank of Portland, Oregon, the sum of one hundred and fifty dollars ($150.00).

Specification 7: Nolle Prosequi.

Specification 8: In that First Lieutenant Frederic M. Wanner of Company "A", One hundred sixty-fourth Infantry, did at Columbus, Georgia, on or about November 17, 1941, with intent to defraud, wrongfully and unlawfully make and utter to the Chancellor Company of Columbus, Georgia, a certain check in the amount of forty-five dollars ($45.00), and by means thereof, did fraudulently obtain from the Chancellor Company forty-five dollars ($45.00), he, the said First Lieutenant Frederic M. Wanner, then well-knowing that he did not have, and not intending that he should have, sufficient funds in the bank for the payment of said check.

Specification 9: Nolle Prosequi.

Specification 10: Finding of not guilty.

Specification 11: Finding of not guilty.

Specification 12: Finding of not guilty.

Specification 13: Nolle Prosequi.

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and Specifications 1 and 2 thereunder, and of Specifications 1, 10, 11, and 12, Charge II, but guilty of Charge II and Specifications 3, 4, 6, and 8 thereunder. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence concerning Specification 3 consists of a second indorsement dated January 17, 1942, from the commanding officer of the accused directing him to reimburse the Officers' Club at Fort Benning for a dishonored check and to advise his commanding officer when reimbursement had been made; a third indorsement from the accused to his commanding officer stating that a postal money order had been mailed to the Officers' Club (This indorsement by the accused is not dated but the 4th Indorsement by the assistant adjutant, inviting attention to the indorsement of accused is dated February 4, 1942.); and a sixth indorsement from the Officers'

Club of Fort Benning signed "H. L. Eskew, 1st Lt., Infantry Secretary", and dated February 13, 1942, stating that no postal money order had been received from the accused (R. 57-58; 71-73; Pros. Ex. 3).

In an unsworn statement the accused explained that he had recently experienced both marital and financial difficulties, but that his obligations had all been discharged. The accused stated further that -

> "* * * The last receipt I have here is a money order receipt for $17.50, mailed to the Officers' Club, Fort Benning Georgia."

The president of the court then stated:

> "Since yours is an unsworn statement, I can't question you, but it would be towards your interest to mention the dates of those stubs."

The accused then replied:

> "The $17.50 money order is dated June 18, 1942. * * *." (R. 101.)

Specification 3 alleges that the accused did, on or about January 17, 1942, with intent to deceive Colonel Earle R. Sarles, officially and falsely report to him that the accused had mailed a postal money order to the Officers' Club at Fort Benning, Georgia.

The only evidence presented by the prosecution to show that the accused had not sent a money order to the Officers' Club at Fort Benning on January 17, 1942, is an indorsement purportedly signed by Lieutenant H. L. Eskew. It is obvious that the admission of such an extrajudicial instrument for the purpose of proving the truth of the statements therein contained offends every principle of proof that the hearsay rule was designed to protect. Lieutenant Eskew was not present before the court or the accused, his testimony was not under oath, and it was not subject to the inquisitive test of cross-examination. To have admitted such an untrustworthy hearsay statement into evidence was error and to have condemned an officer thereupon is shocking to our traditional concept of a fair trial. The Manual for Courts-Martial, 1928, states that, "Hearsay is not evidence" (par. 113).

With this incompetent testimony eliminated, there remains only

one other item of proof requiring consideration. The accused in his unsworn statement in explaining that he had paid all his obligations stated:

> "* * * The last receipt I have here is a money order receipt for $17.50, mailed to the Officers' Club, Fort Benning Georgia."

The president of the court then stated:

> "Since yours is an unsworn statement, I can't question you, but it would be towards your interest to mention the dates of those stubs."

The accused then replied:

> "The $17.50 money order is dated June 18, 1942. * * *." (R. 101.)

This statement by the accused, which is in effect an admission that a money order for $17.50 was mailed to the Officers' Club at Fort Benning approximately 6 months after he had officially reported that he had mailed a money order for an unstated amount, presents at least some evidence pointing toward his guilt. If taken, however, at its face value, this evidence shows only that the accused mailed a money order to the Officers' Club of Fort Benning on July 17, 1942, and does not preclude the reasonable possibility that he had prior to January 17, 1942, also mailed another money order to the same organization.

Furthermore, the manner in which this evidence was elicited from the accused injuriously affected the substantial rights of the accused. The statement by the president of the court to the accused that "* * * it would be toward your interest to mention the dates of those stubs", clearly and unequivocally held out a promise of advantage to the accused as a reward for a full statement, and thereby induced the statement. The practical effect of such an inducement was a cross-examination of the accused in violation of the provision of the Manual which provides that when an accused makes an unsworn statement he "* * * cannot be cross-examined * * *" (M.C.M., 1928, par. 76). Under the circumstances, the consideration of such testimony would not only violate the provision of the Manual prohibiting the cross-examination of an accused upon his unsworn statement but would also be a repudiation of the statement of the court and a violation of those fundamental and traditional concepts of fair trial which are rooted in justice and founded upon the principle of fair play. With the exclusion of the above-quoted statement of accused, there remains no competent evidence in the record to support the finding of guilty of Specification 3.

4. The evidence concerning Specification 4, consists of correspondence between the Dalles Branch of the United States National Bank of Portland, Oregon, and Colonel Sarles, the commanding officer of the 164th Infantry. The first letter from the bank, dated March 5, 1942, and purporting to be signed, Harry A. Davis, Manager, states that the accused on January 25, 1942, procured a loan of $250 from the bank upon the representation that he wished to use the loan to pay a post exchange for canteen books and that he would repay the bank by deducting the amount borrowed from the pay of the men of his organization on February 10, 1942. Colonel Sarles acknowledged the receipt of the letter and assured the bank that he would use his best efforts to get the accused to pay the obligation. A second letter from the bank, dated March 21, 1942, advised Colonel Sarles that the obligation had not yet been paid (R. 73-75; Pros. Ex. 4).

Captain Francis C. Rockey, testified that when he relieved the accused of the command of Company A, on February 10, 1942, he saw a letter in the company records directing that a check for $250 be mailed to the Exchange Officer, Camp Claiborne, in payment of post exchange debts. He also testified that the company fund contained an amount which had been previously collected. The accused paid the men of his company their pay for the month of January (R. 16-17).

In his unsworn statement the accused stated that he received a letter directing him to get a draft immediately and to forward it to Lieutenant Colonel Banglien, executive officer of his regiment. In response to the suggestion of the president of the court, referred to in paragraph 3, supra, the accused stated that three money order receipts for money paid to The Dalles Branch of the United States National Bank of Portland, Oregon, were dated June 3, 1942 (R. 101).

Specification 4 alleges that the accused unlawfully and falsely represented to The Dalles Branch of the United States National Bank of Portland, Oregon, that there were sufficient monies and credits owing and due him to warrant the extension to him of a short term loan of $250 and by means of such representation fraudulently obtained such loan.

The only pertinent evidence designed to show such alleged false representations is a letter dated March 5, 1942, purportedly written by Harry A. Davis, Manager of the Dalles Branch of the United States National Bank of Portland, Oregon, to the Commanding Officer of the 164th Infantry. Since the statements in this letter are extrajudicial, are not made under oath, and are not subject to cross-examination, they must, in compliance

with the provisions of our Manual, be characterized as hearsay, and, therefore, not evidence (M.C.M., 1928, par.113). It necessarily follows that the finding of guilty of Specification 4 is not supported by competent evidence.

5. The evidence concerning Specification 6 consists of three letters and a copy of a promissory note for $150. All three of the letters are purportedly from The Dalles Branch of the First National Bank of Portland, Oregon. The only letter of importance to the issue raised by Specification 6 is that dated March 14, 1942, and addressed to Colonel E. V. Wooten, Adjutant General's Office, Salem, Oregon. This letter is stamped with the word "Duplicate" and is unsigned except for the typed name of V. E. Rolfe, Manager, over which are the initials V.E.R. This letter states that the accused, on February 27, 1942, procured a loan of $150 from The Dalles Branch of the First National Bank of Portland, Oregon, upon the representation that the loan was to be used for the payment of the "salaries of some of the enlisted boys". The other two letters were concerned with the collection of the note (R. 76; Pros. Ex. 5). Colonel Sarles testified that it was not customary for officers in his regiment to borrow money for the payment of the enlisted men (R. 76).

The accused in his unsworn statement denied all charges concerning the $150 note involved in this Specification and stated that he had paid the note in full (R. 101).

Specification 6 alleges that the accused did unlawfully and falsely pretend to The Dalles Branch of the First National Bank of Portland, Oregon, that he desired a loan of $150 for the purpose of paying certain salaries of enlisted men, which he would be able to repay out of collections from the next payroll.

The only evidence tending to show that the accused made such representation to the bank is the letter dated March 14, 1942, addressed to Colonel E. V. Wooten, Adjutant General's Office, stamped "Duplicate", and unsigned except for the typed name of V. E. Rolfe, over which appears in script the initials "V.E.R.". That such a letter is inadmissible in proof of the statements contained therein because it offends the hearsay rule is too elementary to require discussion. In the absence of any competent proof, the record does not support the finding of guilty of Specification 6.

6. The evidence concerning Specification 8 consists of five letters of the Chancellor Company of Columbus, Georgia, addressed to the Commanding Officer of the 164th Infantry, intimating that accused had

given that company a check which had been dishonored because of insufficient funds. The letters threatened to have a civil warrant sworn out against the accused unless the check was paid (R. 80-81; Pros. Ex. 9).

The accused stated that the amount of $45 was paid. He exhibited a paper which he said was a money order receipt for that amount (R. 101).

Specification 8 alleges that the accused did, with intent to defraud, unlawfully make and utter to the Chancellor Company of Columbus, Georgia, a check in the amount of $45, well knowing that he did not have, and not intending that he should have, sufficient funds in the bank for the payment thereof.

The only evidence presented by the prosecution consists of five letters purportedly from the Chancellor Company, addressed to the Commanding Officer of the 164th Infantry, complaining of the act of the accused in giving that company a check which had not been paid. Not only are these letters clearly hearsay and, therefore, of no probative value, but the record is entirely lacking of any evidence as to the identity of the bank upon which the check was drawn or any evidence showing why the check which was purportedly given to the Chancellor Company was dishonored. In the absence of any competent proof of the offense alleged, the record does not support the finding of guilty of Specification 8.

7. The defense presented the testimony of Lieutenant Colonel Robert H. Hall, a battalion commander of the 164th Infantry to the effect that the accused was a good officer, an outstanding leader of men, an excellent platoon leader, an excellent rifle and drill instructor, a well educated and "well intended" officer. He also stated that the accused was on the North Dakota rifle team for five or six years (R. 96-98). Major Harry R. Tenborg, also of the 164th Infantry, gave similar testimony and in addition added that the reputation of the accused was honorable. Both witnesses expressed the opinion that the accused would prove himself a good leader in combat (R. 98-99).

8. The accused is 34 years of age. The records of the Office of The Adjutant General show his service as follows:

Federally recognized as second lieutenant, Infantry, National Guard of North Dakota, October 9, 1940; appointed second lieutenant, Infantry, National Guard of the United States, February 10, 1941; inducted February 10, 1941; promoted temporarily, first lieutenant, Infantry, Army of the United States, July 31, 1941.

9. 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 of Specifications 3, 4, 6, and 8 of Charge II, and of Charge II, and legally insufficient to support the sentence.

_____, Judge Advocate.

_____ Judge Advocate.

_____ Judge Advocate.

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

SPJGK
CM 224465

SEP 22 1942

UNITED STATES	33RD INFANTRY DIVISION
v.	Trial by G. C. M., convened at Camp Forrest, Tennessee, August 7 and 8, 1942. Dismissal and total forfeitures.
Second Lieutenant WILLIAM B. MOORE (0-338234), 136th Infantry.	

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that 2nd Lt. William B. Moore, 136th Infantry, was at Tullahoma, Tennessee, on or about July 20, 1942, drunk and disorderly in uniform in a public place, to wit: Hotel Pep Station.

He pleaded not guilty to the Charge and Specification. He was found,

"Of the specification and the Charge: 'Guilty', except the word, 'drunk', substituting therefor the words, 'while under the influence of intoxicating liquor'; of the excepted word, 'Not Guilty'; of the substituted words, 'Guilty'".

Evidence of one previous conviction by general court-martial for absence without leave from May 19, 1942, to May 22, 1942, as a result of which he was sentenced to be restricted to the regimental area for nine days and forfeiture of $25 of his pay, was introduced. He was sentenced to

be dismissed the service and forfeiture of all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Hotel Pep Service Station is located at the corner of Lincoln and Atlantic Streets in downtown Tullahoma, Tennessee, across the street from the King Hotel (R. 4). Directly east of and adjoining the filling station is the Servel Restaurant. A portion of the driveway running into Lincoln Street near the restaurant was unpaved. This portion of such driveway was habitually used by patrons of the restaurant for parking purposes (R. 5, 6, 71). Such parking obstructed the driveway into Lincoln Street, and the filling station attendant usually asked the drivers of cars so parked to move them (R. 10). On the night of July 19-20, 1942, shortly after 12 o'clock, accused parked his car in the middle of this driveway, near the street and in front of the restaurant (R. 5, 23). After the car had remained there about 30 minutes the filling station attendant approached it, found the occupant apparently asleep on the front seat and observed that he was an officer. He did not molest accused but called the military police (R. 5). Staff Sergeant Rabon A. Vause and Sergeant Robert L. Bell of the Military Police responded to the call promptly. Vause approached the left side of accused's car while Bell approached the right side (R. 21, 43). Bell awakened accused after considerable effort (R. 43, 50). They then informed accused that they were military police (R. 33, 50). When accused was awakened he began cursing. Vause testified:

> "He said, 'God damn it, let me alone!' I opened the door and he fell over on the right hand side of the car and we had to move him so that I could get into the car and drive him to camp. I started the engine and started backing out but Lieutenant Moore reached over and turned off the ignition. I told him to let me take him to camp so that he would not get into trouble. He said, 'You can't drive my God damned car!' I turned the ignition and started the motor again and told the Lieutenant that he couldn't drive; that he was under the influence of alcohol. As I started to back out he reached over and started slapping me with one hand and reached for the key with his other hand.
>
> * * * * *

> He said, 'God damnit, I am an officer. Let me drive the car myself! You can drive the car if you get me a pint of whiskey!' When he hit me, I told Sergeant Bell to get the Provost Marshal. Then Sergeant Bell told me to take him to the City Hall" (R. 21).

At that time accused's breath smelled of alcohol, his eyes were red and his face flushed. He was talking louder than a normal tone (R. 22). He became angry when Vause undertook to drive his car. Vause took the steering wheel against the protests of accused (R. 43, 70). Accused's car was a fluid drive and Vause had trouble starting it (R. 25). He killed the engine trying to start it, and on the second attempt raced the motor. When this occurred accused became very angry, turned the switch off with his right hand and began "scuffling" with Vause for control of the car (R. 35). Vause testified that in doing so accused then struck him on the right cheek with the back of his left hand (R. 21, 24). Bell was then at the military police truck about 15 yards away. He saw the scuffle, returned to accused's car and they then decided to take accused to police headquarters (R. 44), where they turned him over to First Lieutenant Metellus D. Selden, Military Police Detachment, Camp Forrest, some 30 or 40 minutes later. Lieutenant Selden drove accused's car from the City Hall in Tullahoma, about two-thirds of the way to camp and accused drove the rest of the way "in a satisfactory manner". This occurred between 1:30 and 1:45 a.m. At that time Lieutenant Selden deemed accused to have "sufficient control of his faculties to enable him to drive safely and in accordance with the laws of the highways" (R. 40), but believed that accused did not have such control when witness first saw him at the City Hall some 30 minutes earlier (R. 41).

The scuffle which took place when Vause started accused's car lasted only a few seconds (R. 45), and accused's language, though louder than a normal tone (R. 22), was not loud enough for Bell, who was only about 15 yards away (R. 46), to hear "any of the words that were used" (R. 45). The filling station attendant "heard them arguing" but could not say whether there was any cursing - "I couldn't understand what they were saying" (R. 6). It was not shown that anyone other than the two military police and the filling station attendant was present, or saw or heard anything that transpired at the filling station.

Accused testified that he and a Lieutenant Dutkanych had gone from Camp Forrest to Nashville on Saturday evening, July 18. At Nashville accused purchased a fifth of Gordon's gin, about two-thirds of which they drank that night (R. 64). He arose at about 7:30 Sunday morning, was up in his room in the hotel until about 1 p.m., went to bed then until about 3 or 3:30 when Lieutenant Dutkanych returned. He then arose, dressed and "fooled around the room until we checked out" about 7 p.m. (R. 64). He had practically no sleep Saturday night (R. 65). After checking out of the hotel at Nashville he and Lieutenant Dutkanych had two drinks before they left at about 9 p.m. for camp (R. 53). Lieutenant Dutkanych drove the car from Nashville to camp while accused slept on the back seat (R. 54, 65). They arrived at Camp Forrest about 11 or 11:15 p.m. (R. 55), and each went to his own tent (R. 56). A few minutes afterward accused went to Lieutenant Dutkanych's tent and asked him to go with accused to the "Gun Club" for a sandwich (R. 57, 65). Lieutenant Dutkanych declined and accused went alone directly to the Gun Club, arriving there about 11:45 (R. 60), had one drink (R. 60, 65), left there about 12:45, July 19, and drove back to Tullahoma, where, quoting accused's testimony:

> "I had an acquaintance who worked in the Servel Restaurant. She told me once that she got through a little after one. I pulled up there and parked my car; turned off my lights; sat there, it was almost time for her to quit work, and I went to sleep while I was waiting. The next thing I knew, two 'M.P.'s' were shaking me and one of them was trying to get into the car".

Accused's version of what then transpired was:

> "Well, I told them I would drive the car. I was perfectly able to drive the car but they said, 'No', and one of them pushed me over and started to crawl in and I began to get mad. Finally, the Sergeant got in and started to back the car up. He raced the motor and tried to start the car in low gear. There is no low gear on the car -- I got madder yet. I tried to take the switch key -- I was trying to get him away with my left hand

> and turn the switch with my right ***. I swore some, just the same as I would when I am mad. I didn't use any abusive language to any of them personally, I know I didn't". (R. 66).

None of accused's profanity was directed to the military police individually (R. 45).

4. The evidence shows that the accused was found asleep in the front seat of his car between midnight and 1 a.m., July 20, 1942, parked in the driveway of the Hotel Pep Station, in downtown Tullahoma, in such a place and manner as to obstruct the use of the driveway by patrons of the filling station. While the place where his car was parked was in front of a restaurant and was habitually used by restaurant patrons for that purpose, it was not an authorized parking area. He was under the influence of intoxicants at the time, but his falling asleep may also have been attributable, in part at least, to physical exhaustion and loss of sleep the night before. The military police aroused him, advised him who they were, concluded that he was under the influence of intoxicants to such extent that he could not safely drive his car and advised him that they would drive him to his quarters. Their attempt to do so provoked the accused to the use of profanity and physical resistance. He struck one of the military police lightly in a struggle to prevent him from driving his car. This was in part provoked by the unskilled manner in which the military police started accused's car.

Parking his car in an unauthorized area, and so as to block the driveway into a filling station, going to sleep in it while awaiting a questionable appointment with a waitress in a restaurant, resistance of and assault upon the military police in the discharge of their official duties, complete loss of temper, though under aggravating circumstances, and the excessive use of profanity in a boisterous manner, all occurring in a public place, obviously was disorderly and constituted conduct of a nature to bring discredit upon the military service within the contemplation of Article of War 96. Even if the disorderliness was heard and observed only by Army personnel, it was still discrediting to the military service (CM 216707, Hester).

5. Attached to the record is a recommendation for clemency signed by Captain John R. Prentice, 124th Field Artillery Battalion, accused's defense counsel. In his review of the record of trial

the staff judge advocate, 33rd Infantry Division, states that accused, within a few hours after the sentence of the court in this case was announced, left the area to which he had been restricted by the terms of his arrest, and remained absent without authority for several days before he returned to his regiment.

6. War Department records show that accused is 29 years of age. He attended Culver Military Academy four years, and West Virginia University two years. He was commissioned a second lieutenant, Officers' Reserve Corps, December 28, 1935, was reappointed in the same rank December 18, 1940, and was ordered to active duty March 5, 1942.

The War Department records include correspondence indicating that accused was arrested in West Virginia in 1935 for driving while intoxicated, that he was again arrested in West Virginia in 1937 for driving while drunk and that he was convicted in West Virginia in 1939 of drunkenness and sentenced to confinement for ten days or to pay a fine of $10.

7. There has been received in the Office of The Judge Advocate General a letter from accused to The Adjutant General, dated August 29, 1942, in which accused submits his resignation for the good of the service and in which he states that charges laid under the 61st and 69th Articles of War are pending against him.

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. Dismissal is authorized upon conviction of violation of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGK
CM 224549

SEP 16 1942

UNITED STATES	)	93RD INFANTRY DIVISION
v.	)	Trial by G. C. M., convened at Fort Huachuca, Arizona, July 21 and 22, 1942. To be hanged by the neck until dead.
Staff Sergeant JERRY SYKES (6267528), Company B, 369th Infantry.	)	

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that S-Sgt. Jerry (NMI) Sykes, Company "B" 369th Infantry did, at Fort Huachuca, Arizona, on or about June 22, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Hazel Craig, a human being by stabbing and cutting her with a sharp instrument.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead. All members of the court present concurred in the findings and sentence. The reviewing authority approved the sentence and forwarded the record of trial. His action contained the following:

"Pursuant to Article of War 48, the order directing the execution thereof is suspended".

The record has been treated as if forwarded for the action of the President under Article of War 48.

3. The evidence shows that at about 8 p.m., or earlier, June 22, 1942, accused, who was stationed at Fort Huachuca, Arizona, went to a house in nearby Fry, Arizona, where 1st Sergeant Lester M. Craig, Service Company, 25th Infantry, and his wife, Hazel Craig (colored), lived (R. 78, 86, 108). Craig, his wife Hazel, other colored soldiers and other colored women were present (R. 78, 86). Accused remained with the group (R. 86, 104). Hazel and another woman left the party to get liquor, accused asking them to get some rum for him. They returned with whiskey (R. 91, 108) and some drinking followed (R. 92, 104, 138). In the course of the evening accused complained of illness, went into a bedroom in the house and laid down (R. 108, 110). He presently called Hazel and asked her to take him home (R. 109). She asked Craig for the keys to her car, saying she intended to take accused to Fort Huachuca (R. 112) and that she would return in a few minutes. The keys were furnished and she and accused drove away at about 9:20 p.m. She was operating the car (R. 104, 109), a 1939 Ford coupe (R. 59, 114; Ex. 2).

The woman Hazel was 24 years of age (Ex. 15). She was of a height of about 5 feet, 4 inches and weighed from 116 to 130 pounds (R. 118; Ex. 15). Craig testified that he had heard her "argue" to some extent but that she "did not have much of a temper" (R. 118). He had heard, however, that on one occasion she had become disorderly by throwing bottles and other things while in a public place (R. 119). She and Craig had been married about two years (R. 103). She had been married twice before (R. 116) and had associated with accused and other men before her marriage to Craig (R. 104). On one occasion, before her marriage to Craig, she, Craig and accused had occupied one bed together over night (R. 111). After her marriage to Craig she had, with Craig's knowledge, continued frequent associations with accused (R. 94, 104, 105, 112). Accused gave her most of his pay, the donations amounting to about $75 a month after he became a staff sergeant (R. 99, 106, 147). From about January 17 to about April 15, 1942, while Craig was on duty elsewhere, but with his knowledge (R. 100, 101, 105), accused and Hazel lived together with another couple and another woman at Valentine, Arizona (R. 95, 100).

During the period last mentioned Hazel told another woman that she was afraid accused would injure her and asked to be taken to Las Vegas, Nevada, "until Sykes cooled off" (R. 98). In June, 1942, after her return to Fry, Hazel declared to the same woman that she wanted "to get away from Sykes"(R. 99) and "lead a different life " (R. 97) because

Craig had been made a first sergeant and could therefore take care of Hazel and her 11-year-old daughter (R. 97, 99, 101). At about this time she was heard to tell accused that she wanted him to come to her house and get his suitcase - that she "was going to quit him". Accused asked her why she was taking this action but said nothing more at the time (R. 123). About June 15 she told a roomer in her house that she was "going to quit" accused (R. 124). On June 19 or 20 she was again heard to tell accused that she was going to "quit" him (R. 90) and he replied in what the witness who testified to the conversation described as "a playing mood" (R. 89), that "if she quit him he would kill her" (R. 89). Craig testified that in June he had discussed with his wife her relations with accused and had insisted

> "in a mild way that one of us had to go, and which ever way she wanted to go it did not make a lot of difference, it would be all right with me, but the way things had been going it would not be going that way any more" (R. 107).

He testified that she had replied that she had told accused "not to come down anymore, she was through with him" (R. 107), and that this conversation had been repeated in substance on June 19 (R. 108).

Witnesses testified that at the Craig house, during the evening of June 22, accused was quiet and his actions were normal (R. 82, 87). As will hereinafter appear in detail, accused testified that just before they left the house Hazel asked for and accused gave her his pocket knife (R. 139). Craig testified that he was in a position to observe his wife and accused during the entire evening while they were at his house and that witness did not see accused deliver a knife to her (R. 109).

At about 10:30 p.m., June 22 (R. 21), the dead body of Hazel Craig (R. 7, 24, 110) was found lying on an embankment at the edge of a road or street in Fort Huachuca, about 150 yards from the main road leading into the post from Fry, Arizona, and in the vicinity of the "Fry gate" (R. 6, 21, 53; Ex. 1). A medical officer who saw the body at 11:15 p.m., testified that it had been dead for about 45 minutes (R. 16). The body bore three stab wounds, one in the throat about 1½ inches above the base of the neck and about 1 inch to the

right of the mid-line of the neck, one in the left chest, and one in the right chest. There were also 14 cuts upon the body, 6 on the left chest, 2 on the right chest, 4 on the left arm and forearm, and 2 on the right forearm and hand. The stab wound in the neck penetrated to a depth of 1 3/4 inches at an angle of 45 degrees "downward in the plane which passes directly backward through the nose" and severed a small artery, the inferior thyroid artery, and a large vein, the inferior thyroid vein (R. 69). Death resulted from hemorrhages from this stab wound and the 14 incised wounds and from shock (R. 71; Ex. 15). Death was not instantaneous but occurred about 15 to 30 minutes after the stab wound was inflicted (R. 74). The stab wound in the right chest penetrated into the chest cavity and "nicked the lung". The stab wound in the left chest cut into the lung, the "heart bag" and the heart. Bleeding from the heart wound was very slight. The medical officer who performed an autopsy testified that:

> "The general appearance of the heart and the lack of blood surrounding the heart would indicate that the heart had been wounded after death occurred" (R. 72).

The stab wounds in the neck and left chest were such as to indicate that they were inflicted with an instrument which "could have been a blade roughly 1.5 cm in width and 50 to 60 mm in length. It having been reported that a blade of a knife possibly used in inflicting the wounds was broken, a search, by X-ray and otherwise, for a portion of the blade was made, but it was not found in the "thoracic cavity or neck" (Ex. 15)

The body was lying about 2 feet behind or beside the Craig car (R. 25, 32, 114). The body was on its back, with the right arm underneath and with the right knee flexed and somewhat raised (R. 32). It was clothed in slacks and with a handkerchief or similar cloth as a breast covering (Ex. 1). The breast covering was torn or disarranged and the breasts were exposed, the left breast almost entirely so (R. 32, 33; Ex. 1). The car was off the pavement, standing at an angle, to the right, with the course of the road and with the front wheels in a ditch, the front end pointing toward the north (R. 25, 55, 56). An attempt was made to start the car but because of its position it could not be moved on its own power (R. 23). There was

blood on the seat back of the steering wheel, on the back of the seat, on the dashboard and on the windshield (R. 10, 32, 56; Ex. 2). There was a "fairly large amount of blood on the floor of the car and behind the seat" (R. 10). Clots of blood on the dashboard and windshield appeared to have formed from blood spurted from the severed artery (R. 10, 56, 74). There also was blood on the right side of the seat and floor (R. 58) and

> "There was quite a large pool of blood, thick red blood on the running board and streaks over the right edge of the running board, indicating it had run off the running board" (R. 56).

From 10 to 30 feet or somewhat farther back of the car, on the pavement of the roadway, there was a thin "pool" of coagulated blood about 2 feet in diameter (R. 8, 9, 26, 27, 33, 55, 56). There was no blood on the ground beneath the body or in the immediate vicinity of it (R. 8, 26, 56, 57, 64) and there was no trace of blood along the road from the pool to the car (R. 57). A billfold or wallet was lying by the body (R. 54, 113). An unsmoked cigarette was found in the hair of the head of the body and another unsmoked cigarette was found nearby (R. 55).

An officer testified that prior to the trial he had placed his own car on the pavement of the road in the vicinity of the spot where the body was found. When stopped, with the gears in neutral position and with the brakes released, the car remained stationary. It was moved with difficulty by an officer who pushed it and it stopped, when moved, within about 2 feet. The car rolled more readily in a southerly direction than in a northerly direction (R. 180-184).

A few minutes after the body was found accused was brought to the scene. First Lieutenant Albert W. Hall, 212th Military Police, inquired as to accused's name, pointed to the body and asked accused "did you kill this girl". Accused replied "I did". Lieutenant Hall testified:

> "I asked him, why did you kill her? And he said, she tried to stab me. I asked him how long ago that the act was committed, and he stated he did not know. I asked him if it would be two hours

> ago, and he said no. I asked him if it would be ten minutes ago, and he said no and proceeded to say of his own volition, it was about an hour ago. I might add that I arrived on the scene of the accident at about ten minutes of eleven, and it was probably eleven or eleven ten, or thereabouts, when Jerry Sykes came to the scene of the alleged crime" (R. 34).

Accused's clothing at this time was clean. In response to a question by Lieutenant Hall accused said he had changed clothes in his quarters (R. 41). Accused was not warned that what he said might be used against him (R. 50) but no force or duress was used and the statements were made in a "voluntary and calm manner" (R. 35). After the conversation described (R. 36) accused was placed in confinement. Major Raymond J. Brown, Infantry, Commanding Officer, Headquarters Company, 93rd Division, went to accused very soon after he was confined and asked him what he had done with the knife. Accused said he did not "know where the knife was; that the last he knew of the knife that Hazel had the knife in her hands" (R. 61). In the meantime Lieutenant Hall went to the quarters of accused, a room in barracks occupied by but one person (R. 38, 50) and there found on the floor a khaki shirt, khaki tie and khaki trousers with white drawers within the trousers. The shirt, trousers and tie were "covered with blood stains" (R. 39). They were taken to the Fry gate where they were examined by Major Brown and others. In a rear pocket of the trousers were found a blood stained handkerchief and a blood stained pocket knife. The blades were closed. A blade was opened and it also was blood stained (R. 40, 60). The tip of this blade was broken off (R. 60). After having been "warned *** of his rights" accused stated that he had placed the knife in his pocket before he removed his clothing in barracks (R. 66) and that the point of one of the blades had been broken off for some time (R. 62). The knife was received in evidence and later withdrawn. Its measurements were not stated (R. 44).

Accused testified that at the Craig house, during the evening of June 22, after he had asked Hazel Craig and another woman to buy him some rum, the women left the house. While the women were absent accused opened a dresser drawer in which he kept his underwear and, in opening the drawer, injured a fingernail. He kept a knife in this drawer, - a knife which an officer of his company had "told us we could not keep them in the Company because they had to be a certain

length" (R. 138). Accused took the knife from the drawer to trim the injured fingernail. Later he put the knife in his pocket. Upon return of the women with the whiskey accused had one drink (R. 138). He had suffered from arthritis from time to time (R. 135, 136) and his left arm was now giving him trouble. He told the others he was ill and went to a bedroom and laid down. 30 or 40 minutes later Hazel came into the room and suggested that they go to Fort Huachuca. Accused agreed. Hazel "went to fixing her face, and at that time" asked him to lend her his knife, saying she wanted to clean her fingernails. Accused gave her the knife and she retained possession of it. No other person was in the room at this time (R. 138, 139). When the two entered her car they drove to the "Blue Moon", a restaurant or like place (R. 139, 140). En route she remarked that accused's illness was probably due to his drinking rum and said she was "going to put a stop to your drinking rum" (R. 139). Accused remonstrated mildly. She suggested also that accused had "been up to Ethel Westons". At the Blue Moon she conversed with another soldier, saying, among other things, in reference to a previous occasion on which liquor had been consumed, that "I am still drunk". She asked the other soldier to get in the car but he declined. At her request the soldier brought her an ear of buttered corn from the restaurant. She and accused then left. On the way to Fort Huachuca she repeated her remarks about his rum drinking. After they entered the post she said "you have been asking for this a long time", and, when accused remarked that she had been drinking too much, declared that she was not drunk. She turned on a cross road, repeated her remarks as to accused "asking for it", stopped the car (R. 141) and turned the engine off (R. 155).

Accused testified that the woman then suddenly reached "down between her legs and came up with a knife" in her right hand (R. 141, 156). He saw the blade (R. 156). She struck at him many times but accused each time knocked her hand back or otherwise parried the blow (R. 141, 156) and she did not succeed in striking or cutting him (R. 163, 177). Accused did not seize her hand to drive the blows back upon her (R. 163) but struck her hand with force sufficient, he thought, to drive the knife into her (R. 175). During the scuffle the car commenced to roll forward (R. 141, 153). Accused finally saw blood on his own hand (R. 141, 158) and believed that she had cut herself accidentally (R. 150, 177), whereupon with his right hand he twisted the knife from her hand, pushed the car door open (R. 141, 173, 177), jumped out and started to run away (R. 141). Immediately and while the car was still moving (R. 141) the woman, who had been sitting "at an angle" (R. 178) fell to the ground (R. 141, 157, 168). Accused then hurriedly put the knife, still opened, into his pocket

(R. 151) and ran back to the woman, picked her up and held her in his arms for a few minutes until she died, whereupon he laid the body upon the ground (R. 141). Accused did not know how the woman's wounds were inflicted except that they resulted from the scuffle and from his action in knocking her hand back (R. 162, 163).

Accused testified that while in the car or while he was holding the body his clothes became blood stained (R. 165, 170). He could not operate an automobile (R. 180) so walked from the scene to his room. There he changed his clothes but did not attempt to conceal the stained clothing. A few minutes later he remarked to a soldier whom he saw that he had been present at an accidental "killing" (R. 142). He then went to the guardhouse where, in the course of a conversation, he stated to a noncommissioned officer that he had killed the woman. This noncommissioned officer took accused to Lieutenant Hall, to whom accused said that he "was the guy that was the cause" of the woman's death (R. 143). Accused further testified that Hazel Craig had previously threatened him with a knife when accusing him of associating with the woman Ethel Weston, had stabbed him with a knife on another occasion while he was talking to "another lady" at the Blue Moon, and on a third occasion had struck him with a vase after accusing him of "running around" (R. 145, 146). Accused never used violence toward her, however (R. 146), and never threatened her (R. 149). Accused did not know the blade of his knife had been broken until he saw it in court (R. 151). Hazel had a package of cigarettes during the evening and probably had the package in the car. Accused did not smoke (R. 143).

An officer of accused's company testified that accused was "one of my best men" and that witness had planned to recommend him for an Officers' Candidate School or for a first sergeant cadre (R. 125, 126). A chaplain testified that accused had worked for him in a library and that witness had found him "honorable and upright and a fine soldier". Witness did not know of any irregular or immoral acts by accused (R. 127). Another witness for the defense testified that Hazel Craig, to witness' observation, had a "strong temper" (R. 129), and that witness had seen her flourish a pistol on one occasion during a quarrel with another woman (R. 129, 132, 133).

4. It is undisputed that at the place and time alleged the woman described in the Specification was killed by being stabbed and cut with a knife. Accused admitted that he had killed her. At the

trial he testified that he did not directly inflict the wounds but that they were suffered during the struggle in the car and were incident to the woman's attempt to use the knife against accused. Accused's contention that he did not have the knife in his hand when the stabbing and cutting occurred is inconsistent with his admission that he killed the woman and is inconsistent with all the salient circumstances in the case as established by disinterested witnesses. Not only were the stab wounds of such location and depth as to preclude any reasonable hypothesis of accidental self-infliction but one of them, penetrating to the heart, was inflicted after death. The knife with which the wounds were caused was found in the possession of accused although he at first denied knowledge of its whereabouts. There had been friction between the two on account of the woman's insistence on stopping their meretricious relations. She had exhibited fear of him. On the whole, there can be no real doubt that accused, driven by the woman's declarations of intention to break off their relations, set upon and stabbed her to death while she sat in the car and that after killing her he pushed or drove the car off the road and dragged her body to the ground and left it there for discovery by another. At least 15 minutes elapsed between the infliction of the fatal neck wound and death. The stab wound in the left breast, having been inflicted after death, was inflicted after resistance by the victim had ceased. The circumstances plainly show deliberation and an inexorable and malicious design to kill. Accused's exculpatory testimony was in essence unworthy of belief.

No excuse or justification for the homicide appears. The evidence establishes premeditation and malice aforethought. The findings of guilty of murder in violation of Article of War 92 are fully supported by the evidence.

5. The statements by accused that he had killed the woman, uttered within a short time after the stabbing, were made before he had been warned of his right to remain silent or that what he might say could be used against him. The circumstances, however, indicate that the statements were spontaneously and voluntarily made. In any case, the statements were admissions only and did not amount to confessions. The court did not err in considering them.

6. Consideration has been given to a brief and letter submitted by the individual defense counsel and forwarded to The Judge Advocate General by the reviewing authority, the Commanding General, 93rd

Infantry Division, wherein it is urged that errors injurious to the substantial rights of accused were committed during the trial and wherein it is requested that a rehearing be granted at which accused may be represented by civilian counsel of his own choice for whose employment it is stated funds have been collected by members of accused's organization. By the brief it is suggested that (a) the law member erred in sustaining an objection to a question on cross-examination addressed to Edward Williams, a prosecution witness, (b) the assistant trial judge advocate was erroneously permitted to testify concerning tests made by him to ascertain the slope and condition of the roadway on which the Craig car was found, and was thereafter erroneously permitted to address the court in final argument, (c) the prosecution erred in refraining from calling the individual defense counsel as a witness and from introducing in evidence certain letters and other communications from Hazel Craig, which were then in the possession of the trial judge advocate and which are now attached to the brief, (d) the court was unduly influenced by the protracted display in court of the blood stained clothing of accused and the record is in error in designation of the particular member of the court who requested that the court be closed during consideration of an objection to methods of conducting the prosecution including display of the clothing, and (e) new evidence is available as to Hazel Craig's "fiery temper", aggressive nature and bad character.

As to (a) the record of trial shows that Williams, a civilian and former soldier, testified that about ten days prior to the death of Hazel Craig witness had gone with her to the quarters of accused at Fort Huachuca and had there heard her tell accused to come to her house and get his suitcase - that she was going to "quit" him (R. 123), and that she had told witness on another occasion that she was going to quit accused (R. 124). After he had testified on cross-examination that he had lived with Hazel Craig or in the Craig house as a roomer for about two months, that there were two bedrooms and two beds in the house, that he occupied one of the bedrooms and that he was not married, the defense counsel asked him, "As a matter of fact you were fond of Hazel yourself?" An objection by the prosecution was sustained and the question was not answered (R. 124, 125). An affirmative answer might have tended to show prejudice against accused based on witness' friendship with the woman or his jealousy on account of her intimacy with accused, and the objection might properly

have been overruled. There being in evidence, however, in the remaining testimony of the witness, a basis for a strong inference of the existence of this friendship and possible jealousy, an affirmative answer to the question would have been cumulative only. In any case, there was convincing and uncontradicted testimony by other witnesses of the facts concerning which Williams testified, that is, that the woman had expressed to accused and others her intention to discontinue her relations with accused (R. 90, 99, 107). Accused did not attempt to contradict Williams' testimony in any regard. Upon the whole record it is inconceivable that exclusion of the proffered testimony could have materially affected the result of trial or in any manner have injuriously affected the substantial rights of accused within the meaning of Article of War 37.

As to (b) the Board of Review finds no error by the court in permitting the assistant trial judge advocate to testify concerning tests made by him to determine the slope and condition of the road at the point where the homicide occurred. An individual assistant defense counsel was present when the tests were made (R. 181). The record does not show that the assistant trial judge advocate addressed the court after he had testified or in final argument. He was a competent witness (par. 120, M.C.M.; sec. 1159, Wharton's Criminal Evidence, 11th ed.) and there is nothing suggestive of unfairness to accused in the court's action in permitting him to testify.

As to (c) the court did not err in refraining from calling the individual defense counsel as a witness. The individual defense counsel had, as provost marshal, made an investigation of the homicide, but the facts developed by this investigation were fully proved at the trial. There was no apparent reason for requiring the individual defense counsel to testify. By an indorsement upon the letter from the individual defense counsel forwarding the brief, the reviewing authority states that the individual defense counsel was not a member of the reviewing authority's command but that his services as counsel were specially requested by accused and that the individual defense counsel appeared as such independently of any request or direction by the reviewing authority. The individual defense counsel might properly have introduced himself as a witness but he did not do so. Examination of the letters and other communications from Hazel Craig, which were submitted with the brief, shows that they contain protestations of regard for accused, importunate requests for money and some evidences of impatience toward accused. The defense was free to call for and offer the writings in evidence had it chosen to do so. The contents of the

writings were of little relative importance and were wholly cumulative in effect. There was no legal impropriety or element of unfairness in the omission by the trial judge advocate to introduce the writings in evidence.

As to (d) there is nothing in the record to indicate any irregularity in the display before the court of the blood stained clothing of accused or to indicate that the court was unduly influenced by the display. The clothing was properly received in evidence, was properly exhibited to the court and properly remained in the presence of the court until removed at the request of the defense (R. 43, 65, 66). The record shows that following an objection by the defense to a request by the prosecution that the court examine the Craig car and to "display" of the clothing, the president of the court requested that the court be closed. The court was closed. When the court was opened the law member ruled on the objection, sustaining it. In the brief it is stated that a member of the court other than the president made the request that the court be closed. Any question as to the identity of the member who asked that the court be closed during consideration of the objection is inconsequential.

As to (e) the suggested items of new evidence as outlined by the brief include proof (1) that Hazel Craig, while a child, killed her younger brother by pushing him into a "buzz saw"; (2) that without excuse or justification she "threw beer bottles in taverns"; (3) that she cut accused three times and struck him in the head with a vase; (4) that through jealousy concerning accused she tried to shoot another woman; (5) that her father was recently stabbed to death by a woman in the course of a fight; and (6) that Hazel had been debarred from Fort Huachuca for failure to continue treatment for syphilis. Items (1), (2), (3) and (4) are but cumulative concerning the Craig woman's temperament and character. Accused's testimony that she was hot-tempered and was violent in specific cases when angry was corroborated at the trial by another defense witness and to some extent by Sergeant Craig. It was not contradicted. Items (5) and (6) to the effect that the woman's father had been violently killed and that the woman had been debarred from Fort Huachuca for failure to continue treatment for syphilis would be immaterial to the issues in the case in any event and would not be competent if offered in evidence.

The record of trial shows that the defense of accused was skillfully and painstakingly conducted. There is nothing in the record or

in the brief which would justify directing or authorizing a rehearing.

7. Through apparent typographical error the charge alleging violation of Article of War 92 was not copied into the record of trial (R. 3). The record shows that accused was arraigned upon, pleaded not guilty to and was found guilty of the charge as well as the specification. The charge of violation of Article of War 92 is set forth on the original charge sheet which accompanies the record of trial.

8. The charge sheet shows that accused is 25 years of age and that he has served continuously as an enlisted man since November 4, 1936.

9. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. The death penalty is authorized for conviction of violation of Article of War 92.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

(173)

SPJGK
CM 224649

SEP 12 1942

UNITED STATES v. Private DESMOND H. WOODALL (39233013), Company G, 17th Infantry.	SOUTHERN CALIFORNIA SECTOR WESTERN DEFENSE COMMAND Trial by G. C. M., convened at Inglewood, California, August 14, 1942. Dishonorable discharge and confinement for ten (10) years. Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, 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 only question requiring consideration here is as to the legal propriety of the designation of a Federal correctional institution as the place of confinement.

Confinement in a Federal correctional institution or reformatory is authorized only when confinement in a penitentiary is authorized by law (CM 220093, Unckel; CM 222093, Kiser). Confinement in a penitentiary is not authorized by Article of War 42 for committing a lewd and lascivious act upon a minor female child, the offense of which accused was herein found guilty, this offense not being recognized as an offense of a civil nature by any statute of the United States of general application within the continental United States or by any law of the District of Columbia (CM 210762, Valeroso).

3. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years in a place other than a penitentiary, Federal correctional institution or reformatory.

Herbert A. Hoover, Judge Advocate.
James H. Baugh, Judge Advocate.
Gerald T. Hardy, Judge Advocate.

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Washington, D. C.

SPJGK
CM 224730

SEP 23 1942

UNITED STATES v. Private THOMAS J. ATKINS (15102199), Company D, 28th Infantry Training Battalion.	CAMP CROFT, SOUTH CAROLINA Trial by G. C. M., convened at Camp Croft, South Carolina, July 31 and August 11, 1942. Confinement for six (6) months and forfeiture of $30 per month for like period. Camp Croft, South Carolina.

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

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

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

Specification: In that Private Thomas J. Atkins, Company "D", Twenty-eighth Infantry Training Battalion, Camp Croft, South Carolina, did, at Camp Croft, South Carolina, on or about June 26, 1942, desert the service of the United States, and did remain in desertion until he was apprehended at Knoxville, Tennessee on or about June 29, 1942.

CHARGE II: Violation of the 84th Article of War.

Specification: In that Private Thomas J. Atkins, Company "D", Twenty-eighth Infantry Training Battalion, Camp Croft, South Carolina, did, at Union County, South Carolina, on or about July 3, 1942, wrongfully dispose, by selling, two (2) uniforms, value $11.44, issued for use in the service of the United States.

He pleaded guilty to the Specification, Charge I, except the words "desert" and "in desertion", substituting therefor the words "absent himself without leave from" and "without leave", of the excepted words, not guilty, of the substituted words, guilty, and not guilty to Charge I, but guilty of violation of Article of War 61; and not guilty to Charge II and its Specification. He was found guilty of the Specification, Charge I, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words, not guilty, of the substituted words, guilty, and not guilty of Charge I, but guilty of violation of Article of War 61; and guilty of the Specification, Charge II, except the words "Union County, South Carolina, on or about July 3, 1942, wrongfully dispose, by selling, two uniforms, value $11.44", substituting therefor the words "Spartanburg County, South Carolina, on or about June 26, 1942, wrongfully abandoning one shirt, cotton, value $1.70, one trousers, cotton, value $1.90, total value $3.60", of the excepted words, not guilty, of the substituted words, guilty, and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor for six months and to forfeit $30 of his pay per month for a like period. The reviewing authority approved the sentence, directed its execution and designated the camp stockade, Camp Croft, South Carolina, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 139, Headquarters Camp Croft, South Carolina, August 20, 1942.

3. The evidence is legally sufficient to support the findings of guilty of absence without leave under Charge I and its Specification. The only question requiring consideration is as to the legal sufficiency of the record of trial to support the findings of guilty under Charge II and its Specification.

4. By the Specification, Charge II, it was alleged that accused wrongfully disposed of two uniforms by selling them. He was found not guilty of having disposed of the clothing by sale as alleged, and was found guilty, by exceptions and substitutions, of having wrongfully abandoned, at a place and time other than the place and time alleged, one shirt and one pair of trousers. The offense of wrongfully abandoning military property is distinct from the offense of wrongfully disposing of such property by sale. Abandonment connotes a negative act of renunciation, relinquishment or surrender and has none of the elements of a sale. A sale involves a positive act and a contract. Manifestly, to prove a sale of property it is unnecessary to prove

an abandonment of the property. The finding of guilty may not be justified as a finding of an offense included in that charged (par. 78c, M.C.M.). It has been repeatedly held that wrongfully disposing of Government property by means other than by sale is not an offense included in the offense of wrongfully selling the property. See CM 220455, Kennedy, and cases cited. The record of trial is legally insufficient to support the findings of guilty under Charge II and its Specification.

5. The maximum sentence authorized for the offense involved in the findings of guilty under Charge I and its Specification, that is, for absence without leave for three days, is confinement at hard labor for nine days and forfeiture of six days' pay, or $10 (par. 104c, M.C.M.).

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 under Charge II and its Specification, legally sufficient to support the findings of guilty under Charge I and its Specification and legally sufficient to support only so much of the sentence as involves confinement at hard labor for nine days and forfeiture of $10 of accused's pay.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
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Washington, D. C.

SPJGH
CM 224765

SEP 23 1942

N.D.

UNITED STATES	)	FORT KNOX, KENTUCKY
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, July 24, 1942. Dishonorable discharge (suspended), and confinement for two and one-half ($2\frac{1}{2}$) years. Disciplinary Barracks.
Private BILL BUTLER (6986107), Headquarters Company, 3rd Battalion, 6th Armored Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

1. The record of trial in the case of the soldier named above having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part, 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 Bill Butler, Hq. Co., 3rd Bn., 6th Armored Inf., did, at Fort Dix, New Jersey, on or about May 17, 1942, desert the service of the United States, by absenting himself without proper leave, from his proper organization in order to avoid hazardous duty, to wit: transfer to an overseas base, and did remain absent in desertion until he was apprehended by civil authorities and returned to military control at Fort Knox, Kentucky, on or about June 13, 1942.

The accused pleaded to the Specification, guilty except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without proper leave from" and "without leave", and to the Charge, not guilty, but guilty of a violation of the 61st

Article of War. He was found guilty of the Charge and its Specification and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for two and one-half years. The reviewing authority approved the sentence, ordered it executed, but suspended the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The result of the trial was published in General Court-Martial Order No. 74, Headquarters Fort Knox, Kentucky, August 17, 1942.

3. The evidence shows that the accused absented himself without leave from his organization at Fort Dix, New Jersey, on May 17, 1942, and was thereafter apprehended in uniform by a civil officer and returned to military control at Fort Knox, Kentucky, on June 13, 1942 (R. 10-12; Exs. 2 & 3). The evidence also shows that the accused stated to the investigating officer that he had been drinking when he left Fort Dix for his home in Hazard, Kentucky, and that he was on his way to Fort Knox when an officer of the civilian authorities arrested him at the bus station at Hazard, Kentucky (R. 8-9). This statement affirmatively shows that the accused made no remark to the investigating officer as to his understanding as to why his organization was at Fort Dix on May 17 (R. 9).

4. When the prosecution rested, the president of the court stated:

> "The Court at this time will notify the Defense and the Prosecution that the Court will take judicial cognizance of the fact that the First Armored Division, of which the 6th Infantry is a part, was in the staging area for overseas movement as of May 17, 1942" (R. 12).

5. The accused made an unsworn statement that he would not have left Fort Dix if he had not been drinking. He also stated that he had been gone only 7 days when he was apprehended. When arrested he was preparing to go to Fort Knox and was at the bus station at Hazard waiting for his mother, who was doing some shopping. He also stated that he was kept in jail for 18 days before the military police came for him (R. 13).

6. The accused pleaded not guilty to the Charge of violating the 58th Article of War, but guilty of violating the 61st Article of War. As to the Specification, the accused pleaded guilty except the words "* * * desert and in desertion, substituting therefor the words absent himself without proper leave from and without leave * * *". By a literal interpretation of this plea to the Specification, the accused actually pleaded guilty to "absent himself without proper leave from his organization in order to avoid hazardous duty". Such a plea in effect admits the elements of desertion to avoid hazardous service as described in the 28th Article of War. As thus entered, the plea is of

course inconsistent with the plea of "not guilty, but guilty of a violation of the 61st Article of War", as entered to the Charge. Furthermore, the facts as to the length of his absence and as to the reason for his absence as set forth in the unsworn statement of the accused, are altogether inconsistent with his plea that he absented himself to avoid hazardous duty. In view of these obvious inconsistencies and the apparent lack of understanding by the accused of the effect of his plea, the provisions of the Manual, as well as the dictates of simple justice, requires that the plea be considered as one of not guilty (M.C.M., 1928, par. 70).

7. The offense of desertion is defined as "* * * absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service" (M.C.M., 1928, par. 130). Thus it is apparent that desertion is an offense requiring a specific intent of mind. It is equally clear that the word "desert" is a broad, inclusive term and when used in a specification is susceptible of attributing to the accused any one of the three intents of mind described above. When, therefore, the word "desert" in a specification is modified, as in the present case, by the phrase "* * * in order to avoid hazardous duty * * *", its meaning is narrowed and the justiciable issues of the Specification are accordingly restricted. Furthermore, when a Specification alleges desertion with an intent to avoid hazardous duty, the proof must show such an intent. If the proof shows no such intent, but rather an intent not to return to the service, there is a fatal variance between the allegata and the probata and a finding of guilty of desertion based on such proof cannot be approved.

The present specification follows form No. 14, page 240 of the Manual for Courts-Martial, 1928, and alleges that the accused -

> "* * * did * * * desert the service of the United States, by absenting himself without proper leave, from his proper organization in order to avoid hazardous duty, to wit: transfer to an overseas base, and did remain absent in desertion until he was apprehended by civil authorities and returned to military control at Fort Knox, Kentucky, on or about June 13, 1942".

This Specification alleges a desertion with the single intent to avoid hazardous duty. The concluding part of the Specification, which provides as follows: "* * * and did remain absent in desertion until he was apprehended * * *", is merely evidentiary in nature, and descriptive of the period of time in which the accused remained absent "* * * in order to avoid hazardous duty * * *". This latter clause might also be considered as surplusage except for the cautious and desirable practice of always alleging in every desertion specification the dates between which an accused is charged with being absent in desertion. Thus, if the prosecution fails to establish the specific intent of deserting in order to avoid hazardous duty, the basis for a finding of the lesser included offense of absence without leave has been alleged. Furthermore, it is not unimportant to a

fair interpretation of the meaning of the present Specification that the only type of desertion considered by the court was desertion to avoid hazardous service. This interpretation by the court is shown by its announcement at the close of the prosecution's case that it was taking judicial notice that the organization to which the accused was assigned was in a staging area on May 17, 1942. It is also significant of the attitude of the prosecution that it offered no evidence to refute the statement of the accused that he was taken into custody by the civil authorities after he had been absent only 7 days. Apparently the prosecution believed the statement or did not regard proof of the length of the unauthorized absence as important to the allegation of a desertion to avoid hazardous duty. In view of these factors, we must necessarily conclude that both the court and the prosecution regarded the justiciable issues of the Specification restricted to one type of desertion, described as an "* * * absence without leave * * * to avoid hazardous duty, * * *", and that the court's finding of guilty contemplated that particular type of desertion alone.

In order, therefore, to sustain a finding of guilty under the present Specification, it is necessary for the record to show that the accused knew that his organization was about to be transferred to hazardous duty and that he left it in order to avoid that duty. The evidence entirely fails to show either of these two factual elements. Although the court announced that it was taking judicial notice that the organization to which the accused was attached was in a staging area for overseas movement on May 17, the date upon which the accused absented himself without leave, there is nothing in the record to justify the charging of such notice to the accused.

The evidence, however, does show that the accused absented himself without leave from May 17, 1942, to June 13, 1942, and is legally sufficient, therefore, to support only so much of the findings of guilty as involves the lesser included offense of absence without leave for 27 days, and only so much of the sentence as is authorized by paragraphs 104 c of the Manual for Courts-Martial, 1928, for that offense.

For the reasons stated, the Board of Review is of the opinion that the record is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves findings that the accused, at the place and time alleged, absented himself without leave from his organization and remained absent without leave until apprehended and returned to military custody, in violation of the

61st Article of War, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for 2 months and 21 days and forfeiture of two-thirds of his pay per month for a like period.

(Dissent), Judge Advocate.

Charles L. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

WAR DEPARTMENT
Services of Supply
(184) In the Office of The Judge Advocate General
Washington, D. C.

SPJGH
CM 224765

UNITED STATES N.D.	FORT KNOX, KENTUCKY
v.	Trial by G.C.M., convened at Fort Knox, Kentucky, July 24, 1942. Dishonorable discharge (suspended), and confinement for two and one-half ($2\frac{1}{2}$) years. Disciplinary Barracks.
Private BILL BUTLER (6986107), Headquarters Company, 3rd Battalion, 6th Armored Infantry.	

DISSENTING OPINION by HILL, Judge Advocate

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 in part, 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 Bill Butler, Hq. Co., 3rd Bn., 6th Armored Inf., did, at Fort Dix, New Jersey, on or about May 17, 1942, desert the service of the United States, by absenting himself without proper leave, from his proper organization in order to avoid hazardous duty, to wit: transfer to an overseas base, and did remain absent in desertion until he was apprehended by civil authorities and returned to military control at Fort Knox, Kentucky, on or about June 13, 1942.

The accused pleaded to the Specification, guilty except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without proper leave from" and "without leave", and to the Charge, not guilty, but guilty of a violation of the 61st

Article of War. He was found guilty of the Charge and its Specification and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for two and one-half years. The reviewing authority approved the sentence, ordered it executed, but suspended the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, as the place of confinement. The result of the trial was published in General Court-Martial Order No. 74, Headquarters Fort Knox, Kentucky, August 17, 1942.

3. The prosecution introduced in evidence an extract copy of the morning report of Headquarters and Headquarters Company, 3rd Battalion, 6th Armored Infantry, APO 251, New York, New York, showing an entry from duty to absence without leave as to accused on May 17, 1942 (R. 10; Ex. 2). The accused, dressed in uniform, was turned over to the Sergeant of the Guard, Fort Knox, Kentucky, on June 13, 1942, by Charles Cornett, Sheriff of Perry County (R. 11-12; Ex. 3).

The accused, after he had been duly warned of his rights, stated to the investigating officer that he had been drinking when he left Fort Dix about the 6th or 7th of May and went to his home in Hazard, Kentucky; that the civilian authorities came and picked him up when he was waiting in the bus station at Hazard to take the bus for Fort Knox (R. 7-9).

Second Lieutenant James A. King identified an affidavit, sworn to and subscribed to by accused in his presence, stating that accused left without leave his organization at Fort Dix on May 17, 1942, and returned to military control at Fort Knox, Kentucky, on June 13, 1942. The affidavit was received in evidence (Ex. 2) with an affirmative statement of "No objection" by the defense. Since the 6th Armored Infantry left Fort Knox, all correspondence to it as late as 2 weeks prior to date of trial had been addressed to Fort Dix, New Jersey (R. 9-11).

4. The accused, for the defense, made an unsworn statement that he would not have left Fort Dix if he had not been drinking on that night; he was gone only 7 days, and was waiting for his mother to come back from shopping when he was picked up in the bus station, and was then going to catch a bus out of Hazard to Fort Knox; and that he was put in jail where he stayed for 18 days before the military police came for him (R. 13).

5. At the close of the case of the prosecution the record states:

"The President; The Court at this time will notify the Defense and the Prosecution that the Court will take judicial cognizance of the fact that the First Armored Division, of which the 6th Infantry is a part, was in the staging area for overseas movement as of May 17, 1942" (R. 12).

6. In his unsworn statement the accused stated that he was absent without leave for 7 days only at the date of his apprehension by the civil authorities. That statement is inconsistent with his plea of guilty to absence without leave for the period of 27 days. The court should then have proceeded with the trial as if he had pleaded not guilty (A.W. 21).

7. Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service (M.C.M., 1928, par. 130 a).

The Specification contains two complete allegations of desertion: the first by absenting himself without leave on May 17, 1942, in order to avoid a certain hazardous duty; and the second by absenting himself on May 17, 1942, and remaining absent in desertion until apprehended and returned to military control on June 13, 1942. It is possible that the Specification was subject to a special plea for duplicity. The Specification clearly set out the two allegations and the accused may not plead surprise or that he was misled as to the allegations of fact upon which he was required to defend himself. Proof either that accused absented himself with intent to avoid the stated hazardous duty, or that he absented himself for the period stated accompanied by the intention not to return, would support a finding of guilty of the Specification.

The Board of Review has held:

"The fact that a specification is multifarious is not of itself a sufficient reason for setting aside a finding of guilty" (CM 202601, Sperti, p. 37).

"Although the specification thus charged two offenses, violations of different Articles of War, it is apparent that the substantial rights of accused were not affected thereby, for the defense proceeded with the trial without objection to the form of the specification or to the evidence in support thereof" (CM 192530, Browne, p. 15).

8. In order to sustain a finding of guilty of desertion by quitting his organization with intent to avoid hazardous duty the record must show that accused absented himself with knowledge that his organization was about to enter upon hazardous duty. There is no proof in the record that the accused had any knowledge of any such movement. The action of the court in stating that it took judicial notice that the First Armored Division, which included the regiment of accused, was on the date of the initial absence of accused in a staging area for overseas movement, was not authorized under paragraph 125, Manual for Courts-Martial, 1928. In any event, knowledge that his organization was about to enter upon hazardous duty was not brought home to accused. The effect of his plea of guilty, with certain exceptions, in admitting his intent to avoid the hazardous duty alleged, is negatived by his unsworn statement which states facts inconsistent both with the length of his absence and with the intent to avoid hazardous duty alleged.

There is no proof to support the allegation that accused absented himself with intent to avoid hazardous duty.

9. The proof does show that accused absented himself without leave on May 17, 1942, and that he remained absent in desertion until he was turned over to the sergeant of the guard, Fort Knox, Kentucky, by the Sheriff of Perry County on June 13, 1942. The accused in his unsworn statement admits the fact of apprehension. The length of the absence, 27 days, the distance traveled from Fort Dix to Fort Knox, 851 miles, and the fact of apprehension support the inference by the court of the intent to desert (M.C.M., 1928, par. 130 a).

10. This case may be distinguished from CM 224128, Collopy, in which the substitution by the court of a finding of a specific intent to remain absent permanently for the allegation of a specific intent to shirk certain important service, was held to constitute a variance fatal to the finding of guilty.

It may also be distinguished from CM 222861, Fragassi, in which, under a specification similar to the Specification in this case, the record was found legally sufficient to support only the lesser included offense of absence without leave in violation of Article of War 61, because in the Fragassi case the Board of Review stated that the circumstances justified neither an inference of intent by accused to shirk important service nor an inference of intent not to return to his proper station or to quit the service entirely.

11. There is no maximum limit of punishment upon conviction of violation of Article of War 58 committed after February 3, 1942 (Executive Order No. 9048, Feb. 3, 1942).

12. For the reasons stated the record of trial is, in my opinion, legally sufficient to support the findings of guilty and the sentence.

_____, Judge Advocate.

SPJGH
CM 224765 1st Ind.

War Department, J.A.G.O., NOV 13 1942 - To the Secretary of War.

1. The record of trial and the accompanying papers in the case of Private Bill Butler (6986107), Headquarters Company, 3rd Battalion, 6th Armored Infantry, together with the opinion of the Board of Review and the dissenting opinion of one member are transmitted herewith pursuant to Article of War 50½ as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), for the action of the Secretary of War.

2. The accused was found guilty of desertion at Fort Dix, New Jersey, on May 17, 1942, by absenting himself without proper leave from his organization in order to avoid hazardous duty, to wit, transfer to an overseas base, terminated by apprehension at Fort Knox, Kentucky, June 13, 1942. The reviewing authority approved the sentence of dishonorable discharge, total forfeitures, and confinement at hard labor for two and one-half years, ordered it executed, but suspended the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Order No. 74, Headquarters Fort Knox, Kentucky, August 17, 1942.

3. The Board of Review as well as the dissenting member are of the opinion that the record fails to support the allegation that accused absented himself with intent to avoid hazardous duty.

The Board of Review is of the further opinion that the record is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involve findings of guilty of absence without leave from May 17, 1942, to June 13, 1942, in violation of the 61st Article of War, and only so much of the sentence as involves confinement at hard labor for two months and twenty-one days and forfeiture of two-thirds of his pay per month for a like period.

The dissenting member is of the opinion that notwithstanding the failure of the record to support the allegation that accused absented himself with intent to avoid hazardous duty, the Specification also alleges, and the record supports, desertion terminated by apprehension and supports the sentence.

4. I concur in the opinion of the Board of Review that the record does not support the allegation that accused absented himself without leave with intent to avoid hazardous duty, that the record is legally sufficient to support only so much of the findings of guilty as involve findings of guilty of absence without leave for the period alleged, in

violation of Article of War 61, and to support only so much of the sentence as involves confinement at hard labor for two months and twenty-one days and forfeiture of two-thirds pay per month for a like period.

5. I recommend, therefore, that only so much of the findings of guilty be approved as involve findings that accused, at the time and place alleged, absented himself without leave from his organization and remained absent without leave until apprehended at the time and place alleged, in violation of the 61st Article of War, and only so much of the sentence be approved as involves confinement at hard labor for two months and twenty-one days and forfeiture of two-thirds of his pay per month for a like period.

6. Inclosed herewith are two forms of action prepared for your signature. Form "A" will accomplish the approval of the findings and sentence in accordance with my views. Form "B" will accomplish the approval of the findings and sentence in accordance with the views of the dissenting member of the Board of Review.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1- Record of trial.
Incl.2- Action Form "A".
Incl.3- Action Form "B".

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

SPJGK
GM 224805

OCT 1 0 1942

UNITED STATES	)	33RD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Forrest, Tennessee, August 20 and 21, 1942. Dishonorable discharge (suspended) and confinement for five (5) years. Disciplinary Barracks.
Private THOMAS P. CONLON (36025426), Battery C, 210th Field Artillery Battalion.	)	

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

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

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

Specification: In that Pvt Thomas P. Conlon, Battery C, 210th F. A. Bn. did, at Camp Forrest, Tennessee on or about 5 August 1942 desert the service of the United States by absenting himself without proper leave from his organization, with intent to shirk important service, to wit: Having been assigned as part of a cadre to 2d Brigade Engineer Amphibian Command, Camp Edwards, Massachusetts per par 2 SO #189 Hq 33d Infantry Division, dated 5 August 1942 ordered to leave early the morning of 6 August 1942, and did remain absent in desertion until he surrendered himself at Battery C, 210th F.A. Bn., Camp Forrest, Tennessee on or about 7 August 1942

CHARGE II: Violation of the 61st Article of War.
(Disapproved by reviewing authority.)

Specification: (Disapproved by reviewing authority.)

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of one previous conviction by special court-martial for violation of the 65th Article of War 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 five years. The reviewing authority disapproved the findings of guilty of Charge II and its Specification, approved the sentence, and directed its execution but suspended the execution of the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 51, Headquarters 33rd Infantry Division, Camp Forrest, Tennessee, August 28, 1942.

3. The evidence shows that accused absented himself without leave from his organization at Camp Forrest, Tennessee, sometime between retreat on August 5 and reveille on August 6, 1942 (R. 7, 15, 18, 24; Ex. C). He returned voluntarily on the morning of August 7 (R. 37; Ex. C). On July 31, in response to an official order from Headquarters 33rd Infantry Division, Captain David Turnbull, Commanding Battery C, 210th Field Artillery Battalion, furnished to that Division Headquarters a list of men for a cadre to be transferred to the 2nd Brigade Engineer Amphibian Command at Camp Edwards, Massachusetts (R. 6, 41). A copy of this list was posted on the bulletin board of the Battalion on July 31 (R. 7, 14, 27). It included the name of the accused (R. 6, 26). On the same day accused wrote to his mother in Chicago stating to her that he was going to Camp Edwards, Massachusetts, on the following Wednesday (Aug. 5) and that if she wanted to send him a message to telegraph before Tuesday noon (R. 51; Def. Ex. 1). On August 5, Headquarters 33rd Infantry Division issued Special Orders 189, paragraph 2 of which directed the transfer by rail on August 6, 1942, of several hundred men, approximately 137 from 210th Field Artillery Battalion, including accused, from Camp Forrest, Tennessee, to 2nd Brigade Engineer Amphibian Command, Camp Edwards, Massachusetts (R. 12, 14; Ex. B). All the men in the cadre were kept fully informed as to when the cadre was to move and their equipment was packed the day before (R. 14). Standing orders required each man in the battalion to read the bulletin board daily (R. 39). On August 5 accused was personally given a book relating to his pay status, a kind of book given only to members of the cadre (R. 39, 40). The cadre left Camp Forrest for Camp Edwards at about 7:30 a.m., August 6 (R. 7, 56). In January, 1942, accused had been ordered

transferred to a new organization leaving Camp Forrest, Tennessee, but had not left with his new organization (R. 32).

After accused had returned to his organization on August 7, and had been placed under arrest, he stated to his battery commander that he was willing to pay his own expenses if permitted to join his organization at Camp Edwards (R. 49, 50, 55).

Accused did not testify or make an unsworn statement.

4. Accused was found guilty of desertion with intent to shirk important service, to wit:

> " *** Having been assigned as part of a cadre to 2d Brigade Engineer Amphibian Command, Camp Edwards, Massachusetts per par 2 SO #189 Hq 33d Infantry Division, dated 5 August 1942 ordered to leave early the morning of 6 August 1942".

The evidence shows that accused, with full knowledge that he was one of the men composing the cadre ordered to entrain on the morning of August 6, 1942, for Camp Edwards, Massachusetts, willfully absented himself without leave at some time between retreat on August 5 and reveille on August 6, in order to avoid going with such cadre, and remained absent until after the cadre had departed from Camp Forrest. The proof is adequate to show that he acted with specific intent to shirk the duty imposed upon him by official orders. The controlling question consequently is, whether the service involved constituted "important service" within the meaning of Article of War 28, so as to sustain a conviction for desertion. If it does not, the evidence was not sufficient to support the finding of desertion.

The question of what constitutes "important service" contemplated in Article of War 28, was carefully considered by the Board of Review in CM 151672, Lytle (Dig. Ops. JAG, 1912-40, sec. 385) wherein the Board of Review stated that:

> " *** Within the meaning of that article 'important service' includes all actual service designed to protect or promote, in a manner direct and immediate, the national or public interest or welfare; but does not include what may be termed 'preparatory

> service; that is, service which constitutes merely a part of a series of acts or course of prescribed conduct, designed, by way of preparation and training, to perfect the personnel of the Army in its duties to the end that it may be fitted when called upon in time of national stress or public emergency to render efficiently that actual, direct, immediate service to the national or public interest or welfare which is the ultimate object of maintaining an army. In time of peace such services of troops as strike or riot duty, employment in aid of the civil power in, for instance, protecting property, or quelling or preventing disorder in times of great public disaster, embarkation for foreign duty or duty beyond the continental limits of the United States, and, under some exceptional circumstances, such as threatened invasion, entrainment for duty upon the border may be considered as 'important service'; while such services as drilling, target practice, maneuvers, practice marches, etc., will not ordinarily be regarded as coming within the purview of A.W. 28. C.M. 151672 (1922)".

Is what was there said applicable in time of war as well as in time of peace?

All military service in time of war is more important, in a general sense, than similar service in time of peace. The importance of such service is increased by its urgency and necessity. The importance of war service and the greater relative seriousness of avoidance of such service are fully recognized in the statutory authorizations for punishments for such avoidance through desertion. Under Article of War 58 the authorized penalty for desertion is greater than for the same offense in time of peace. But if the intention of Congress in defining the special type of desertion embraced in Article of War 28 had been to include in the term "important service" all service in time of war it could simply have so stated and it would have been quite unnecessary to make the differentiation, as the Congress did, between important and other service. The context of Article of War 28 plainly uses the word "important" as a relative term to be applied comparatively in time of war as well as in time of peace. What is important in war may not always be important in peacetime, but the test as to whether a particular

wartime service is important lies wholly in its comparison to other wartime service.

It seems clear that the standards laid down in the Lytle case are generally applicable in time of war and should govern in determining whether any particular service in time of war is "important service" within the meaning of Article of War 28. By these standards transfers or movements for the organization or expansion of new units, or for training purposes of routine character, not directly related to the maintenance of internal order, embarkation for foreign duty, possible contact with the enemy, or other special functions of the Army, may not be classified as important service.

Accused was designated as a member of a cadre transferred to Camp Edwards, Massachusetts, to join an engineer amphibian command. It does not appear that the movement was directly preparatory to departure overseas and the record is silent as to the immediate prospective duties of the new command. The movement was not a secret one. Accused was merely a member of the cadre which, in so far as he had reason to know, was intended for routine organization, recruitment or training. The evidence thus sufficiently shows that accused shirked the service involved in his assignment and movement to his new organization, as charged, but fails to show that the service was important service within the meaning of Article of War 28. The shirking of the service described was an offense more serious than mere absence without leave and was violative of Article of War 96 (CM 151672, Lytle). Paragraph 104 c of the Manual for Courts-Martial does not prescribe maximum limits of punishment for this offense.

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves findings that accused did, at the place and time alleged, absent himself without leave from his organization with intent to shirk the service of accompanying the cadre to which he had been assigned by the order described for movement as alleged to the 2d Brigade Engineer Amphibian Command, Camp Edwards, Massachusetts, and did remain absent until he surrendered himself at the place and time alleged, in violation of Article of War 96, and legally sufficient to support the sentence.

Robert W. Davis, Judge Advocate.

James H. Baugh, Judge Advocate.

Glenn W. Hardy, Judge Advocate.

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

SPJGK
CM 224849

SEP 1 0 1942

UNITED STATES v. Private First Class KENNETH ISAACS (20382061), Headquarters Detachment, 1322nd Service Unit; Private BERTRAND L. MULLEN (33082904), Company L, 1302nd Service Unit; and Private HENRY J. REINECK (32066262), Detachment of Patients, Station Hospital, Fort George G. Meade, Maryland.	THIRD SERVICE COMMAND SERVICES OF SUPPLY Trial by G. C. M., convened at Fort George G. Meade, Maryland, August 17, 1942. Each: Dishonorable discharge and confinement for one and one-half ($1\frac{1}{2}$) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

2. Accused were jointly tried upon separate charges.

Accused Isaacs was tried upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private first class Kenneth Isaacs, Headquarters Detachment, 1322nd Service Unit, did, at Fort George G. Meade, Maryland, on or about May 12, 1942, in his testimony before a board of officers convened under AR 615-360, Section VIII, make under oath a statement in substance as follows:

"I have listened carefully to the statements made by Lt. Spiegel and Private Reineck and I must admit they are true",

which statement he did not then believe to be true.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Charge and of the Specification

> "Guilty, with the substitution: 'In that Private Kenneth Isaacs did at Fort George G. Meade, Maryland, on or about May 12, 1942, make under oath a statement in substance as follows:
>
> "I sucked his (the civilian's) penis";
>
> and in that Private Kenneth Isaacs did, at Fort George G. Meade, Maryland, on or about July 23, 1942, make under oath a second statement in substance as follows:
>
> "I wish to state that that portion of Reineck's statement wherein he says that I took the civilian's penis in my mouth is not true",
>
> one of which statements he knew to be untrue'".

Accused Mullen was tried upon the following Charge and Specifications:

> CHARGE: Violation of the 96th Article of War.
>
> Specification 1: In that Private Bertrand L. Mullen, Company L, 1302nd Service Unit, did, at Fort George G. Meade, Maryland, on or about May 15, 1942, in his testimony before a board of officers convened under AR 615-360, Section VIII, make under oath a statement in substance as follows:
>
> "While seated in the back seat, Isaacs sucked my penis but I did not reciprocate on this occasion",
>
> which statement he did not then believe to be true.
>
> Specification 2: In that Private Bertrand L. Mullen, Company L, 1302nd Service Unit, did, at Fort George G. Meade, Maryland, on or about May 15, 1942, in his testimony before a board of officers convened under AR 615-360, Section VIII, make under oath a statement in substance

as follows:

"While at this apartment, Isaacs and I went into the bedroom and went down on each other",

which statement he did not then believe to be true.

He pleaded not guilty to the Charge and Specifications. He was found guilty of the Charge. Of Specification 1 he was found

"Guilty, with the substitution: 'In that Private Bertrand L. Mullen did, at Fort George G. Meade, Maryland, on or about May 15, 1942, make under oath a statement in substance as follows:

"He (Private Kenneth Isaacs) sucked my penis";

and in that Private Bertrand L. Mullen did, at Fort George G. Meade, Maryland, on or about June 30, 1942, make under oath a second statement in substance as follows:

"Isaacs did not commit an abnormal act with anyone in the car that night",

one of which statements he knew to be untrue'".

Of Specification 2 he was found

"Guilty, with the substitution: 'In that Private Bertrand L. Mullen did, at Fort George G. Meade, Maryland, on or about May 15, 1942, make under oath a statement in substance as follows:

"While at this apartment (in Washington, D.C.) Isaacs and I went into the bedroom and went down on each other (sucked the penis of each other)";

and in that Private Bertrand L. Mullen did, at Fort George G. Meade, Maryland, on or about June 30, 1942, make under oath a second statement in substance as follows:

"That was untrue (re the abnormal act with Private Kenneth Isaacs in a Washington, D.C. apartment); Isaacs was never in that apartment in Washington",

one of which statements he knew to be untrue'".

Accused Reineck was tried upon the following Charge and Specification:

> CHARGE: Violation of the 96th Article of War.
>
> Specification: In that Private Henry J. Reineck, Detachment of Patients, Station Hospital, Fort George G. Meade, Maryland, did, at Fort George G. Meade, Maryland, on or about May 12, 1942, in his testimony before a board of officers convened under AR 615-360, Section VIII, make under oath a statement in substance as follows:
>
> > "While I was sitting in the front seat I saw Private Isaacs engage in homosexual relations with the civilian who was seated next to him. Private Isaacs took this civilian's penis in his mouth",
>
> which statement he did not then believe to be true.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Charge, and of the Specification

> "Guilty, with the substitution: 'In that Private Henry J. Reineck did, at Fort George G. Meade, Maryland, on or about May 12, 1942, make under oath a statement in substance as follows:
>
> > "I saw Private Isaacs take this civilian's penis in his mouth";
>
> and in that Private Henry J. Reineck did, at Fort George G. Meade, Maryland, on or about June 27, 1942, make under oath a second statement in substance as follows, the statement being made in answer to a question as to whether the first one was true:
>
> > "No, it was not true; I did not see Isaacs do such a thing",
>
> one of which statements he knew to be untrue'".

Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor

for eighteen months. No evidence of previous convictions was introduced. The reviewing authority approved the sentence in each case, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement in each case, and forwarded the record for action under Article of War 50½.

3. The court did not expressly find accused guilty or not guilty of the specific allegations contained in the Specifications upon which they were arraigned. From the findings of guilty of substituted words, however, it is to be implied that it was the intention of the court to find accused not guilty of such allegations. The record of trial contains no evidence that the respective statements of accused set forth in the Specifications upon which accused were arraigned were false or that accused did not believe the statements to be true. There is evidence that each accused made a statement or statements under oath as alleged and that each subsequently made an inconsistent or contradictory statement or statements under oath (Exs. B-E). It is well established that evidence of two contradictory statements does not alone establish falsity of either statement and does not establish false swearing (sec. 451 (53), Dig. Op. J.A.G. 1912-1940). The general rule is stated in Corpus Juris as follows:

> "A statement of accused, directly contradicting that upon which perjury (false swearing) is assigned, is not sufficient evidence of the falsity of the latter, but other extrinsic evidence is necessary to establish its falsity" (48 C.J. 900).

4. Each Specification alleges that accused made under oath a specific statement which he did not believe to be true. In each case he was found guilty only of making contradictory statements under oath "one of which statements he knew to be untrue". The corrupt making of contradictory statements under oath may under some circumstances be a military offense but such an offense is distinct in nature and identity from false swearing, the offense here charged. No allegation of making inconsistent or contradictory statements was expressly or by necessary inference included in any of the specifications. It is axiomatic that an accused cannot be convicted of an offense not charged against him. The findings of guilty are not legally justified as findings of lesser included offenses (par. 78c, M.C.M.), and the record of trial is legally insufficient, on this account, to support such findings.

5. It is noted that the papers accompanying the record of trial contain reports upon the several Charges by Lieutenant Colonel John T. Thompson, Judge Advocate General's Department, signed with the designation "Staff Judge Advocate". The records of the office of The Judge Advocate General indicate that this officer is the post judge advocate, Fort George G. Meade, Maryland. The charges were referred for trial by indorsements signed by Colonel Charles A. Wickliffe, Judge Advocate General's Department. Colonel Wickliffe is the staff judge advocate of the appointing authority, the Commanding General, Third Service Command. There is nothing accompanying the record to show that before directing trial the appointing authority referred the charges to Colonel Wickliffe, his staff judge advocate, for consideration or advice as required by Article of War 70, or that such staff judge advocate submitted to the appointing authority his written advice and recommendations as required by paragraph 35b of the Manual for Courts-Martial. In so far as appears the indorsements referring the charges for trial were signed by the staff judge advocate in a purely ministerial capacity.

6. For the reasons stated the Board of Review holds the record of trial legally insufficient, in the case of each accused, to support the findings of guilty and the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGH
CM 224894

SEP 9 1942

N.D.

UNITED STATES	FIRST SERVICE COMMAND
v.	Trial by G.C.M., convened at Fort Devens, Massachusetts, August 7 and 14, 1942. Dismissal.
First Lieutenant EDWARD A. TULIS (0-158628), 705th Military Police Battalion.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

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

Specification: In that First Lieutenant Edward A. Tulis, 705th Military Police Battalion, did without proper leave, absent himself from his station at Camp Aiken, Moscow, Vermont, from about June 22, 1942, to about July 12, 1942.

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

Specification: (Finding of not guilty.)

The accused pleaded guilty to Charge I and the Specification thereunder and not guilty to Charge II and the Specification thereunder. He was found guilty of Charge I and the Specification thereunder and not guilty of Charge II and the Specification thereunder and was sentenced to be dismissed the service. The reviewing authority approved the sentence

and forwarded the record of trial for action under the 48th Article of War.

3. The evidence with respect to the Specification and Charge I, of which accused was found guilty shows, by a stipulation, that the accused, without proper leave, left his organization at Camp Aiken, Moscow, Vermont, on June 22, 1942, and was returned to military control on July 12, 1942 (R. 11). When the charges were served upon him and after he had been duly warned, accused voluntarily stated that he was guilty of Charge I but thought he was being charged with two excess days (R. 12-14).

4. The accused testified for the defense that he left Moscow, Vermont, on June 16, 1942, to report at the Quartermaster Motor Transportation School, Holabird Quartermaster Base, Baltimore, Maryland, on the 17th. His baggage lost in transit delayed his arrival for two days. When he reported on the 19th, he was not admitted to the school. He left Baltimore on June 22nd to return to his own station, and reached Boston on June 23rd. His baggage did not arrive in Boston for four days. After shipping the baggage to Moscow, Vermont, he met some friends, had a drink and kept on drinking with them until July 3rd. After cashing a check to pay his hotel bill, he intended to go to Moscow on July 4th. Instead he had some more drinks with his friends and finally was apprehended on July 12, 1942. He served in the last war and was commissioned a second lieutenant in the Air Service. He was divorced in 1938 and his eleven year old boy lives with his former wife (R. 15-19).

Captain Bernard J. Duffy, Infantry, testified that while he was in command of the 1106th Company, Veterans Civilian Conservation Corps, the accused was a member of that company (R. 21-22).

5. The pleas of guilty and the stipulated testimony establish the absence without leave of accused from his station, from about June 22 to about July 12, 1942, in violation of Article of War 61.

6. The accused is 45 years of age. The records of the Office of The Adjutant General show his service as follows:

Enlisted service May 11, 1918 to December 19, 1918; appointed second lieutenant, Aviation Section, Signal Reserve Corps, December 19, 1918; reappointed second lieutenant, Air Service, Army of the United States, December 19, 1923; reappointed December

19, 1928; appointed temporary first lieutenant, Army of the United States, April 2, 1942, for duty with the Corps of Military Police; extended active duty April 7, 1942.

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

Judge Advocate.

Judge Advocate.

Judge Advocate.

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

SPJGH
CM 224932

NOV 14 1942

UNITED STATES	)	SECOND SERVICE COMMAND
	)	
V.	)	Trial by G.C.M., convened at Fort Du Pont, Delaware, June 18, 1942. Dishonorable discharge (suspended) and confinement for four (4) years. Disciplinary Barracks.
	)	
Private FRANK G. JENKINS (20264517), Battery E, 53rd Coast Artillery.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part. The record has now 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 58th Article of War.

Specification: In that Private FRANK G. JENKINS, Battery "E", 53rd Coast Artillery, did, at Camp Pendleton, Virginia, on or about April 15, 1942, desert the service of the United States by absenting himself without proper leave from his organization with intent to shirk important service, to wit: foreign service, and did remain absent in desertion until he was apprehended at Dagsboro, Delaware, on or about May 9, 1942.

He pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to dishonorable discharge, total forfeituresand confinement at hard labor for five years. The reviewing authority disapproved so much of the finding as involved a finding of guilty with intent to avoid important service, to wit, foreign service,

approved the sentence but remitted one year of the confinement imposed, directed the execution of the sentence as modified, but suspended the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Order No. 422, Headquarters Second Service Command, Services of Supply, Governors Island, New York, September 1, 1942.

3. The evidence shows that the accused absented himself without leave from his organization at Camp Pendleton, Virginia, on April 15, 1942 (R. 8; Ex. 1). He was apprehended at his home in Dagsboro, near Georgetown, Delaware, on May 9, 1942. As the civil police approached, the accused left his home and ran across the field until an officer drew a revolver and ordered accused to halt. The accused was dressed in civilian clothes.

4. The only testimony for the defense was the unsworn statement of accused that he had been in service for some seventeen months and had had only one twenty-four hour pass and one forty-eight hour pass. He had tried to get a pass to go home but had been unable to do so. His mother was in the hospital, and he had a Class A pass which gave him a twenty-four hour leave or overnight leave. Upon going home, he felt that he should stay around and help care for several small brothers and sisters. He had been a good soldier and wished to remain in the service.

5. Major W. A. Haviland, Field Artillery, Fort Du Pont, Delaware, testified for the court that he believed that Camp Pendleton had been used as a staging area for ports of embarkation on the north coastal region of Virginia.

6. The findings of guilty as approved by the reviewing authority found accused guilty of deserting by absenting himself without leave from his organization at Camp Pendleton, Virginia, April 15, 1942, and remaining absent in desertion until apprehended at Dagsboro, Delaware, on or about May 9, 1942.

In a recent case (CM 224765, Butler) in which accused was similarly charged with desertion with intent to avoid "hazardous duty", rather than "important service" as in this case, the Board of Review stated:

> "The offense of desertion is defined as ' *** absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service' (M.C.M., 1928, par. 130).

Thus it is apparent that desertion is an offense requiring a specific intent of mind. It is equally clear that the word 'desert' is a broad, inclusive term and when used in a specification is susceptible of attributing to the accused any one of the three intents of mind described above. When, therefore, the word 'desert' in a specification is modified, as in the present case, by the phrase '*** in order to avoid hazardous duty ***', its meaning is narrowed and the justiciable issues of the Specification are accordingly restricted. Furthermore, when a Specification alleges desertion with an intent to avoid hazardous duty, the proof must show such an intent. If the proof shows no such intent, but rather an intent not to return to the service, there is a fatal variance between the allegata and the probata and a finding of guilty of desertion based on such proof cannot be approved.

* * *

"*** Thus, if the prosecution fails to establish the specific intent of deserting in order to avoid hazardous duty, the basis for a finding of the lesser included offense of absence without leave has been alleged. ***.

* * *

"In order, therefore, to sustain a finding of guilty under the present Specification, it is necessary for the record to show that the accused knew that his organization was about to be transferred to hazardous duty and that he left it in order to avoid that duty. The evidence entirely fails to show either of these two factual elements. ***.

"The evidence, however, does show that the accused absented himself without leave from May 17, 1942, to June 13, 1942, and is legally sufficient, therefore, to support only so much of the findings of guilty as involves the lesser included offense of absence without leave for 27 days, and only so much of the sentence as is authorized by paragraphs 104c of the Manual for Courts-Martial, 1928, for that offense."

The above principles are as equally binding upon the reviewing authority as upon the court. The reviewing authority correctly dis-

approved that portion of the finding of guilty which pertained to the allegation of "intent to shirk important service, to wit: foreign service". Upon disapproval of those words, the reviewing authority was legally authorized to approve only a finding of guilty of the lesser included offense of absence without leave from April 15, 1942, to May 9, 1942.

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involve findings that the accused, at the time and place alleged, absented himself without leave from his organization and remained absent until apprehended at the time and place alleged, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for two months and twelve days and forfeiture of two-thirds of his pay per month for a like period.

Curtis S. Hill, Jr., Judge Advocate.

(On Leave), Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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

SPJGH
CM 224947

NOV 17 1942

UNITED STATES N.D.	)	8th MOTORIZED DIVISION
v.	)	Trial by G.C.M., convened at Fort Jackson, South Carolina, June 15, 1942. Dishonorable discharge (suspended) and confinement for six (6) years. Disciplinary Barracks.
Private EZEKIEL LOVETTE, Jr. (14008153), Company M, 13th Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, 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 in part, 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.
(Finding of Not Guilty.)

Specification 1: (Finding of Not Guilty.)

Specification 2: (Finding of Not Guilty.)

CHARGE II: Violation of the 64th Article of War
(Finding of Not Guilty.)

Specification: (Finding of Not Guilty.)

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

Specification: In that Private Ezekiel Lovette, Company M, Thirteenth Infantry, did, without proper leave absent himself from his organization at Fort Jackson,

South Carolina from about six (6) AM January 27, 1942 to about ten (10) AM February 5, 1942.

CHARGE IV: Violation of the 96th Article of War (Finding of Not Guilty.)

Specification: (Finding of Not Guilty.)

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

Specification: In that Private Ezekiel Lovette, Company M, Thirteenth Infantry, did at Fort Jackson, South Carolina on or about February 11, 1942, desert the services of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty to wit: departure of his organization to Charleston, South Carolina, on Sub Sector defense mission, and, did remain in desertion until he was apprehended at Strange's store, Bluff Road, in the vicinity of Columbia, South Carolina on or about February 13, 1942.

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

Specification: In that Private Ezekiel Lovette, Company "M", 13th Infantry, having been duly placed in confinement in the Post Stockade, Fort Jackson, South Carolina, on or about February 15, 1942, did, at Fort Jackson, South Carolina, on or about May 22, 1942, escape from said confinement before he was set at liberty by proper authority.

The accused pleaded not guilty to Charges I and IV and the Specifications thereunder; and as to Charge V, not guilty of violation of the 58th Article of War, but guilty of violation of the 61st Article of War, and as to the Specification thereunder, not guilty of desertion, but guilty of absence without leave. He pleaded guilty to Charges II, III, and the Additional Charge, and the Specifications thereunder. He was found guilty of Charges III, V, and the Additional Charge and the Specifications thereunder, sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six years. The reviewing authority approved the sentence but suspended the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 22, Headquarters 8th Motorized Division, Fort Jackson, South Carolina, August 31, 1942.

3. The only question in this case requiring discussion is the issue presented by the Specification, Charge V, which alleges that the accused -

"* * * did at Fort Jackson, South Carolina on or about February 11, 1942, desert the service * * * by absenting himself without proper leave from his organization with intent to avoid hazardous duty to wit: departure of his organization to Charleston, South Carolina, on Sub Sector defense mission, and, did remain in desertion until he was apprehended at Strange's Store, Bluff Road, in the vicinity of Columbia, South Carolina on or about February 13, 1942".

The accused pleaded guilty to absenting himself without leave on February 11 and of thereafter being apprehended in the vicinity of Columbia, South Carolina, on or about February 13, 1942 (R. 9-10). The evidence concerning this Specification shows that the Commanding Officer of Company M, 13th Infantry, the organization to which the accused was assigned, informed his company in December 1941, that the organization was on the alert and under restrictions. The men, including the accused, were told that they might leave the barracks but not the company area. Furthermore, this restriction had not been lifted on February 11, 1942, the date the organization left Fort Jackson for Charleston, South Carolina (R. 50-53).

On February 11, 1942, when the accused was returned to the company area, Company M was packing its equipment and loading trucks preparatory to departure from Fort Jackson. There was, however, no general knowledge among the men as to where the organization was going. Moreover, rumor in the organization suggested that it was going either to Charleston, Florida, or North Carolina. On this day the accused had been placed under guard. Prior, however, to the actual departure of the company, he escaped from his guard, and left the company area without permission (R. 55-57).

4. The accused testified that on the day he was released from the stockade his company was packing up and that he was instructed to draw a bed (R. 68). When asked whether he had any absolute knowledge as to where his company was going, he replied by saying:

"All I know, I was turned out of the stockade around 12:00 o'clock. I went in and asked Lieutenant Crocker what it was all about and he didn't say anything. I *** asked Lieutenant Crocker for a pass. He said, all I know, we are going somewhere, I don't know where. I asked Lieutenant Crocker could I get a three hour pass to go home and see my mother, my mother was sick. He said I cannot give you a pass and you are going to have to stay in the company. In the meantime my sister came over to see me and after * * * my sister went home, my mother was sick and I went home. I meant to catch the 5:00 o'clock bus out and come back to camp but missed that 5:00 o'clock bus and caught the next bus at 5:30 and came back to camp and they had pulled out and left" (R. 62).

He also testified that at all times he wore his uniform (R. 62).

5. The 28th Article of War states that -

"Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter" (M.C.M., 1928, p. 209).

The Manual explains that -

"* * * The 'hazardous duty' or 'important service' may include such service of troops as strike or riot duty; employment in aid of the civil power in, for example, protecting property, or quelling or preventing disorder in times of great public disaster; embarkation for foreign duty or duty beyond the continental limits of the United States; and, under some exceptional circumstances such as threatened invasion, entrainment for duty on the border. Such services as drill, target practice, maneuvers, and practice marches will not ordinarily be regarded as included" (M.C.M., 1928, par. 130).

In order to sustain the findings of guilty under the present allegation of desertion, the evidence must show that the accused absented himself from his organization with the specific intent of avoiding hazardous duty with his organization at Charleston, South Carolina. The proof shows no such intent. In fact the evidence shows that the accused did not know, and had no cause to know where his organization was going, or that it was going to Charleston. Furthermore, the record presents no evidence to explain the meaning of the phrase "Sub Sector defense mission" as alleged in the Specification, or to show that the service to be performed in Charleston was actually hazardous. In fact, there is a complete absence of evidence from which a reasonable inference might be drawn that the accused deserted his organization in order to avoid any dangerous service.

The evidence does, however, show that the accused absented himself without leave with the knowledge that his organization was preparing to move to some other place. This fact is shown in his own testimony wherein the accused admitted that Lieutenant Crocker told him " * * * We are going somewhere, I don't know where." This evidence justifies the inference that the accused absented himself for the purpose of avoiding his duties in connection with the contemplated move. This offense under the precedents of this office, is

"* * * an offense, violative of Article of War 96, more serious than mere absence without leave, for which the Manual for Courts-Martial does not prescribe maximum limits

of punishment (CM 151672, Lytle; CM 224805, Conlon)." CM 225422, Barrett.

Dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for one year and one month is authorized for the offenses of escape from confinement (Additional Charge) and of absence without leave (Charge III).

6. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge III and the Specification thereunder; legally sufficient to support the findings of guilty of the Additional Charge and the Specification thereunder; legally sufficient to support only so much of the findings of guilty of Charge V and the Specification thereunder as involve findings that the accused did, at the time and place alleged, absent himself without leave from his organization with the intent to avoid duty in connection with the departure of his organization for an undisclosed destination, and did remain absent until he was apprehended at the time and place alleged, in violation of the 96th Article of War, and legally sufficient to support the sentence.

Victor S. Hilf, Jr., Judge Advocate.

Chas. L. Gresson, Judge Advocate.

Abner E. Lifsconb, Judge Advocate.

SPJGH
CM 224947 1st Ind.

War Department, J.A.G.O., NOV 25 1942 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Ezekiel Lovette, Jr. (14008153), Company M, 13th Infantry.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that so much of the findings of guilty of Charge V and the Specification thereunder be vacated as involve findings of guilty of an offense by accused other than absence without leave from his organization at the time and place alleged with intent to avoid duty in connection with the departure of his organization for an undisclosed destination, in violation of the 96th Article of War, and that all rights, privileges, and property of which the accused has been deprived by virtue of the findings so vacated be restored.

3. Dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and one month is authorized for the offense of escape from confinement (Additional Charge) and of absence without leave (Charge III). No maximum limit of punishment is prescribed for the offense of absence without leave with intent to avoid duty in connection with the departure of his organization for an undisclosed destination (Charge V). Inasmuch, however, as this latter offense involves less culpability than the offense of desertion as found by the court, I recommend that the period of confinement allocated for this offense be reduced to six months, and that the total period of confinement be reduced to one year and seven months.

4. Inclosed is a form of action designed to carry into effect the recommendations made above.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

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

(217)

Board of Review
CM 224949

SEP 11 1942

UNITED STATES	)	28TH INFANTRY DIVISION
v.	)	Trial by G. C. M., convened at Camp Livingston, Louisiana, August 6, 1942. Dishonorable discharge (suspended) and confinement for one (1) year and one (1) day. Federal Reformatory, El Reno, Oklahoma.
Private JAMES E. HANNON (32085593), Company C, 628th Tank Destroyer Battalion.	)	

HOLDING by the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, 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 only question requiring consideration is the propriety of the designation of a Federal reformatory as the place of confinement.

Confinement in a Federal reformatory or correctional institution is not authorized under letter dated February 26, 1941 (AG 253 (2-6-41) E), from The Adjutant General to all commanding generals, subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except in a case where confinement in a penitentiary is authorized by law (CM 220093, Unckel). Confinement in a penitentiary is not authorized under Article of War 42 for the offense of which accused was found guilty, to-wit, being found sleeping upon his post in violation of Article of War 86.

3. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year and one day in a place other than a penitentiary, Federal reformatory or correctional institution.

Robert W. Hoover, Judge Advocate.
James H. Baugh, Judge Advocate.
Alvin R. Hardy, Judge Advocate.

1st Ind.

War Department, J.A.G.O., SEP 12 1942 - To the Commanding General, 28th Infantry Division, Camp Livingston, Louisiana.

1. In the case of Private James E. Hannon (32085593), 628th Tank Destroyer Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year and one day in a place other than a penitentiary, Federal reformatory or correctional institution, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution, you will have authority to order the execution of the sentence.

2. Inasmuch as a penitentiary (Federal reformatory) was designated as the place of confinement you were without authority to order the execution of the sentence in the absence of a prior holding by the Board of Review, with the concurrence of The Judge Advocate General, that the record of trial was legally sufficient to support the sentence. See third subparagraph of Article of War 50½. A corrected general court-martial order promulgating the proceedings, including your corrective action as required by this holding, and reciting compliance with Article of War 50½, should be published.

3. When copies of the corrected 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 corrected published order to the record in this case, please place the file number of the record in brackets at the end of the corrected published order, as follows:

(CM 224949).

42 PM

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

RECEIVED
SEP 15 1942
Hdqrs. 28th Div.

1 Incl.
Record of trial.

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

SPJGH
CM 224951

OCT 2 1942

UNITED STATES v. Private CHARLES H. THOMPSON (17044241), Company E, Fourth Quartermaster Training Regiment, Quartermaster Training Center, Fort Francis E. Warren, Wyoming.	SEVENTH SERVICE COMMAND Trial by G.C.M., convened at Fort Francis E. Warren, June 19, and August 3, 1942. To be shot to death with musketry.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, 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 Charles H. Thompson, Company E, Fourth Quartermaster Training Regiment, Quartermaster Training Center, Fort Francis E. Warren, Wyoming, did, at Fort Francis E. Warren, Wyoming, on or about May 27, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Henry McLean, a human being, by shooting him with a rifle.

The accused pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Following the arraignment of the accused, the defense counsel moved the court to adjourn until such time as a medical board could be appointed to inquire into the mental condition of the accused and make a report thereon. After receiving some brief unscientific testimony in support of the motion, the motion was granted (R. 4-15).

Thereafter the court reconvened and received into evidence the report of the medical board which had been appointed to examine the accused. The board reported its findings as follows:

> "THE BOARD FINDS THAT Private Charles H. Thompson, Jr., 17044241, Company E, Fourth Quartermaster Training Regiment, is not now insane and was not insane on May 27, 1942, at the time of the commission of the offenses of which he is charged; that he is now and was at the time the alleged offenses were committed capable of realizing right from wrong and of the normal control of his actions; that he is capable of communicating intelligently with his counsel and of doing the things necessary for the proper presentation of his case. That as he is not insane, hospital care is not necessary" (Pros. Ex. 1).

These findings are supported by the personal testimony of two of the members of the board (the third member was reported as absent on leave). Both witnesses were shown to be experienced psychiatrists and each testified that in his opinion the accused was sane on July 9, 1942, the date upon which he was examined, and upon May 27, 1942, the date of the offense. Upon the evidence thus presented the law member ruled without objection that the accused was neither then, nor at the time of the offense charged, suffering from any mental disease or defect, and directed that the trial proceed (R. 19-24).

4. The evidence for the prosecution shows that on the evening of May 27, 1942, the accused was in the city of Cheyenne, Wyoming. At about 10:30 o'clock two military policemen brought him to a military patrol truck and requested the driver to take the accused to the bus stop. The military policemen did not arrest the accused but in delivering him to the patrol bus they were carrying out regulations requiring soldiers not on pass to leave the city by 10:30 p.m. The appearance of the accused showed that he had been drinking, although his balance or equilibrium was described as "not bad". When the driver of the truck attempted to put the accused on the truck, the accused threatened to kill him if he did. The driver of the truck, however, put the accused on the truck and carried him to a bus stop where he put him on a bus (R. 37-39).

The accused returned to Fort Francis E. Warren, and at about 11 p.m. entered the orderly room of Company E of the Fourth Quartermaster Training Regiment. The accused asked the charge of quarters for a cigarette and when the charge of quarters told the accused that he did not have any, the accused made the same request of other soldiers present, and received similar replies. The accused then said to Sergeant Boyd, "You've got a cigarette", and began patting Sergeant Boyd's pockets. Sergeant Boyd then said, "You get away from me, if you want anything, ask for it". The accused jumped back and started "cussing". The charge of quarters then told the accused to leave the room and to go home and "sleep it off". The accused backed out of the orderly room, ran his hand into his pocket in a threatening manner, and said, "You're bigger than I am and you are just trying to take advantage of me". The accused also stated that he would fight the charge of quarters but that he (accused) would not fight fair. The charge of quarters replied to the accused by saying, "If you pull a knife out of your pocket I'll knock you down". The accused then jumped off the porch and called out, "I'll be back" (R. 39-41, 42-44, 44-46).

A short time thereafter a soldier, later identified as the accused, approached the sentinel on Post No. 1 near the guardhouse and announced to the sentinel that he was the corporal of the guard and that he had come to exchange rifles with the sentinel. The sentinel, who was serving his first tour of duty as a member of the guard, exchanged rifles with this soldier. The evidence shows further that the chamber of the rifle which the sentinel gave to this soldier had three cartridges in it, whereas the chamber of the rifle which this soldier gave to the sentinel was empty. After the exchange of the rifles, this soldier walked a short distance and then "started off at a good fast trot". The sentinel thereupon opened the bolt of his newly acquired rifle, discovered that the rifle was unloaded, and called out to this soldier to halt. This soldier then turned, worked the bolt of his rifle, and, without raising the rifle to his shoulder, pointed it toward the sentinel. The sentinel jumped around the corner of the guardhouse and called for the corporal of the guard. While he was explaining to the corporal of the guard what had happened, he heard a shot fired. The sound of this shot came from the direction of Post No. 3. The sentinel was not acquainted with the accused, but about 45 minutes later he identified accused by his voice, as the soldier with whom he had exchanged rifles (R. 48-57).

Within a few minutes after the firing of the shot heard by the sentinel on Post No. 1, Privates Lewis H. Coates and Jesse L. Boyd, who shared quarters with the accused in a building not far from Post No. 3, were awakened, each by the calling of his name. They went into

the hall and found the accused there. The accused told them that he had just killed a man and requested them to take him to the guardhouse. The accused was crying and very emotional. The accused kept repeating "I didn't mean to kill him". He also said that he was sorry that he had done it. When asked where the dead man was, he said that he would show them. Private Coates, accompanied by the accused and followed by Private Boyd, then went from their quarters to the place on Post No. 3 where a crowd was assembled and where the sidewalk was stained with blood. Upon arrival at this place, Private Coates stated "Here's the man who did the shooting", and the accused said "I did it, but I don't know why". Private Boyd testified that the accused was not very drunk at that time but that he did have a faint odor of alcohol on his breath. He also testified that the accused did not have full control of his voice and body (R. 71, 73-76, 76-78).

The officer of the day heard a shot fired near Post No. 3 at about 11:20 p.m. and ran to that area. There he found Private Henry McLean, the sentinel on Post No. 3, lying on the sidewalk. The officer of the day asked the sentinel where he had been hit and who shot him. McLean replied that he had been hit in the leg and that he did not know the person who had shot him, but that the man who did the shooting ran through the orderly room of Building 249. Shortly after the shooting, the rifle, which the accused had taken from the sentinel on Post No. 1, was found in the hall of Building 249. The bolt of the rifle was open, there were two cartridges in the magazine but none in the chamber, and the rifle smelled of freshly burned powder. The rifle used by sentinel McLean had three cartridges in it, the number issued to members of the guard, and gave no evidence of having recently been fired.

The evidence shows that Private McLean was shot at about 11:20 p.m. on May 27, 1942, and that he died at about 12:58 a.m., May 28, 1942. It was also shown that an autopsy was performed on his body on May 28, 1942, and that it was the opinion of the medical officer who made this post mortem examination that Private McLean had died as the result of a hemorrhage caused by a laceration of the femoral artery, the large artery of the leg. In the opinion of this medical officer the femoral artery was severed by a bullet passing through the tissues. It was explained that the wound of the deceased was so located that an ordinary pressure bandage or tourniquet would have been of no real value in stopping the hemorrhage and that the only way in which the hemorrhage could have been stopped would have been by an operation involving enlarging the bullet site and tying the artery. Such an operation would have taken from 10 to 15 minutes of operating time, whereas the average normal person would

have exsanguinated from such a wound in two or three minutes. The deceased, however, did not die so quickly (R. 31-35).

5. The accused made an oral unsworn statement as follows:

"Sir, I had no intention of shooting Henry McLean. I didn't even know him, his name, and he never did anything to me. I can remember that I was running and I ran into him and almost knocked him down and he told me to drop my gun and his gun hit mine and mine went off, sir. I went down town that night with a boy friend and I bought a pint of whiskey and we drank it and some wine and we went to a house down there with some women, and my boy friend left. After he left I went upstairs with a woman and came back and drank some more whiskey and my money was gone. I felt myself slipping and started home. After I started home I can't recall what happened. I lost my head" (R. 79).

In addition, the accused made the following unsworn written statement which his counsel stated had been prepared in the handwriting of the accused and without the knowledge or assistance of his counsel:

"Your Honor and Gentlemen of the Jury:

"I want to thank you for giving me this opportunity to speak to you before I am sentenced. I do not make this speech to not have mercy upon me. I want to speak of the army as a whole. I love the army and there is nothing I can say against it. After all my bad treatment since I have been in the Guard House. Before I would say anything against it I would say a thousand things for it. I know the army builds you up and makes a man out of you. It teaches you everything that is right. There is one thing the army forgets to teach young men and boys whom might fall in the same pit that I have. That is about drinking and being around prostitutes who drug you and take your money. If only the army would take two weeks to teach the soldiers about those things it would also be beneficial. I know I am to be an example and God knows I hope no one will make the same mistake I made. I know my case is hopeless, however, I pray for the best and expect the worst. In my opinion I believe I will get life or death. So you see life to me is like a fish without water. What good is a fishs' life without water and what good is mine

without freedom. If I am to be sentended to prison for life I would rather have death. I would rather have my death in foreign service where I could die for more than one man. My mother, father, brothers, sisters, your mothers and fathers and you! I know that one man can't win a war. It takes a million and one men and I might be the one. If you give me life my life would be nothing to me or you. Especially the white race because you have all ways had liberty, freedom and speech. If you give me life you will be taking away a little freedom. I am a Negro boy who hasn't had much freedom. So if it is possible let me go fight for your freedom and my living without being a slave. As I said before I'm not making this speech so you may have mercy upon me. I want you to judge me according to righteousness. Judge me as if I were your own son. Whatever this sentence is I am willing to take it but, I knew not what I was doing. May God forgive you for you know not what you judge me. May God bless us all and America" (Pros. Ex. 7).

6. The evidence introduced in rebuttal shows that the clothing of the deceased had no powder burns. An Ordnance officer testified that guard ammunition (the ammunition used in the rifle fired by the accused), when fired into cloth from a gun such as that used by the accused would make powder markings on the cloth at a distance of 5 feet. On cross examination this officer stated that the maximum distance at which such powder burns could be produced on fabric was approximately 15 feet. He further testified that the rifle fired by the accused had a trigger pull of about 5 to 7 pounds, and that it would not have been discharged by striking another rifle (R. 80-82).

7. The accused is charged with murder and the Specification alleges that he "* * * did * * * with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Henry McLean, * * *, by shooting him with a rifle".

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought". The word "unlawful" as used in this definition means "* * * without legal justification or excuse". A justifiable homicide is "A homicide done in the proper performance of a legal duty * * *". Furthermore, an excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray, * * *". The definition of murder requires that the death of the victim "* * * take place within a

year and a day of the act or omission that caused it, * * *" (M.C.M., 1928, par. 148 a). It is universally recognized that the most distonguishing characteristic of murder is the element of "malice aforethought". The authorities, in explaining this term have stated that the term is a technical one and that it cannot be accepted in the ordinary sense in which the term may be used by the layman. In the famous Webster case, Chief Justice Shaw explains the meaning of malice aforethought as follows:

> "* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.
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> * * *
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> "* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought,' in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance" (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

Similarly, the Manual for Courts-Martial defines malice aforethought as follows:

> "Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient

that it exist at the time the act is committed.

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the personal actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. * * *" (M.C.M., 1928, par. 148 a).

The words "deliberately" and "with premeditation" have been held to mean "* * * an intent to kill, simply, executed in furtherance of a formed design to gratify a fealing for revenge, or for the accomplishment of some unlawful act" (Wharton's Criminal Law, vol. 1, sec. 420). These terms have also been defined as follows:

"* * * The thought of taking life must have been consciously conceived in the mind, the conception must have been meditated upon, and a deliberate determination formed to do the act; * * * malice is deliberate and premeditated when it has been dwelt upon at all in the mind, and when motive or consideration moving to the act has been to any extent mentally weighed; premeditation may be as quick as thought in the mind of man.

"* * * A majority hold that no particular time is necessary, the existence rather than length of duration of purpose or intent to kill being important. * * *" (Miller on Criminal Law, pp. 274-275).

When the evidence is examined in the light of the above concepts it becomes apparent that the accused is guilty as charged. The uncontradicted evidence shows that the accused shot and killed the deceased. It is equally clearly established that this homicide was unlawful in that it was done without justification or excuse. Furthermore, there is ample proof to support the findings that it was done with malice aforethought. The facts show that the accused, on the evening of the homicide, was in a quarrelsome frame of mind. He threatened to kill the driver of the patrol truck when the military police required him to leave the city of Cheyenne. Shortly thereafter he entered the orderly room of Company E and upon leaving threatened

to fight the charge of quarters, asserting that he would not fight fair. When he was expelled from the orderly room and told that he would be knocked down if he drew a knife, he left with the threat that he would be back. These various statements, made in a loose conversation by a soldier obviously quarrelsome from the effects of drink, may have been lightly and boastfully intended, but subsequent events interpret their meaning and show that they were made in a cruel and vengeful spirit.

After leaving the orderly room in anger, the accused procured an unloaded rifle and cunningly tricked the inexperienced sentinel on Post No. 1 into exchanging his loaded rifle for the empty one of the accused. When the sentinel discovered this deception and called upon the accused to halt, the accused pointed the loaded rifle at the sentinel and thus forced him to seek the protection of cover. The accused then proceeded a short distance to the vicinity of Post No. 3 and there shot Sentinel Henry McLean.

The act of the accused in thus killing the deceased clearly appears to be the culmination of a malicious design. The accused first threatened to kill the driver of the patrol truck. Next, he threatened the charge of quarters with an unfair fight and warned him that he would return. Then he procured a deadly weapon, threatened the sentinel from whom he procured it, and finally shot and killed Sentinel McLean. The fact that the accused did not know the deceased does not alter the nature of his crime or change the fact that the accused was possessed with a premeditated purpose to kill. The evidence shows beyond any reasonable doubt every element of the crime alleged.

8. The Board of Review has given careful consideration to the following letters:

a. A letter dated August 5, 1942, from Mrs. Emma Thompson to Captain Glen Jacoby.
b. A letter dated August 5, 1942, signed "Citizens of Waco, Texas" but having no signatures and addressed to Officials of Ft. Warren.
c. A card dated August 5, 1942, from Mrs. E. C. Curtis to Captain Glen Jacoby.
d. A letter dated August 7, 1942, from Mr. J. B. Clark to Captain Glen Jacoby.
e. A letter dated August 10, 1942, from Adah M. Fulbright to Captain Glen Jacoby.
f. A letter dated August 11, 1942, from the accused to The President.
g. A letter dated August 23, 1942, from Mrs. Maraguritte Troutt to Mrs. Franklin D. Roosevelt.

h. A letter dated September 3, 1942, from Mrs. Maraguritte Troutt to Service Command Area, Omaha, Nebraska.

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

Arthur S. Hill Jr., Judge Advocate.

Charles Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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

SPJGH
CM 225128

NOV 14 1942

UNITED STATES v. Private LOYCE R. SOUTHERN (34169461), Headquarters Battery, 124th Field Artillery Battalion.	)	33RD INFANTRY DIVISION Trial by G.C.M., convened at Camp Forrest, Tennessee, August 29, 1942. Dishonorable discharge (suspended) and confinement for two (2) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Loyce R. Southern, Pvt. Hq. Btry., 124 F. A. Bn., Camp Forrest, Tennessee, did, on or about August 5, 1942, desert the service of the United States by absenting himself without proper leave from his organization, with intent to shirk important service, to wit: cadre for an amphibian force, and did remain in desertion until he surrendered himself at his assigned place of duty, Camp Forrest, Tennessee, on or about August 12, 1942.

He pleaded not guilty to the Specification and Charge in violation of Article of War 58, but guilty of absence without leave in violation of Article of War 61. He was found guilty of the Charge and its 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 for two years. The reviewing authority approved the

sentence, directed its execution but suspended the execution of the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 60, Headquarters 33rd Infantry Division, Camp Forrest, Tennessee, September 7, 1942.

3. The evidence shows that the Headquarters Battery, 124th Field Artillery Battalion, of which accused was a member returned to Camp Forrest on about July 29, 1942, from a months absence at Fort Sill, Oklahoma. On about August 1, 1942, the battery commander, Captain Edward J. Skarda, was notified that the battery was to furnish a forty man cadre for the "Engineer Amphibian Command". The list furnished for that cadre included the name of accused. The roster was checked at a battery formation at which the entire battery including accused was present except for one man in the hospital. Captain Skarda announced at the formation the names, including that of accused, of the men who should be prepared to go on the cadre. The men to go had to draw certain clothing, mainly shelter halves. On Monday afternoon, August 3, Captain Skarda called together all forty men, including accused, who were to go on the cadre and interpreted the 28th Article of War to them. He believed that this might be a hazardous duty. He had no idea whether these men were cadremen or replacements. At that formation the men asked what was an amphibian command. Captain Skarda explained its nature to the best of his knowledge. In reply to a question why it was a hazardous duty, he explained as far as he had knowledge from official sources, that it would probably move out after a short training period to an unknown destination. He also answered to the best of his ability another question as to why they were taking so little equipment and not their ordinary equipment. He did not have a definite answer but his theory was that if they got to a port of embarkation, they would be issued a new type of equipment and clothing. Captain Skarda did not remember that the accused asked any question. The accused did not come to him after the formation nor did he have any request from the accused for a pass or a furlough. The accused received all the clothing he was supposed to have. On Tuesday, the morning prior to the evening accused left, the 33rd Division Artillery sent around inspectors to check and see that the men had proper clothing and equipment. The equipment of accused was checked and he was furnished everything but one set of chinos which were late coming in. The cadre had to be of grade six and seven and took practically all of the men in the battery of these grades (R. 5-11).

The accused was not present in the battery area at reveille roll call on August 5, 1942. He was shown on the morning report of

August 5, as "from duty to A.W.O.L. 12:01 a.m ". The morning report ofAugust 12, 1942, showed him "from A.W.O.L. to confinement, 8:45 p.m.". Captain Skarda had no knowledge of his own why accused left "except for the fact that accused was not on that cadre". When questioned upon his return by Captain Skarda, accused stated that he was worried about his folks at home and decided to go to see them. He stated that he knew that he did wrong. The accused had joined the battery from Fort Bragg about the middle of July at Fort Sill. In the opinion of Captain Skarda, accused was generally a willing worker with above average intelligence (R. 9, 12-14; Ex. D).

4. The accused elected to make an unsworn statement that his mother was worrying herself because three of the boys were in the Army. He wanted to go back and see her because he knew she was worrying. He intended to come back. He had spent all of his time at home working on the farm and had never been away from home before. He was inducted in the Army on April 28, 1942, sent to Fort Bragg, to Fort Sill and then to Camp Forrest, and was very homesick. He knew they were leaving, but did not know just when they were leaving. He was gone only seven or eight days, always intended to come back and did come back on the bus himself (R. 14-15).

5. The accused was found guilty of desertion with intent to shirk "important service, to wit: cadre for an amphibian force". The evidence shows that he knew he was one of the men selected to form the cadre and had been furnished new equipment. The company commander read to the group, of which the accused was a member, the provisions of the 28th Article of War including the statement that "Any man shirking hazardous duty shall be termed a deserter". The accused absented himself without leave from his organization, remained absent about seven days and until after the departure of the cadre. The nature of the duties to be performed after the formation of the cadre for an amphibian force does not appear. The question requiring consideration is whether the service designated, "cadre for an amphibian force" was "an important service" within the meaning of the 28th Article of War.

> "'Important service' within the meaning of Article of War 28 has been defined as including 'all actual service designed to protect or promote, in a manner direct and immediate, the national or public interest or welfare' but not including 'what may be termed "preparatory service"' (CM 151672, Lytle). The Board of Review has expressed the opinion that the standards thus stated are generally applicable in time of war and that
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> > 'transfers or movements for the organization or expansion of new units, or for training purposes of routine character, not directly related to

> the maintenance of internal order, embarkation for foreign duty, possible contact with the enemy, or other special functions of the Army, may not be classified as important service' (CM 224805, Conlon)." (CM 225422, Barrett)

In so far as appears in the record, the duties to be performed by accused as a "cadre for an amphibian force" were intended to be nothing more than those of routine training. The proof accordingly does not show that the service alleged in the Specification was important service within the meaning of Article of War 28.

6. The record shows that accused shirked the service involved in the formation of the cadre as alleged. That was an offense cognizable under Article of War 96, more serious than mere absence without leave. The Manual for Courts-Martial does not prescribe a maximum limit of punishment for this offense (CM 151672, Lytle; CM 224805, Conlon; CM 225422, Barrett).

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification thereunder as involve findings that accused did, at the time and place alleged, absent without leave from his organization with intent to shirk the service of a cadre for an amphibian force and did remain absent without leave until he surrendered himself at the time and place alleged, in violation of Article of War 96, and legally sufficient to support the sentence.

Curtis E. Wright Jr., Judge Advocate.

(On leave.), Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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

SPJCH
CM 225249

SEP 24 1942

UNITED STATES	)	PUERTO RICAN DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at
	)	Antigua Base Command, Antigua,
Private WALTER C. HAMBY	)	British West Indies, June 2,
(14008768), Company E,	)	1942. Dishonorable discharge
434th Infantry.	)	and imprisonment for life.

REVIEW by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, 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 Walter C. Hamby, Company "E", 434th Infantry, did, at Antigua Base Command, Antigua, B.W.I., on or about 11:55 P.M. April 30, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Everett Frank Kuhns, a human being by shooting him with a rifle.

The accused pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be imprisoned for the term of "your" natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that the accused was, on April 30, 1942, a member of the guard, and came off post at 10 p.m. Two civilian employees, F. E. Kuhns (the deceased), and Ernest S.

Goodbread, came back from town bringing with them a bottle of Scotch whiskey and entered barracks 103 at the base at about 11:30 p.m. They invited two soldiers, Corporal D. T. Senft and Corporal Emerson of the 35th Bombardment Squadron, to join them in the barracks. They all sat down and had a drink. The accused came in shortly thereafter, stood around for a while, and asked for a drink. A third civilian employee, Kenneth Rawson, stated that it was not his bottle and he could not offer accused a drink. Corporal Senft told accused that he could not have it. An argument developed between Corporal Senft and accused when Corporal Senft asked accused if he had been invited in and then offered to bet $10 that he could throw accused out of the barracks. Accused started to leave after shaking hands with Corporal Senft. Accused muttered something as he went out. Corporal Senft followed accused out and asked if accused had been cussing. The accused replied in the negative, told Corporal Senft to stay there as accused would be back, and started running. Corporal Emerson thought something was up when he saw accused running and tried to get Corporal Senft to leave. The two corporals went back into barracks 103. Corporal Senft had a drink, became sick, went outside and vomited, and did not return until after the shooting (R. 9-10, 12, 15-18, 19-21, 23).

The accused returned in about 10 minutes to barracks 103 with a rifle, opened the door, pointed the rifle into the barracks, and motioned for Corporal Emerson to come out. Corporal Emerson started out but stepped to one side to wait for accused to come in so that he could grab the rifle. Goodbread walked over and pushed the barrel of the rifle out of the door. Kuhns then walked by Goodbread to the door, opened the door, tried to get back into the barracks, but was shot and fell to the floor with a very heavy impact. Goodbread then said to Rawson, "Eddie is dead, the soldier killed him". Goodbread was three or four feet behind Kuhns, heard the report of the rifle, saw the flash, and then saw accused go around the corner of the building with a rifle in his hand. There was no one else in the immediate vicinity at the time of the shooting (R. 9-10, 12-14, 15, 16, 20-22).

Shortly after 11:45 p.m. Corporal James G. Pitts, Corporal of the Guard, was roused in his bed in the guardhouse and told that there had been a shooting. As he was on the guardhouse step, the accused came up with his rifle and raincoat, waved to Corporal Pitts, and said that he had just killed a man. The accused was excited. Corporal Pitts examined the rifle of accused. The chamber smelled as if it had been fired (R. 22-23).

At 12:15 a.m., May 1, 1942, Captain Walter E. Vermilya,

Medical Corps, examined the body of F. E. Kuhns, lying in a pool of blood about a foot inside the door in building 103. There was a round hole near the right ear and a gaping wound in rear portion of skull. There were no powder burns on the body or the clothes. After an autopsy, he reached the conclusion that death was due to a bullet wound of the head with extensive destruction of brain tissue (R. 7-8).

At about 12:55 a.m., May 1, Captain Vermilya performed a sobriety test on accused at the guardhouse, found no trace of liquor on his breath, but other tests proved that he had been drinking and was under the influence of an intoxicant, but was not drunk (R. 7-8).

4. The accused testified that he was on guard on the night of April 30, 1942. At 7 p.m. he purchased a pint bottle of rum and carried it to his barracks. He went on post at 8 p.m. and was relieved at 10 p.m. After 10 o'clock he went to his barracks, drank half of the rum, smoked a cigarette, and then drank the other half of the rum. He went to barracks 103 where a bunch of fellows were sitting, talking and drinking, and asked if a man named "Doc" were there. After he went to the other end of the barracks and talked with some fellows, two soldiers and a civilian walked up and that is the last thing he remembered until he woke up in the guardhouse the next morning (R. 25-26).

5. "Murder is the unlawful killing of a human being with malice aforethought. * * *.

* * *

"Malice aforethought.- Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.)

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous

bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. * * *."
(par. 148 a, M.C.M., 1928.)

6. The evidence is undisputed that the accused opened the door of barracks 103 and pointed a rifle through the door. When F. E. Kuhns started out the door, a shot was fired, killing Kuhns, and the accused went around the corner of the building with a rifle in his hand. The accused with his rifle met the corporal of the guard at the steps of the guardhouse and said that he had just killed a man. The chamber of his rifle smelled as if it had been fired. The autopsy showed that death was due to a bullet wound of the head with extensive destruction of brain tissue. Although no person testified that accused actually fired the fatal shot, the evidence conclusively shows that he did fire it.

The accused had earlier entered barracks 103 and asked for a drink from the group which had a bottle of whiskey on a table. He did not get a drink and an argument arose between accused and Corporal Senft about throwing accused out of the building. When accused left he told Corporal Senft to stay there until accused came back. Corporal Senft was not there when accused came back with the rifle. It was apparently a matter of chance that Kuhns started to go out the door and was shot. The record does not show that Kuhns took any part in the earlier argument, although he and Goodbread provided the bottle of whiskey from which accused desired a drink.

In the opinion of the Board of Review, the evidence is clear that the accused attacked Kuhns without any provocation and without any necessity of self defense. The record establishes beyond any reasonable doubt that the homicide was committed by accused with malice aforethought, willfully, deliberately, unlawfully, and with premeditation as alleged. Such an act constitutes murder in violation of Article of War 92.

7. The charge sheet shows that accused is 23 years of age and that he enlisted at Fort Jackson, South Carolina, January 16, 1941.

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 sentence. A sentence either of death or of imprisonment for life is mandatory upon conviction

of the 92nd Article of War. 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).

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGK
CM 225256

SEP 26 1942

UNITED STATES	)	36TH INFANTRY DIVISION
	)	
v.	)	Trial by G. C. M., convened at
	)	Camp Blanding, Florida, August
First Lieutenant WILLIAM	)	12 and 13, 1942. Dismissal and
E. LATHAM (0-422756), 142nd	)	confinement for six (6) months.
Infantry.	)	Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, 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. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that First Lieutenant William E. Latham, 142nd Infantry, did at or near Atlantic Beach, Florida on or about July 7, A. D. 1942 feloniously take, steal, and carry away one black Ford automobile casing, size 6.00 x 16, serial number V-422788, value of about twelve dollars ($12.00), the property of Roy S. Fletcher, a civilian.

Specification 2: (Finding of not guilty).

He pleaded not guilty to the Charge and Specifications. He was found guilty of the Charge and Specification 1 thereunder, and not guilty of Specification 2. 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 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. Since the court found accused not guilty of Specification 2, only the evidence relating to Specification 1 of the Charge will be considered. The evidence shows that on the night of July 7, 1942, the right front wheel of a 1942 Ford sedan belonging to Roy S. Fletcher, a civilian salesman of Moultrie, Georgia, was stolen while the car was parked on a street in Jacksonville Beach, Florida. The wheel was mounted with a black 6.00 by 16.00 Ford automobile tire casing. The casing had been used about 7½ months and had been run less than 10,000 miles (Ex. A). Fletcher notified the civil police of the loss of his tire, but before the police arrived at the scene (R. 7, 14) located it himself on the right front wheel of a 1940 Ford maroon two-door sedan parked in Jacksonville Beach, near the "Flag", a "recreation hall" (R. 17). The car on which the casing was found bore a Georgia license and a "Camp Blanding plate" (Ex. A). When the police arrived Fletcher was standing beside the maroon car, and identified his tire casing (R. 7, 14). About an hour and fifteen minutes after the theft was reported (R. 12), and after Patrolman A. Sands and Sergeant Russell Seymour of the Jacksonville Beach police had stood for about twenty-five minutes beside the car on which the stolen tire had been located, accused walked up to the car. His shirt was open and wet with perspiration (R. 14) and his "tie was down" (R. 11, 14). He stood by the police officers for a minute or two, and when asked by Patrolman Sands what he wanted, stated that the car was his (R. 8, 14). He was thereupon arrested and taken to the police station (R. 8). He at first denied any knowledge of the casing (R. 15) but some thirty to forty-five minutes later (R. 9), while being questioned, stated to the civil police that he had taken the casing (R. 10, 15, 18). Accused thereafter consented to the casing being taken from his car and placed on Fletcher's car, and authorized Sergeant Seymour to have the change made at accused's expense (R. 13, 15). Accused paid for the change (R. 21). The change of Fletcher's casing to the car belonging to accused was effected by removal of the entire wheel from Fletcher's car, placing it on accused's car, and then placing on Fletcher's car the wheel and casing removed from accused's car. The current ceiling price fixed by the Government for a used casing of the size described was $8.10 (R. 35), but the Fletcher casing had a possible "actual value" of about $17.50 (R. 38). Fletcher was not acquainted with accused (Ex. A).

At the time accused was taken into custody he had four tire casings on the wheels of his car and four "in the back" of the car. One

of the four casings in the back was mounted on a spare wheel (R. 10, 11, 16). The four in the back of the car were all used tires in "pretty bad shape" but apparently still usable (R. 19).

When asked by the police why he had taken the casing in question accused stated that he must have been drunk (R. 11). Patrolman Sands testified that when apprehended accused was not drunk or suffering from a "hangover" but that, in witness' opinion, accused had previously been drunk (R. 12). This witness also testified that accused did not stagger and answered questions clearly and distinctly (R. 11). Sergeant Seymour testified that when he first saw accused witness did not smell liquor upon him and that accused did not talk or act "like he was drunk" (R. 18).

Accused testified that on the night of July 7 his organization was "bivouaced down by the beach", and that he went to Jacksonville Beach to meet a "lady friend" in the vicinity of the Flag (R. 40, 41). He drank some whiskey before he started and drank more on the way. He had consumed between 1/3 and 1/2 of a pint before he arrived at Jacksonville Beach at about 9 p.m. (R. 40, 41), and was "feeling good" (R. 40). He had one "flat" on the way and changed the tire himself (R. 41). When he reached the Flag the girl was not there. While waiting for her he consumed the remainder of the pint of whiskey and became drunk (R. 41, 42). He went into the "recreation center", sat down at a table and drank three or four bottles of beer. He then went back to his car. The next thing he remembered was that someone flashed a light in his face, asked if the car was his and reached in and seized the keys. Accused left his car, walked up and down the beach in a confused state of mind for a time and finally returned to his car. He remembered that when he returned to his car there were eight or ten people around it, including two civil police (R. 49, 52) who asked him whose car it was, and that the police took him to jail in a "patrol car", not in a "station wagon" (R. 49). He did not remember that anything was said about tires or what any of his answers were to questions asked. He did not recall anything that occurred between the time he was taken to jail and the time at which he was awakened and turned over to the military police the following morning. The first he knew of paying for the changing of tires was when he was told of it next morning by the civil police (R. 51). Accused also testified that he did not need the tire casing involved, having eight tires, four of which were used tires,

unbroken and with "some tread on them", bought by him unseen from a Sergeant Harby, and shipped from Houston, Texas (R. 45, 46, 54). He had recently had five or six "flats" with the tires on his car. He intended to have an enlisted man who had been transferred to Texas drive his car from Jacksonville, Florida, to his home at Stephenville, Texas, on July 8, 1942, or soon thereafter (R. 45, 47).

Major Mark Zeiffert, Medical Corps, whose qualifications as an expert psychiatrist were conceded, testified for the defense. His testimony was based upon what accused told him in an hour's examination of accused on the day of the trial (R. 28). Based upon what accused told witness as to his condition on the night of July 7, 1942, Major Zeiffert was of the opinion that accused, due to use of alcohol, had a "spotty memory" on the night of July 7 (R. 26); that after he arrived in Jacksonville Beach that night

> "he could have been and probably was sufficiently intoxicated to have these episodic periods of amnesia so that he might remember certain rather startling things and not remember other things" (R. 27),

and that he probably had periods on that night in which he had a loss of memory. He testified that it was possible for accused to have taken a tire off another car and changed it to his own without realizing or recalling what he had done (R. 31). He also testified that at the time in question accused was, in witness' opinion, temporarily insane (R. 33) in the sense that when one is drunk enough he does not appreciate the full consequences of what he does (R. 34) The prosecution repeatedly objected to this witness' testimony upon the ground that it was based only on statements privately made by accused, but the objections were overruled (R. 25, 27, 28).

4. The evidence clearly shows that on the night of July 7, 1942, the automobile casing described in Specification 1 of the Charge was wrongfully removed from the car of the civilian Fletcher while the car was parked in Jacksonville Beach, Florida. The stolen wheel and casing were located on accused's car, parked in the same vicinity. Accused later admitted that he had taken the property. Accused testified that he was so drunk that he did not remember anything about

taking the casing, and a psychiatrist testified, in substance, in support of accused's statement, that a man might be so drunk as to suffer episodic periods of amnesia. The two civil policemen who arrested accused, however, testified that he was apparently sober at the time of his arrest. Accused's own testimony shows that he remembered many details of what occurred at the time he was arrested, and that his asserted loss of memory occurred only as to those incidents which were directly incriminating. In view of all the testimony and of the circumstances under which the property was taken, the Board of Review entertains no doubt that accused was fully capable of entertaining the specific intent to steal as found by the court.

Accused also testified that he already had eight tires and did not need the stolen casing, but the evidence shows that accused had recently had difficulties with the tires he had been using, that he had recently bought four badly worn used tires and that the stolen casing was comparatively new. It further appears that accused contemplated having his car driven, at an early date, from Jacksonville, Florida, to Stephenville, Texas. Under the circumstances, accused's assertions of lack of a dishonest motive are unworthy of belief. It must be inferred from the evidence that he believed that he needed a tire casing and that he resorted to larceny to obtain it.

5. The court, over objection by the trial judge advocate, admitted in evidence expert opinion testimony of Major Zeiffert as to the mental condition of accused on July 7, 1942, based upon what the accused had privately told him on the date of the trial about accused's condition on July 7. The general rule is that expert opinion evidence must be based upon facts proven, facts known to the witness, or upon evidence already adduced and assumed to be true (Wharton's Cr. Ev. (11th ed.), Vol. II, sec. 1020, p. 1781; 20 Am. Jur., sec. 850, p. 711). And where an expert examines an accused, not as a patient, but for the purpose of qualifying himself as a witness, his opinion based upon what such person told him as a history of his case, is not admissible (20 Am. Jur., sec. 866, p. 728; 65 A.L.R. 1219). It was not improper for the court to consider this witness' expert opinion as to the effect, generally, of drunkenness upon a man's mental capacities, but the witness' opinion, specifically, as to accused's mental condition on July 7 was incompetent. Since, however, this inadmissible testimony inured to the benefit of the accused, his rights could not have been injuriously affected thereby.

6. War Department records show that accused is 24 years of age. He graduated from John Tarlton Agricultural College, Stephenville, Texas, in 1939, and attended the University of Texas for one year. He enlisted in the National Guard in October, 1936, and served as private, corporal and sergeant until appointed a second lieutenant therein July 14, 1941. He was promoted to first lieutenant on April 24, 1942. He has been on active duty as an officer since July 15, 1941.

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

Robert H. Foulk, Judge Advocate.
James H. Baugh, Judge Advocate.
Glenn B. Hardy, Judge Advocate.

1st Ind.

War Department, J.A.G.O., - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant William E. Latham (0-422756), 142nd Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Accused stole an automobile tire casing by removing it at night from a civilian stranger's car while the vehicle was parked upon a public street. Accused had been drinking. He testified that he was so drunk he did not recall what had occurred, but the testimony of persons who saw him soon after the theft, as well as the circumstances under which the casing was taken, shows beyond reasonable doubt that accused was capable of entertaining the specific intent to steal. The stolen property was recovered. Accused's previous record was good. The sentence is appropriate but under all the circumstances I believe the unexecuted confinement and forfeitures may properly be remitted and that the dismissal may properly be suspended. I recommend that the sentence be confirmed, that the confinement and forfeitures be remitted and that the sentence to dismissal be suspended.

3. Consideration has given to a letter from Honorable Sam M. Russell, House of Representatives, dated September 2, 1942, and to a letter from Mr. G. H. Williamson, Stephenville, Texas, dated September 2, 1942, both addressed to The Adjutant General, requesting clemency in Lieutenant Latham's case. The letter from Representative Russell and a copy of the letter from Mr. Williamson are attached to the 201 file of accused. Consideration has also been given to three letters from accused, dated "Sunday" (August 23, 1942), August 30 and August 31, 1942, respectively, inclosed herewith, informally delivered to this office by the Honorable Sam Russell, House of Representatives, on September 29, 1942.

4. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to confirm the sentence, to remit the unexecuted portions of the sentence to confinement and forfeitures, and to suspend the sentence to dismissal, should such action meet with approval.

Myron C. Cramer,
Major General,
The Judge Advocate General.

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.
Incl.4-3 let. from accused.

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

SPJGH
CM 225292

SEP 16 1942

UNITED STATES v. Private ALBERT J. MEINDERS (37113814), Company H, 117th Infantry.	30th INFANTRY DIVISION Trial by G.C.M., convened at Fort Jackson, South Carolina, August 22, 1942. Dishonorable discharge and confinement for six (6) years. Reformatory.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

2. Accused was found guilty of wrongfully and knowingly encouraging and permitting his wife to engage in acts of prostitution, in violation of Article of War 96. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Confinement in a Federal reformatory is not authorized in this case. Paragraph 90 b, Manual for Courts-Martial, provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated".

War Department letter dated February 26, 1941 (AG 253 (2-26-41)E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorizes confinement

in a Federal reformatory only when confinement in a penitentiary is authorized by law (CM 220093), Unckel).

Penitentiary confinement is not authorized by Article of War 42 for the offense of wrongfully encouraging and permitting his wife to engage in acts of prostitution, of which this accused was convicted. That offense is not punishable by confinement in a penitentiary for more than one year by some statute of the United States of general application within the continental United States, excepting section 289, Penal Code of United States, 1910, or by law of the District of Columbia. The offense alleged does not come within the "White Slave Act" (18 U.S.C. 387 to 404) or within any of the pandering sections of the District of Columbia Code (22-2705 to 2713, D.C. Code 1940).

4. There is no maximum limit of punishment prescribed by paragraph 104 c, Manual for Courts-Martial, 1928, for the offense of which accused has been found guilty.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six years in a place other than a penitentiary, Federal correctional institution or reformatory.

Judge Advocate.

Elias B. Bressoy, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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

SPJGK
CM 225356

C 22 1942

UNITED STATES v. Corporal DONALD C. HERNDON (6266828), Battery C, 78th Coast Artillery (AA).	SOUTHERN CALIFORNIA SECTOR WESTERN DEFENSE COMMAND Trial by G. C. M., convened at Inglewood, California, August 19, 1942. Dishonorable discharge (suspended) and confinement for six (6) months. Camp Haan, California.

HOLDING by the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

CHARGE: Violation of the 86th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Corporal Donald C. Herndon, Battery C, 78th Coast Artillery (AA), Long Beach, California, being on guard and posted as a sentinel, at Battery C, 78th Coast Artillery (AA), Long Beach, California, on or about 12:10 a.m., July 29, 1942, was found sleeping upon his post.

He pleaded not guilty to the Charge and Specifications. He was found not guilty of Specification 1 and guilty of the Charge and Specification 2 thereunder. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved the sentence, reduced the period of confinement to six months, suspended execution of the dishonorable discharge and designated Camp Haan, California, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 80, Headquarters Southern California Sector, Western Defense Command, September 9, 1942.

3. The evidence shows that at 9 p.m., July 28, 1942, at Long Beach, California, accused was posted by the sergeant of his battery guard for a four-hour tour of duty as a sentinel in a machine gun pit (R. 7-9, 17, 41). At about 12:10 a.m., July 29, 1942, he was found asleep in a sentry box approximately 30 or 40 feet from the gun pit (R. 9, 10, 22-24, 32). Accused was "in more or less of a reclining position. His head was down on his chest" (R. 25). Before he was aroused it was necessary to call his name several times (R. 26). He had not been relieved from his post (R. 11, 16, 20, 24, 26, 39, 45-46).

The gun pit where accused was posted was equipped with a fifty caliber machine gun, and was circular, about 10 feet in diameter (R. 13). The sentry box, about four feet square (R. 32), was equipped with a telephone (R. 33, 40), and was situated on top of a "dug out" (R. 9-10, 32). The box and pit were connected by a tunnel (R. 25). In the dug out, about 10 or 15 feet below the sentry box, were sleeping quarters (R. 10) where accused had one of the bunks (R. 41). At night the top of the sentry box was removed for the purpose of observing attacks from the air, and both a sentinel in the box and a sentinel in the gun pit commanded an identical view (R. 32, 37, 38, 49).

Orders required that one sentinel be posted in the sentry box and another in the gun pit (R. 33). When accused was posted in the pit another man was posted as an air guard in the sentry box. Accused was also an air guard (R. 9, 19-20, 38-39). His duties were to protect personnel and materials from air and ground attack (R. 9-10), and he was also charged with the usual duties of a sentinel and of a gas sentry (R. 13, 19). Upon an attack, accused was to fire the machine gun in the pit as a warning and to fire at the enemy target immediately (R. 15-16, 25, 27, 42). He was required to remain in the pit in order to perform this duty (R. 25), and at no time in the discharge of his duties as a sentinel in the pit was he to enter the sentry box (R. 38-40). If he desired to secure a relief he was to call the man on duty in the sentry box or the sergeant of the guard (R. 40). Accused was not able to perform his gun pit duties from the position in the sentry box where he was found sleeping (R. 32).

A standing oral order charging the sentinel in the gun pit with the duty of immediately firing the machine gun in the event of attack had been issued by accused's battalion commander at a meeting of all section leaders two months prior to the commission of the offense alleged. All section leaders were necessarily familiar with the contents of this order which had never been rescinded. These section

leaders were checked twice each night to insure their compliance with this oral order, accused's machine gun section leader included (R. 28, 29, 35, 36). The order defined the limits of accused's post as the pit itself (R. 30). Accused himself was a leader of the machine gun section but it was not known whether he was present at the meeting when the terms of the standing order were made known (R. 15, 34, 36). When accused was posted as a sentinel by the sergeant of the guard, the sergeant checked his equipment but gave him no special instructions as to his duties or the limits of his post as "being a non-commissioned officer himself, I took it for granted he knew his job himself the same as I did" (R. 12, 13, 22). Accused had been posted as a sentinel on that post several times before (R. 18, 47), and knew "what the mission of the sentries on that post was" (R. 10).

No guard orders were posted in the gun pit (R. 29, 30). Orders posted in the "Battery" stated that "there would be two guards at the position and that they would act as air guards, against ground attack and the normal guard orders" (R. 29). Guard orders for the position were also posted on the bulletin board in a bivouac about eighteen feet from the sentry box. As a machine gun section leader accused had charge of posting on the bulletin board in the sentry box the orders for the duties of his section (R. 34, 36, 37). Men were required to read the bulletin board daily (R. 34). On the bulletin board in the sentry box two orders were posted. One order stated who would post the guard and the number of guards on duty at the position. The other, entitled "Special Orders for No. 1 and No. 2 Machine Guns", was admitted in evidence (R. 34-38; Def. Ex. 1). The second proviso of this order requires that the "Sentry box cover will be open at all times, for the purpose of air guard". Normally, accused was not a sentinel but acted in this capacity on the evening in question because of the shortage of men (R. 36).

4. The uncontradicted evidence shows that accused was, at the place alleged, duly posted as a sentinel, and that before being relieved he was, at the time alleged, found sleeping in a sentry box about 30 or 40 feet from the spot where he had been posted. As accused was posted in the gun pit and found sleeping in the sentry box, the question arises as to whether accused was, in fact, found sleeping upon his post within the meaning of Article of War 86.

The evidence shows that accused's duties were those of an air guard and gas sentry. He was also a sentinel charged with the protection of personnel and material from ground attack. He was posted

in the gun pit and was charged with the firing of a machine gun in the event of enemy attack. According to oral standing orders the limits of accused's post were the gun pit itself. At no time in the discharge of his duties was accused to leave the pit and go to the sentry box. By going to the sentry box he thus placed himself in a position from which he could not at once perform his duty of serving the gun, but from which he could adequately perform his remaining general duties as a sentinel as well as his duties as an air guard and gas sentinel. It may safely be said that from the position in which he was found asleep accused could adequately perform a substantial part of his duties as a sentinel.

The Manual for Courts-Martial provides that:

> "A sentinel's post is not limited to an imaginary line, but includes, according to orders or circumstances, such contiguous area within which he may walk as may be necessary for the protection of property committed to his charge or for the discharge of such other duties as may be required by general or special orders. The sentinel who goes anywhere within such area for the discharge of his duties does not leave his post, but if found drunk or sleeping within such area he may be convicted of a violation of this article" (par. 146a, M.C.M.)
>
> "The offense of leaving post is not committed when a sentinel goes an immaterial distance from the point, path, area, or object which was prescribed as his post" (par. 146c, M.C.M.)

The Board of Review said, in a case in which a soldier had been found guilty of leaving his post before he was regularly relieved:

> "*** The post of a sentinel is, therefore, that position or area, designated by orders of various degrees of exactness, on or from which he may effectively perform his duties ***".
>
> * * * * *
>
> "The test, therefore, to be applied in ascertaining whether a sentinel has left his post is to determine whether he has so far removed himself from his normal positions or area of duty as to be unable adequately to perform his duties" (CM 222856, Stevenson). (Underscoring supplied.)

The purpose of Article of War 86, implicit in the language used, is to punish those omissions of vigilance and failures to perform duty incident to drunkenness or sleep or incident to leaving the designated place of duty. The foregoing quotations from the Manual and from the holding of the Board of Review support this view. The Article does not define the post of a sentinel. His post is his place of duty and is not to be rigidly measured in inches, feet or yards. A sentinel does not escape his obligations of vigilance by the simple expedient of stepping outside a designated area. If the purpose of the Article is to be achieved the gravamen of the offenses denounced thereby must be in the omissions or failures to perform the duties imposed. The soldier is a sentinel regardless of his position, if from the position he assumes he is able adequately to perform his duties or any substantial part of them. Inasmuch as the accused in this case when found asleep was in a place from which he could have performed a substantial part of his duties as a sentinel had he been awake, he was asleep upon his post within the meaning of Article of War 86.

The evidence is legally sufficient to support the findings of guilty.

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

Robert H. Hoover, Judge Advocate.
Andrew J. Lopp, Jr., Judge Advocate.
Edward H. Gerhardt, Judge Advocate.

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

SPJGK
CM 225405

OCT 2 0 1942

U N I T E D S T A T E S	)	30TH INFANTRY DIVISION
v.	)	Trial by G. C. M., convened at Fort Jackson, South Carolina, August 24, 1942. Dishonorable discharge (suspended) and confinement for three (3) years. Disciplinary Barracks.
Private First Class RALPH W. LINEBERGER (20454972), Company K, 120th Infantry.	)	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Ralph W. Lineberger, Company "K", One Hundred Twentieth Infantry, did, at Fort Jackson, South Carolina, on or about August 6, 1942, desert the service of the United States by absenting himself from his organization with intent to shirk important service, to wit: transfer to an undisclosed destination and did remain absent in desertion until he surrendered himself at Fort Jackson, South Carolina, on or about August 10, 1942.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. The reviewing authority approved the sentence, directed its execution, but suspended the execution of the dishonorable discharge

and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Order No. 58, Headquarters 30th Infantry Division, September 8, 1942.

3. The evidence shows that accused absented himself without leave from Fort Jackson, South Carolina, on August 6, 1942 (R. 6; Ex. A). He surrendered at the same place on August 10 (R. 13; Ex. A). On August 5 the acting first sergeant of his company had advised accused that he was to be transferred immediately (the nature of the transfer was not stated), had told him to check his equipment and had restricted him to the company street (R. 5). Accused was not advised of the date on which the transfer would be made (R. 5). The transfer was made on August 8 (R. 7). The first sergeant testified that accused had always been attentive to his duties and a "very good" soldier, and had never, to witness' knowledge, been previously charged with an offense (R. 8). The company commander testified that the accused is "not a leader at all but he is a very good private *** one of the best" (R. 9).

Accused testified that after he had been placed on the alert and instructed to remain in the company street (R. 10), he and another soldier drank a quart of whiskey, became drunk and left camp at about 4:30 or 5 p.m., August 6. He had no intention to desert or to avoid the transfer, but intended to return the next day (R. 10, 11).

4. The circumstances surrounding the proposed transfer and the circumstances of accused's absence do not differ materially from the circumstances of the Barrett case (CM 225422), in which the Board of Review recently expressed the opinion that service incident to transfer of a soldier to an undisclosed destination was not important service within the meaning of Article of War 28 and that the shirking of such service was not desertion. The standards to be applied in determining whether any particular service is important, as stated in that opinion and in the opinion of the Board of Review in CM 224805, Conlon, are applicable here. The evidence in the present case sufficiently shows that accused intended to shirk the service incident to the transfer involved in the findings but, applying the standards mentioned, is not sufficient to show that the service was important service within the meaning of Article of War 28. The evidence is therefore legally sufficient to support only so much of the findings of guilty as involves the lesser included offense of absence without leave with intent to shirk the specific service described, in violation of Article of War 96, for which no maximum limits of punishment are prescribed by the Manual for Courts-Martial (CM 151672, Lytle).

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves findings that accused did at the place and time alleged absent himself without leave from his organization with intent to shirk the service of transfer to an undisclosed destination and did remain absent until he surrendered himself at the place and time alleged, in violation of Article of War 96, and legally sufficient to support the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGK
CM 225407

OCT 2 6 1942

U N I T E D S T A T E S	)	30TH INFANTRY DIVISION
v.	)	Trial by G. C. M., convened at Fort Jackson, South Carolina, August 24, 1942. Dishonorable discharge (suspended) and confinement for three (3) years. Disciplinary Barracks.
Private LAWRENCE S. DERRICK (20454899), Company K, 120th Infantry.	)	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Lawrence S. Derrick, Company "K", One Hundred Twentieth Infantry, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about August 6, 1942 desert the service of the United States by absenting himself from his organization with intent to shirk important service, to wit: transfer to an undisclosed destination and did remain absent in desertion until he surrendered himself at Fort Jackson, South Carolina on or about August 10, 1942.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. The reviewing authority approved the sentence, directed its execution but suspended the execution of the dishonorable discharge, and designated the

United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Order No. 59, Headquarters 30th Infantry Division, September 9, 1942.

3. The evidence shows that accused absented himself without leave from his organization at Fort Jackson, South Carolina, on August 6, 1942 (R. 9, 13; Ex. A). He returned to military control voluntarily on August 10, 1942 (Ex. A). On the afternoon of August 5 (R. 5), pursuant to verbal orders (R. 7), the first sergeant of accused's company had told accused personally that he was to remain on the alert for transfer to an undisclosed station and had directed him to remain in the company street (R. 5). Again, on the same day, the first sergeant had had the company formed in the company street and had called out the names of those to be transferred, including the name of accused (R. 5). He had also instructed accused to turn in all of his equipment and check with the supply sergeant so as to "be ready for transfer at a moments notice" (R. 6). Accused's name was included in the tentative list for transfer, but was stricken from that list by the company commander and not included in the order of transfer because the accused was absent and not available for transfer on the date the transfer of the men selected was consummated (R. 9).

Accused testified that after the first sergeant had placed him on the alert and had told him of the transfer accused and a Private Lineberger drank a quart of whiskey and became "pretty well high" (R. 10), after which accused left camp on August 6 (R.13), stopped a bus on the highway and went to Columbia, South Carolina. There he drank more liquor and then went to Shelby, North Carolina, where his people lived (R. 10). He further testified that on the morning after he arrived at Shelby he started back to camp and got as far as Charlotte, North Carolina, but had no money and could not catch a ride (R. 14). He stayed at Charlotte until August 9, knowing that he would upon his return miss the transfer with the others (R. 14). He would not have left had he not been under the influence of whiskey (R. 12). He had no objection to the transfer (R. 14). He "would like to go in combat". He surrendered voluntarily (R. 11).

4. The circumstances surrounding the proposed transfer and the circumstances of accused's absence do not differ materially from the circumstances of the Barrett case (CM 225422), in which the Board of Review recently expressed the opinion that service incident to transfer of the soldier to an undisclosed destination was not important service within the meaning of Article of War 28 and that the shirking of such service

was not desertion. The standards to be applied in determining whether any particular service is important as stated in that opinion and in the opinion of the Board of Review in CM 224805, Conlon, are applicable here. The evidence in the present case sufficiently shows that accused intended to shirk the service incident to the transfer involved in the findings but, applying the standards mentioned, is not sufficient to show that the service was important service within the meaning of Article of War 28. The evidence is therefore legally sufficient to support only so much of the findings of guilty as involves the lesser included offense of absence without leave with intent to shirk the specific service described, in violation of Article of War 96, for which offense no maximum limits of punishment are prescribed by the Manual for Courts-Martial (CM 151672, Lytle).

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings that accused did, at the place and time alleged, absent himself without leave from his organization with intent to shirk the service incident to his transfer to an undisclosed station, and did remain absent until he surrendered himself at the place and time alleged, in violation of Article of War 96, and legally sufficient to support the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGK
CM 225409

26 1942

UNITED STATES v. Private JAMES L. LONG (20407129), 30th Cavalry Reconnaissance Troop.	30TH INFANTRY DIVISION Trial by G. C. M., convened at Fort Jackson, South Carolina, September 1, 1942. Dishonorable discharge (suspended) and confinement for three (3) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James L. Long, Thirtieth Cavalry Reconnaissance Troop, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about August 4, 1942, desert the service of the United States by absenting himself from his organization with intent to shirk important service, to wit: transfer to an undisclosed destination, and did remain in desertion until he surrendered himself at Fort Jackson, South Carolina, about August 10, 1942.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by summary court-martial for absence without leave for two days in violation of Article of War 61 and for use of property without permission in violation of Article of War 96, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved

the sentence, reduced the period of confinement to three years, directed the execution of the sentence as thus modified but suspended the execution of the dishonorable discharge and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Order No. 60, Headquarters 30th Infantry Division, September 10, 1942.

3. The evidence shows that about August 3, 1942, at Fort Jackson, South Carolina, the troop of which accused was a member was told by the troop commander, at a retreat formation, that about half the troop was to be transferred, but that the troop commander did not know when the transfer would take place, what the nature of the transfer or duties following transfer would be or what individuals would be involved (R. 5, 6, 9, 10). The men of the troop were advised that "they were on the alert, but not restricted" (R. 6). Accused was not reported absent at this formation but might have been elsewhere (R. 8, 9, 38). Later on the same day accused approached the troop clerk and asked if his name was on the list of transferees being prepared. The clerk said he could not give accused any information. Accused made an obscene remark about the proposed cadre and said he did not "like the idea" of being included in it (R. 12, 17). Accused absented himself without leave about noon, August 4 (Ex. A). A list of men selected for the transfer, including accused, was published during the afternoon of August 4 (R. 6, 8). Accused was heard to say, before he absented himself, that he did not wish to be included in the cadre and would prefer to go to the parachute troops (R. 16), to which he had previously requested transfer (R. 9). Accused had also theretofore remarked that he "was going to the parachute troop at any cost" (R. 19). Accused surrendered to his troop commander at Fort Jackson on August 10. After stating that he was "giving himself up" he made a remark to the effect that he "wanted to be psycho-analyzed" (R. 7). The cadre was transferred to Camp Gordon as a "basis for organization of some kind of a transport" (R. 10) on August 5 (R. 13).

Accused testified that he was not present at the retreat formation of August 3, 1942, but heard "rumors" on the morning of August 4 that a cadre for transfer was being formed (R. 27). He and two other soldiers left camp for the purpose of going to Myrtle Beach, South Carolina. He would not have absented himself if he had known he was to be a member of the cadre (R. 29), did not intend to shirk any hazardous duty (R. 28) and did not intend to desert (R. 27). When he asked the troop clerk if he was on the cadre he did not make the obscene remark attributed to

him but asked the clerk, in effect, if the least valuable men were being put on the cadre (R. 30). Accused left his companions in Charleston, South Carolina, visited a girl friend there and then returned to Fort Jackson (R. 36).

A witness for the defense, a member of accused's troop, testified that he was with accused on the afternoon of August 3 and did not accompany the troop "in the field", that witness was not present at the retreat formation and that accused made a remark during the evening indicating that accused had not been at the formation (R. 23, 24).

4. Although the evidence shows that accused absented himself without leave before publication of the list of transferees containing his name, there is ample evidence that prior to absenting himself he had reason to believe that his transfer was a possibility. He expressed his desire to avoid the transfer contemplated. The circumstances sufficiently show that, as alleged in the Specification, accused absented himself with intent to shirk transfer to an organization and place not made known to him.

The circumstances surrounding the proposed transfer and the circumstances of accused's absence do not differ materially from the circumstances of the Barrett case (CM 225422), in which the Board of Review recently expressed the opinion that service incident to transfer of a soldier to an undisclosed destination was not desertion. The standards to be applied in determining whether any particular service is important as stated in that opinion and in the opinion of the Board of Review in CM 224805, Conlon, are applicable here. The evidence in the present case sufficiently shows that accused intended to shirk the service incident to the transfer described in the Specification, but, applying the standards mentioned, is not sufficient to show that the service was important service within the meaning of Article of War 28. The evidence is therefore legally sufficient to support only so much of the findings of guilty as involves the lesser included offense of absence without leave with intent to shirk the specific service described, in violation of Article of War 96, for which offense no maximum limits of punishment are prescribed by the Manual for Courts-Martial (CM 151672, Lytle).

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so

much of the findings of guilty of the Charge and Specification as involves findings that accused did, at the place and time alleged, absent himself without leave from his organization with intent to shirk the service of transfer to an undisclosed destination and did remain absent until he surrendered himself at the place and time alleged, in violation of Article of War 96, and legally sufficient to support the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGK
CM 225422

1 7 1942

U N I T E D S T A T E S	)	30TH INFANTRY DIVISION
v.	)	Trial by G. C. M., convened at Fort Jackson, South Carolina, September 9, 1942. Dishonorable discharge (suspended) and confinement for five (5) years. Disciplinary Barracks.
Private JOHN H. BARRETT (34013085), Company D, 117th Infantry.	)	

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John H. Barrett, Company D, 117th Infantry, did at Fort Jackson, South Carolina on or about August 7, 1942, desert the service of the United States by absenting himself from his organization with intent to shirk important service, to wit: transfer to undisclosed destination, and did remain absent in desertion until he surrendered at Fort Jackson South Carolina on or about August 17, 1942.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by summary court-martial for absence without leave for 60 days, in violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence, directed its

execution but suspended the execution of the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 66, Headquarters 30th Infantry Division, September 11, 1942.

3. The evidence shows that accused absented himself without leave from his organization at Fort Jackson, South Carolina, on August 6, 1942 (R. 10; Ex. A). He surrendered at the same place on August 17, 1942 (Ex. A). On August 5, in response to an official order, the first sergeant of accused's company had formed the company, called out the names of men of the company designated by said order to constitute a cadre for transfer to another, and then unknown, destination. He ordered the members selected for the cadre to leave ranks and sent them to the orderly room where they were informed that they would be transferred. Accused was among the men designated, was in the formation, went to the orderly room and received information of the impending transfer. He was ordered to check in the equipment he had belonging to the company and to get ready for an equipment check, and was ordered to remain within the limits of the company street unless he had permission from the first sergeant of the company to leave (R. 4, 5). The members of the cadre were not advised until subsequent to August 6 what its destination would be (R. 11). The order for transfer was not a secret one. The cadre left Fort Jackson on August 8 for a destination not shown by the evidence (R. 10).

Accused testified that he had been drinking and did not realize what he was doing when he absented himself. He went to Talico Plain, Tennessee (R. 11) to see his mother and relatives. He had not been home for three or four months (R. 12). He left in company with two other soldiers (R. 14). He had no money and was delayed on this account but came back to Fort Jackson as quickly as possible (R. 15). He realized that the cadre would be transferred at almost any time and wished to accompany it (R. 13, 15). There was a rumor through the camp that the cadre was a training cadre (R. 14) and accused was told by a noncommissioned officer while in the orderly room that the cadre was going to Camp Gordon (R. 14, 16).

4. Accused was found guilty of desertion with intent to shirk important service consisting of "transfer to undisclosed destination". The evidence shows that with full knowledge that he was one of the men

selected to form a cadre and that he had been ordered to hold himself in readiness for immediate transfer to an undisclosed destination, accused absented himself without leave from his station and remained absent until after the cadre had departed. The nature of the duties to be performed following the transfer does not appear. The important question to be determined is whether the transfer described constituted "important service" within the meaning of Article of War 28.

Important service within the meaning of Article of War 28 has been defined as including "all actual service designed to protect or promote, in a manner direct and immediate, the national or public interest or welfare" but not including "what may be termed 'preparatory service'" (CM 151672, Lytle). The Board of Review has expressed the opinion that the standards thus stated are generally applicable in time of war and that

> "transfers or movements for the organization or expansion of new units, or for training purposes of routine character, not directly related to the maintenance of internal order, embarkation for foreign duty, possible contact with the enemy, or other special functions of the Army, may not be classified as important service" (CM 224805, Conlon).

In so far as appears from the record of trial the duties to be performed by accused upon his transfer were intended to be nothing more than those of routine training. This being so, the evidence does not prove that the service described in the Specification was important service within the meaning of Article of War 28.

It is sufficiently shown that accused shirked the service involved in the contemplated transfer, as charged. This was an offense, violative of Article of War 96, more serious than mere absence without leave, for which the Manual for Courts-Martial does not prescribe maximum limits of punishment (CM 151672, Lytle; CM 224805, Conlon).

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings that accused did, at the place and time alleged, absent himself without leave from his organization with intent to shirk the

service of transfer to an undisclosed destination and did remain absent until he surrendered himself, at the place and time alleged, in violation of Article of War 96, and legally sufficient to support the sentence.

Robert H. Hawes, Judge Advocate.
James H. Baugh, Judge Advocate.
Edward B. Handy, Judge Advocate.

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

SPJGH
CM 225490

SEP 29 1942

UNITED STATES	6th ARMORED DIVISION
v.	Trial by G.C.M., convened at Camp Chaffee, Arkansas, August 22, 1942. Dismissal.
Second Lieutenant MELVIN H. VAN HUSS (0-1010328), (Inf.), 69th Armored Regiment.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, 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. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Melvin H. Van Huss, 2d Lieut. (Inf), 69th Armored Regiment did, at Camp Chaffee, Arkansas, while on duty as officer in charge of pit details, on the rifle range, on or about the 6th day of July, 1942, in the presence of enlisted men, gamble with Privates Irving A. Bryan, and Paul F. Mills, of Company B, 69th Armored Regiment, to the disgrace of the military service and to the prejudice of military discipline.

Specification 2: (Finding of not guilty.)

Specification 3: (Finding of not guilty.)

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

3. The evidence for the prosecution upon Specification 1, of which the accused was found guilty, shows that on July 6, 1942, the accused was range officer in charge of the target pit detail. At about six o'clock that morning Privates Irvin A. Bryan and Paul F. Mills, both of Company B, 69th Armored Regiment, of which company accused was an officer, were engaged in a game of craps in the target house, before firing began at about 7 a.m. The accused joined them in the game, put down some money and started shooting when his turn came. They played on the concrete on their hands and knees (R. 5, 7, 8, 10, 14, 15).

The accused again played craps with Privates Bryan and Mills during the noon hour. The total time of playing that day was stated by one enlisted spectator as between one and one-half and two hours and by another as about four hours. Private Bryan stated that the noon game lasted from about thirty to forty minutes. The record does not show the length of the morning game. Private Mills stated that the play was during duty hours. One enlisted spectator stated that he saw the play during the noon hour, another that he saw the play in the morning and in the afternoon while he was actually working the targets, another that he saw the play around 2:30 p.m., and a fourth that he saw the three gambling off and on all day. Firing was taking place during the majority of the time the game was on (R. 10, 11, 12, 14, 15).

The accused lost $18 to Private Bryan. He lost $75, over a period of two days, to Private Mills. The games after the first morning were a continuation to let the accused get even, but he went further into debt (R. 5-9).

4. For the defense the accused testified that he reported on the morning of July 6th at the usual time and found that he was supposed to have been in the pits at 6:15 a.m. He went with Colonel Bacon, who told him to stay up there all afternoon. Accused stood and watched the crap game for a while and, as it was not time to go to work, entered the game. He did not realize that he would in any way bring disgrace on the military service (R. 17).

Upon cross examination and examinatiom by the court, he stated that he entered the Army in June 1941, and as an enlisted man had seen officers gambling with enlisted men. He was commissioned through the Officer Candidate School, Fort Knox, Kentucky. At the school he was instructed not be too familiar with enlisted men, but not as to drinking

or gambling with them. Upon arrival at Camp Chaffee, Colonel Bacon talked to them on relations with enlisted men. The accused knew gambling was frowned upon but did not know that it was forbidden. He was familiar with the "Officers Guide" but it said nothing about gambling. He gambled with these men a part of two days, joining the game after it started and put up a dollar or two each time except in the evening game. Only a part of the gambling was during duty hours (R. 17-18).

Second Lieutenant Charles Roodman, 69th Armored Regiment, testified for the defense (although it appears that the court requested that an officer who had graduated from the Officer Canditate School at about the same time as accused be called (R. 19).), that he graduated from the Officer Candidate School, Fort Knox, June 15, 1942, but was not a member of the same class as accused. He stated that the conduct, behavior and relationship of officers to enlisted men were taught in a lecture by Colonel Morrow and by similar instruction at three periods. The instruction dealt mostly with the conduct of an officer, that he should be a gentleman, should not associate with enlisted men, that he should have to do with them only on military business, that he should not drink on duty and should not drink with enlisted men at any time. He was not told specifically not to gamble with enlisted men, but that he should not associate with them socially in any way (R. 20).

5. In rebuttal, Lieutenant Colonel Forsyth Bacon, 69th Armored Regiment, testified that accused was at one time in his battalion. As officers joined his battalion, he assembled them in groups of three or four, accused was in one group, and told them their obligations as officers, and what was expected of them in their professional contacts and their conduct in associating with enlisted men. When asked whether he explicitly told accused that it was against regulations for officers to gamble with enlisted men, Colonel Bacon did not give a definite answer (R. 19).

6. The evidence shows and the accused admits that he gambled while on duty with the two enlisted men at the place and upon the date alleged, while accused was on duty in charge of a pit detail on the rifle range. The evidence further shows that the gambling was in the presence of other enlisted men. There is, however, nothing in the record to indicate that he failed to perform the duties required of him as officer in charge of the pit detail.

The record clearly demonstrates that the accused was guilty of the offense alleged in Specification 1.

7. Winthrop defines conduct unbecoming an officer and a gentleman as

> "Action or behavior in an official capacity, which, in dishonoring or otherwise disgracing an individual as an officer, seriously compromises his character and standing as a gentleman; or action or behavior in an unofficial or private capacity, which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms" (Winthrop, Military Law & Precedents, Reprint, p. 713).

The Manual for Courts-Martial states:

> "There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not every one is or can be expected to meet ideal standards or to possess the attributes in the exact degree demanded by the standards of his own time; but there is a limit of tolerance below which the individual standards in these respects of an officer or cadet can not fall without his being morally unfit to be an officer or cadet or to be considered a gentleman. This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness" (par. 151, M.C.M., 1928).

Winthrop cites the "Demeaning of himself by an officer with soldiers or military inferiors" as an instance of offenses charged under the 95th Article of War. He refers thereunder to cases of drinking and carousing with them, of gambling with them, of gambling while officer of the guard with soldiers of the guard and of gambling with them while officer of the day (Winthrop, Military Law & Precedents, p. 716).

In the case of Lieutenant F. S. Davidson, involving gambling with citizens and men of his company and winning money from the latter,

The Judge Advocate General stated:

> "The conduct of the accused on this occasion was certainly most disreputable, as well as demoralizing in its effect upon his subordinates, and was properly viewed by the court as 'unbecoming an officer and a gentleman.' Precedents of similar acts of gambling thus charged when the convictions were approved by the Secretary of War, are to be found in G. O., No. 1, of 1847, and G. O., No. 243 of 1863" (R. 37, 127; November 1875).

In the opinion of the Board of Review the conduct of accused in gambling with enlisted men of his company under the circumstances here shown, where at least a portion of the gambling was done while both the accused and the men were actually on duty in the target area of the rifle range and firing was in progress, was conduct unbecoming an officer and a gentleman in violation of Article of War 95.

8. The accused is 25 years old. The records of the Office of The Adjutant General show his service as follows:

Enlisted service: Inducted July 3, 1941; graduate, Armored Force Officer Candidate School, May 23, 1942; appointed second lieutenant, Infantry, Army United States, May 23, 1942.

9. The court was legally constituted. 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 of guilty and the sentence. Dismissal is mandatory upon conviction of violation of the 95th Article of War.

Walter E. Hick Jr., Judge Advocate.

Thorsten Thoresson, Judge Advocate.

Abner E. Lifsconb, Judge Advocate.

1st Ind.

War Department, J.A.G.O., - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Melvin H. Van Huss (0-1010328), (Inf.), 69th Armored Regiment.

2. Lieutenant Van Huss was convicted of gambling with enlisted men in the presence of other enlisted men in violation of Article of War 95, and sentenced to be dismissed the service.

The records of the War Department show that he was inducted July 3, 1941, was graduated from the Armored Force Officer Candidate School, and appointed second lieutenant, Infantry, Army of the United States, May 23, 1942. He is 25 years old.

3. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

4. I recommend that the sentence be confirmed, but in view of his youth, his short service in the Army and his short service as an officer of less than two months after graduation from an Officer Candidate School and prior to the commission of his offense, and his apparent capability of rendering useful service as an officer, recommend that the execution of the sentence of dismissal be suspended during the pleasure of the President.

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

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

Sec II (3)

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

(277)

SPJGK
CM 225505

OCT 2 6 1942

UNITED STATES	30TH INFANTRY DIVISION
v.	Trial by G. C. M., convened at Fort Jackson, South Carolina, September 9, 1942. Dishonorable discharge (suspended) and confinement for five (5) years. Disciplinary Barracks.
Private WILLIAM W. TOWNSEND (34013090), Company D, 117th Infantry.	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private William W. Townsend, Company D, 117th Infantry, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about August 7, 1942, desert the service of the United States by quitting his organization with the intent to shirk important service, to wit, transfer to another station, and did remain absent in desertion until he surrendered himself at Fort Jackson, South Carolina, on or about August 17, 1942.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification except the words "transfer to another station", substituting therefor the words "transferred to undisclosed destination", of the excepted words, not guilty, of the substituted words, guilty, and guilty of the Charge. Evidence of two previous convictions was introduced, one by summary court-martial and the other by special court-martial for absences

without leave for 8 days and 27 days, respectively, in violation of Article of War 61. The conviction for the absence of 8 days was erroneously considered, as will hereinafter appear. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved the sentence, directed its execution, but suspended the execution of the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Order No. 65, Headquarters 30th Infantry Division, September 11, 1942.

3. The evidence shows that accused absented himself without leave from his organization at Fort Jackson, South Carolina, on August 6, 1942 (R. 11; Ex. 1). He surrendered at the same place on August 17 (Ex. 1). On August 5, in response to an official order, the acting first sergeant held a formation of accused's company and called out the names of members of the company who had been selected for transfer to an undisclosed destination. Among the names was that of accused (R. 5). The acting first sergeant instructed accused and the other members of the group to get their equipment and check it (R. 6, 11) and ordered them not to leave without permission (R. 5, 6). Accused was not informed as to the station to which he would be transferred or as to the time such transfer would take place (R. 5, 8, 14, 15). The order directing the transfer was read to accused (R. 12). A group composed of men transferred left Fort Jackson August 8, 1942 (R. 6). They were transferred to the 118th Infantry at Camp Gordon, Georgia (R. 9, 10). When accused returned to his organization on August 17 he stated to his first sergeant that he would like to be transferred after being tried (R. 9).

Accused testified that it was understood in his company that the group was to go to Camp Gordon, Georgia, and that he was rather proud to be included in the prospective transfer. In answer to questions by the court, he testified that there was a general understanding in his company that of the men who had on previous occasions been transferred on cadre from his company some had been sent overseas (R. 17). After being advised of the prospective transfer he got drunk and went to his home, intending, however, to return (R. 13). His home was in Talico Plain, Tennessee, about 330 miles from Fort Jackson (R. 14). He reached home the morning after leaving (R. 15). He was afraid to return for fear of being put in the guardhouse for being absent without leave (R. 15, 16). He testified that the sergeant did not advise him that if he left he would be a deserter but that the sergeant did tell the group that if they were not there upon call they would be absent without leave (R. 18).

4. The circumstances surrounding the proposed transfer and the circumstances of accused's absence do not differ materially from the circumstances of the Barrett case (CM 225422), in which the Board of Review recently expressed the opinion that service incident to transfer of a soldier to an undisclosed destination was not important service within the meaning of Article of War 28 and that the shirking of such service was not desertion. The standards to be applied in determining whether any particular service is important as stated in that opinion and in the opinion of the Board of Review in CM 224805, Conlon, are applicable here. The evidence in the present case sufficiently shows that accused intended to shirk the service incident to the transfer involved in the findings but, applying the standards mentioned, is not sufficient to show that the service was important service within the meaning of Article of War 28. The evidence is therefore legally sufficient to support only so much of the findings of guilty as involves the lesser included offense of absence without leave with intent to shirk the specific service described, in violation of Article of War 96, for which offense no maximum limits of punishment are prescribed by the Manual for Courts-Martial (CM 151672, Lytle).

5. The court, in its findings of guilty of the Specification, excepted the words "transfer to another station", words descriptive of the service shirked, and substituted the words "transferred to undisclosed destination". The substitution did not alter the specification in any material aspect, and did not change the nature or identity of the offense charged. It was authorized as conforming to the evidence (par. 87c, M.C.M.).

6. The court received without objection on the part of the accused (R. 19) evidence of two previous convictions of the accused by courts-martial. One of these related to a conviction approved July 12, 1941, for absence without leave from June 15, 1941, to June 23, 1941. Such offense was committed by the accused more than one year next preceding the commission of the offense charged in this case, full allowance being made for all periods of unauthorized absences as shown by the findings in this case and by the evidence of previous convictions. This previous conviction was erroneously considered by the court, but it does not appear from the record that such conviction influenced the court in its sentence.

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so

much of the findings of guilty of the Charge and Specification as involves findings that accused did at the place and time alleged absent himself without leave by quitting his organization with intent to shirk the service of transfer to an undisclosed destination and did remain absent until he surrendered himself at the place and time alleged, in violation of Article of war 96, and legally sufficient to support the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGH
CM 225512

NOV 14 1942

N.D.

UNITED STATES v. Private HERBERT E. HENNING (32187151), Task Force Replacement Pool, Station Complement, NYPE, Fort Dix, New Jersey.	SECOND SERVICE COMMAND SERVICES OF SUPPLY Trial by G.C.M., convened at Fort Dix, New Jersey, July 15, 1942. Dishonorable discharge and confinement for five (5) years (Suspended).

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

1. The record of trial in the case of the soldier named above having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part, 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 Pvt. Herbert E. Henning, Task Force 6528-I, Fort Dix, New Jersey, did, at Fort Dix, New Jersey, on or about May 4, 1942, desert the service of the United States by absenting himself without proper leave from his organization, with intent to shirk important service, to wit: embarkation for duty at an unknown foreign destination, and did remain absent in desertion until he was apprehended at Hoboken, New Jersey, on or about June 1, 1942.

The accused pleaded to the Specification of the Charge, not guilty, but guilty of violation of the 61st Article of War, and to the Charge not guilty. This plea may properly be considered as a plea of guilty of absence without leave in violation of the 61st Article of War. He was found guilty of the Charge and the Specification thereunder and sentenced to dishonorable discharge, to forfeit all pay and allowances due or to

become due, and to be confined at hard labor for a period of five years. The reviewing authority approved the sentence, but suspended the execution thereof. The result of the trial was published in General Court-Martial Order No. 479, Headquarters Second Service Command, Services of Supply, Governors Island, New York, September 16, 1942.

3. The evidence shows that the accused absented himself without leave from Battery C, 91st Armored Field Artillery Battalion, at Fort Dix, New Jersey, on May 4, 1942, and that on June 1, 1942, he was apprehended in uniform at 72 Garden Street, Hoboken, New Jersey. The evidence also shows that the 91st Armored Field Artillery arrived at Fort Dix on April 7, 1942, that it was placed in a staging area, that it was given the Force number 6528-1, that it departed from Fort Dix on May 30, 1942, and that on May 31, 1942, it embarked on ship "NY-39". After presenting this evidence the prosecution rested (Ex. 1, R. 7-9).

4. The accused pleaded guilty to absence without leave from his organization from May 4, 1942, to June 1, 1942. In addition, the accused testified that when he left his organization he did not know that it was to leave for foreign service and that had he known that it was to leave for such service he would not have absented himself. He testified that he went home on a week end pass, that he became intoxicated and remained that way for about two weeks, and at the end of that time his family was "* * * under quarantine because chicken pox was running around". The accused asserted that he had no intention of avoiding hazardous service.

5. The Specification alleges that the accused deserted the service by "* * * absenting himself without proper leave from his organization, with intent to shirk important service, to wit: embarkation for duty at an unknown foreign destination * * *". The evidence, however, fails to sustain this allegation. There is proof that the organization to which the accused was attached was in a staging area, that it was given the Force number 6528-1, and that it actually embarked for foreign service four weeks after the accused absented himself without leave. There is no evidence, however, that the accused was informed that his organization was to embark for foreign service or that he knew of its impending departure. The conclusion cannot, therefore, be legally drawn that the accused absented himself from his organization in order to avoid embarkation with his organization. There is, therefore, no proof of a desertion in order to avoid important service.

6. Although the facts of the present case may indicate that the accused absented himself from his organization with the intent not to

return, the allegation of the Specification did not place such an issue before the court, and accordingly a finding of guilty of desertion based upon those facts is not authorized. In CM 224765, Butler, the Board of Review stated -

> "The offense of desertion is defined as '* * * absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service' (M.C.M., 1928, par. 130). Thus it is apparent that desertion is an offense requiring a specific intent of mind. It is equally clear that the word 'desert' is a broad, inclusive term and when used in a specification is susceptible of attributing to the accused any one of the three intents of mind described above. When, therefore, the word 'desert' in a specification is modified, as in the present case, by the phrase '* * * in order to avoid hazardous duty * * *', its meaning is narrowed and the justiciable issues of the Specification are accordingly restricted. Furthermore, when a Specification alleges desertion with an intent to avoid hazardous duty, the proof must show such an intent. If the proof shows no such intent, but rather an intent not to return to the service, there is a fatal variance between the allegata and the probata and a finding of guilty of desertion based on such proof cannot be approved."

The evidence, however, does show that the accused absented himself without leave from May 4, 1942, to June 1, 1942, and is legally sufficient, therefore, to support only so much of the finding of guilty as involves the lesser included offense of absence without leave for twenty-eight days, and to support only so much of the sentence as involves confinement at hard labor for two months and twenty-four days and forfeiture of two-thirds of his pay per month for a like period (par. 104 c, M.C.M., 1928).

7. For the reasons stated, the Board of Review is of the opinion that the record is legally sufficient to support only so much of the findings of guilty of the Charge and the Specification thereunder as involves findings that the accused, at the place and time alleged, absented himself without leave from his organization and remained absent without leave until apprehended, in violation of the 61st Article of War, and legally sufficient to support only so much of the sentence

as involves confinement at hard labor for two months and twenty-four days and forfeiture of two-thirds of his pay for a like period.

Curtis S. Hyde Jr., Judge Advocate.

(On. leave.), Judge Advocate.

Abner E. Lipscomb Judge Advocate.

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

SPJGK
CM 225525

OCT 3 1942

UNITED STATES	10TH ARMORED DIVISION
v.	Trial by G. C. M., convened at Fort Benning, Georgia, September 3, 1942. Dismissal.
First Lieutenant JAMES A. REEVES (0-316068), Headquarters Supply Battalion, 10th Armored Division.	

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that First Lieutenant James A. Reeves, Q.M.C., Headquarters, Supply Battalion, 10th Armored Division, was, at Fort Benning, Georgia, on or about August 15, 1942, drunk while on duty as Officer of the Day of the Supply Battalion, 10th Armored Division.

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

Specification: In that First Lieutenant James A. Reeves, Q.M.C., Headquarters, Supply Battalion, 10th Armored Division, did, at Fort Benning, Georgia, on or about August 15, 1942, with intent to deceive his commanding officer, Captain Charles O. Brown, Army of the United States, officially state to Captain Charles O. Brown, that he, First Lieutenant James A. Reeves, did not drink intoxicating liquor after 1700, August 15, 1942, which statement was known by the said Lieutenant James A. Reeves to be untrue.

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

Specification: In that First Lieutenant James A. Reeves, Q.M.C., Headquarters, Supply Battalion, 10th Armored Division, did, at Fort Benning, Georgia, on or about August 15, 1942, wrongfully discharge a service pistol, caliber .45, in the vicinity of Post Number 4 of the guard, in the motor park area of the Supply Battalion, 10th Armored Division.

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

3. The evidence shows that at about 11:30 a.m., August 15, 1942, at Fort Benning, Georgia, accused entered upon the duties of battalion officer of the day of the Supply Battalion, 10th Armored Division, for which duty he had been regularly detailed. His tour of duty extended from 11:30 a.m., August 15, to 11:30 a.m., August 16. (R. 7, 10; Ex. A)

Between 3 and 4 p.m., August 15, accused, while in the company of other officers at an officers' club at Fort Benning, ordered and drank two mixed rum drinks - "Rum Cokes" (R. 20-21½, 23). Another officer had temporarily assumed accused's duties for a period beginning at about 1:30 p.m., and extending to about 3:30 p.m. (R. 63, 64), and accused was not, while drinking at this time, wearing the brassard and pistol with which he was equipped as officer of the day (R. 21). At about 7:10 p.m., accused ordered the sergeant of the guard, Sergeant Cecil L. Reynolds, Company B, Supply Battalion, 10th Armored Division, to take him to the officers' club. This was done and accused instructed Reynolds to come to the club for him when accused should telephone later. Accused telephoned to Reynolds at about 8:15 p.m. Thereafter, prior to 10:15 p.m., Reynolds made two trips to the club but did not find accused (R. 28, 29). At about 9:40 p.m. (R. 12, 21½) accused was seen at the bar of the club drinking what was ordered as and what appeared to be a Rum Coke (R. 14, 22) from a filled glass about nine inches tall. He consumed most of the contents of the glass (R. 16).

First Lieutenant John H. Rahter, Supply Battalion, 10th Armored Division, who was with accused and observed him from about 9:40 p.m., to about 10:15 p.m., testified that during this period accused talked loudly and in a disconnected manner and repeated his remarks (R. 16, 17). He "had a smug look" and was in an "arguing mood" (R. 16). He did not stagger and witness did not consider him drunk (R. 19) but believed he was "under the influence of liquor" (R. 13, 19) and was "well on his way". In witness' opinion accused "didn't have a clear head" (R. 19) and was not in a condition properly to perform his duties (R. 17-19). First Lieutenant John T. Eichnor, Supply Battalion, 10th Armored Division, who observed accused while the latter was in the company of Lieutenant Rahter at the club bar, testified that accused's speech was incoherent and "didn't make sense" and that although he did not stagger his "walk was unsteady" (R. 23). This witness was of the opinion that accused was drunk (R. 23; 27) and incapable of fully performing his duties. At about 10:15 p.m., accused left the club in an automobile, accompanied by Reynolds (R. 29, 30). Reynolds testified that accused took with him a glass containing "some kind of fluid" (R. 29), that he bore the odor of liquor and was unusually voluble - "highly talkative" (R. 29). Witness was of the opinion that accused was drunk (R. 29, 32).

Sometime before 11 p.m., accused entered his battalion headquarters and there engaged in a long and contentious discussion with Reynolds as to the capacity of a certain private of the guard to continue his duties (R. 30, 35, 37). Second Lieutenant Charles B. McFarland, Supply Battalion, 10th Armored Division, who observed accused at this time, testified that he noted the odor of liquor about accused, that accused was "very talkative, and at times he didn't quite make sense" and that his eyes were "blurred" (R. 34). In drinking water from an aluminum pitcher accused appeared to lose his balance and his "head rolled slightly to one side" (R. 35). Witness believed that accused had been drinking and was not "up to his normal powers of reasoning". A member of the guard, apparently the private soldier whose condition had been discussed by accused and Reynolds, became ill and witness assumed the duty of telephoning for an ambulance. He testified that he did so because he believed accused was not capable of attending to the matter properly (R. 34, 35).

During the early morning of August 16 accused went in a car with Reynolds and other members of the guard to post a new relief. At one post, Post No. 4, Reynolds, after being challenged, alighted from the car, approached the sentinel and talked with him. While the two

enlisted men were thus engaged a .45 caliber pistol was fired from the car or from its immediate vicinity, the bullet, a tracer, striking the ground about eight feet from the car and about the same distance from Reynolds (R. 38). Accused later stated to Reynolds that he had fired the shot to "see what the reaction of the Guard would be" (R. 39, 40). Accused also remarked to the officer of the day of another organization, Captain William J. Scott, Maintenance Battalion, 10th Armored Division, who had heard the shot and who had made inquiries, that he was "trying to put a little realism into the Guard" (R. 46, 47). Captain Scott testified that in the course of a conversation with accused he observed that accused repeated one or two statements he had made and on account of "his manner of speech, and the performance of his duties" witness had some "suspicion" as to whether accused was in full control of his faculties. Had witness been accused's company commander he would have investigated accused's condition. He did not, however, feel justified in making a report in the premises (R. 46, 47).

On the afternoon of August 16 (R. 54) accused was questioned at his battalion headquarters by his battalion commander, Captain Charles O. Brown, Supply Battalion, 10th Armored Division, as to whether he had been drinking during his tour of duty. Other officers and a noncommissioned officer were present (R. 52). Accused stated, in response to questions, that during the afternoon of August 15, prior to 5 p.m., he had "consumed three drinks" but that he had not consumed any intoxicating liquor after 5 p.m. on that day (Ex. C). Accused was again questioned by Captain Brown after the latter had told accused that he intended to investigate the case and after "warning" him. Asked if he had not taken a drink after 5 p.m. on August 15, accused said, "No, sir, not after 5:00 o'clock" (R. 53).

Accused testified that during the posting of the new sentinel accused observed that the clip was projecting from the butt of his pistol and that he pulled the pistol out of the holster and attempted to adjust it. The hammer of the pistol became cocked and in his effort to release the hammer to half-cock the pistol "went off". He testified that it was not true that he fired the pistol in an attempt to frighten the sentinel or to make members of the guard more attentive to their duties (R. 57). He himself was surprised when the pistol was discharged and he commented at the time that "this would certainly put them on their toes - that statement coming out of the difficulty we had during the night, of guards not being on their toes" (R. 60). Accused testified that on August 16 he was questioned

at battalion headquarters, at which time he stated that he had fired a pistol but that he had not been drunk (R. 58). When recalled for questioning by the battalion commander accused was warned that anything he said might be used against him (R. 59) and was told that an investigation was to be made. Accused testified that the solemnity of the battalion commander's manner,

> "stiffened me a little, and I did tell him that I fired the thing for the reason as brought out - to scare the Guard - and that I hadn't been drinking. However, by the time the thing got into its formal stage I had to stick to my guns, realizing the consequences of the thing" (R. 58).

Accused told the battalion commander that he had not had a drink of intoxicating liquor after 5 p.m. on August 15 (R. 60).

4. The evidence thus shows without contradiction that while on duty as officer of the day, at the place and time alleged in the Specification, Charge I, accused drank intoxicating liquor on at least two occasions. Officers and a noncommissioned officer who observed him thereafter while he was still on duty as officer of the day, testified that they believed he was drunk at that time or was under the influence of intoxicating liquor. He became garrulous and exhibited lack of coordination in his speech and movements. He fired a pistol in the immediate proximity of a sentinel of his guard and remarked, in substance, that he fired the shot in order to make the members of his guard more alert in the performance of their duties. On all the evidence the court was fully justified in concluding that accused was in fact drunk while on duty as officer of the day as alleged in this Specification.

In his testimony accused contended, in effect, that the firing of the pistol was accidental and that although he had remarked that the firing would alert members of the guard, he did not fire the shot for this purpose. Under the circumstances in evidence and in view of accused's admissions in the premises there can be no doubt that accused intentionally and wrongfully discharged the pistol at the place and at about the time alleged in the Specification, Charge III.

The uncontradicted evidence also shows that at the place and at about the time alleged in the Specification, Charge II, accused officially stated to Captain Brown, his commanding officer, that he

did not drink intoxicating liquor after 5 p.m. on August 15 and that he repeated this statement after having been advised that an investigation was in progress. The evidence establishes the falsity of the statement as well as knowledge by accused that it was false. The making of the statement with specific intent to deceive, as alleged, is fully proved. The making of the false official statement was violative of Article of War 95.

5. War Department records show that accused is 33 years of age. He served as an enlisted man in the grades of private, corporal, staff sergeant and technical sergeant from June 11, 1929, to September 8, 1941, on which latter date he was ordered to active duty as a second lieutenant, Quartermaster Corps Reserve. He was promoted to first lieutenant, Army of the United States, February 24, 1942.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Articles of War 85 and 95 and is authorized upon conviction of violation of Article of War 96.

Herbert C. Sauers, Judge Advocate.
James H. Baugh, Judge Advocate.
Claire W. Hardy, Judge Advocate.

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

SPJGH
CM 225533

OCT 21 1942

UNITED STATES	)	SEVENTH SERVICE COMMAND SERVICES OF SUPPLY
v.	)	Trial by G.C.M., convened at Fort Leonard Wood, Missouri, August 19, 1942. Dishonorable discharge (suspended) and confinement for one (1) year. Disciplinary Barracks.
Private BILLY J. KAUFFMAN (37130284), Company F., 340th Engineers Regiment.	)	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

1. The record of trial in the case of the soldier named above, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part, 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 William J. Kauffman, Company F, 340th Engineers Regiment, then attached to Troop B, Second Cavalry, did at Phoenix, Arizona, on or about May 20, 1942 desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Sam Houston, Texas, on or about June 8, 1942.

The accused pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence of one previous conviction by summary court for absence without leave in violation of Article of War 61, was introduced.

He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for three years. The reviewing authority approved only so much of the finding of guilty of the Specification of the Charge as finds the accused guilty of desertion as alleged, terminated in manner, at a place, and on a date unknown, approved the sentence but remitted two years of the confinement, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Proceedings were published in General Court-Martial Orders No. 403, Headquarters Seventh Service Command, Services of Supply, dated September 4, 1942.

3. The only evidence presented by the prosecution consists of extract copies of two morning reports. The first extract copy from Troop B, Second Cavalry, Papago Park, Phoenix, Arizona, shows the pertinent entry:

"May 20/42 - Pvt. Kaufman, Co. 'D' 8th Eng., from atch for duty
M.S.M. to A.W.O.L. 7:30 A.M. L.F.L." (Ex. 1).

The second extract copy from Headquarters Detachment, Fort Sam Houston, Texas, shows the following entry:

"JUNE 1942

8th: Pvt Kauffman fr A.W.O.L. to atchd in
CCS arrest in qrs MB" (Ex.2).

In order to clarify any doubt as to the identity of the accused, the following stipulation was placed in evidence (R.5):

"It is stipulated between the prosecution and the defense and the above named accused that the correct name of said accused is Billy J. Kauffman; that his army serial number is 37130284; that his present organization is Company F, 340th Engineer Regiment; that he is the person described in the Specification of the Charge herein as 'William J. Kauffman'; that he is the person described in the morning-report of Headquarters Detachment, Fort Sam Houston, Texas, under date of June 8, 1942, as 'William J. Kauffman, 37130284, Pvt. Co. F, 8th Engrs., Ft. Lewis Wash'; and that he is the person described in the morning-report

of Troop 'B', Second Cavalry, under dates of May 20 and June 2, 1942, as 'Pvt. Kaufman, Co. "D" 8th Eng. '" (Ex. 3).

4. The accused testified that he was 16 years of age and that he had enlisted in the Army with his mother's consent. After his enlistment the accused was sent to Fort Leonard Wood, a distance of about ninety miles from his home. Thereafter he was transferred to Fort Lewis, Washington. At Fort Lewis the accused asked for a furlough because he wanted to visit his mother who had been divorced from the stepfather of the accused and who was then living alone. After his request for a furlough was refused, the accused procured a ride on a truck going to Texas. At Yuma, Arizona, the accused was arrested by the military police. He was then sent to Phoenix and placed in the guardhouse. While there he "shoveled horse manure all the time". He asked for a trial but was not given one.

While at Phoenix he received a letter from his mother stating that she was in San Antonio, Texas. The accused then left Phoenix and went to San Antonio, where he found that his mother had returned to Missouri. The accused was again apprehended and placed in arrest at Fort Sam Houston, Texas. The accused then left Fort Sam Houston, and "hitchhiked" to Missouri where he visited his mother. After a visit with his mother the accused surrendered himself in uniform at Fort Leonard Wood on July 12, 1942. The accused testified that he was planning to go back to his unit and that he wanted to be tried at Fort Leonard Wood (R.7-11).

5. The evidence shows that the accused first absented himself without leave from Fort Lewis, Washington, and that during this period of unauthorized absence he was apprehended in Arizona and there attached to Troop B of the Second Cavalry. According to his own testimony the accused was placed in the guardhouse at Phoenix, refused a trial and required to shovel horse manure all the time. The accused then for a second time absented himself without leave and traveled from Phoenix to San Antonio, Texas. He was apprehended a second time at a time and place unknown and on June 8, 1942, was placed in arrest at Fort Sam Houston, Texas. The accused breached this arrest and for a third time absented himself without leave. He "hitchhiked" from San Antonio, Texas, to Missouri, and there surrendered himself in uniform at Fort Leonard Wood.

6. The Specification alleges that the accused, while attached to Troop B, Second Cavalry, did at Phoenix, Arizona, on or about May 20, 1942, desert the service of the United States. Desertion is defined as

> "* * * absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service.
>
> "* * * Both elements are essential to the offense, which is complete when the person absents himself without authority from his place of service (which is for him 'the service of the United States') with intent not to return thereto. * * * Unless, however, an intent not to return to his place of duty exists at the inception of, or at some time during the absence, the soldier can not be a deserter, whether his purpose is to stay away a definite or an indefinite length of time. * * *" (M.C.M., 1928, par. 130a).

The Manual in discussing methods of proving desertion and the "intent not to return" states that

> "* * * Such inference may be drawn from such circumstances as that the accused * * * was arrested or surrendered at a considerable distance from his station; * * * that while absent he was in the neighborhood of military posts and did not surrender to the military authorities; that he was dissatisfied in his company or with the military service; that he * * * had escaped from confinement at the time he absented himself * * *" (M.C.M., 1928, par. 130a).

When the evidence of this case is considered in the light of the above explanatory discussion, it is apparent that the record presents at least several evidentiary factors from which the court was legally permitted to infer that the accused, at some time during his unauthorized absence, had the intent "not to return".

The evidence shows that the accused went to San Antonio, Texas, a distance of over a thousand miles from Phoenix, Arizona, and an even greater distance from the station which he had abandoned in the state of Washington, and that he was apprehended at a place unknown and placed in arrest at Fort Sam Houston, after an absence of 19 days. The evidence also shows that the accused was in the neighborhood of two military posts, one in Arizona and the other in Texas, and that he did not surrender himself to the authorities in either state. In addition, the testimony of the accused that he was required to shovel horse manure all the time while at Phoenix clearly indicates that the accused was dissatisfied with his station and duties there. Furthermore, the evidence shows that the accused was in the guardhouse at Phoenix prior to absenting himself without leave from that station. The function of weighing this evidence and of drawing the legal conclusion of guilt rested exclusively in the court and the reviewing authority (M.C.M., 1928, par. 216; CM 152797).

7. The record shows that the accused was 18 years and 7 months of age at the time of the trial. The accused, however, testified that he was only 16 years of age. An affidavit attached to the record and purportedly signed by the father of the accused, states that the accused was born on December 8, 1925.

8. The Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

Lester S. Hill, Jr., Judge Advocate.

Charles Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

1st Ind.

War Department, J.A.G.O., Board of Review, October 21, 1942 - To The Judge Advocate General.

For his information.

10/21/42
Notes. I do not concur.
mcc.
10/24/42 Noted Cecil W. Gibson

Lester S. Hill, Jr.,
Colonel, J.A.G.D.,
Chairman, Board of Review No. 1.

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

SPJGH
CM 225598

OCT 19 1942

UNITED STATES v. First Lieutenant JOSEPH DAVIS (0-382231), Medical Corps, Medical Detachment, 22nd Infantry.	4th MOTORIZED DIVISION Trial by G.C.M., convened at Camp Gordon, Georgia, September 4 and 16, 1942, Dismissal and confinement for one (1) year.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that First Lieutenant Joseph (NMI) Davis, Medical Corps, Medical Detachment, 22nd Infantry, having received a lawful command from Major Arthur S. Teague, 22nd Infantry, his superior officer to put on his (Lieutenant's Davis') web equipment, get out of his vehicle and march on foot with the battalion when not engaged in rendering medical attention to anyone, did, at or near Camp Gordon, Georgia, on or about August 20, 1942, wilfully disobey the same.

Accused pleaded not guilty to and was found guilty of the Specification and 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 for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that on August 20, 1942, the Third Battalion, 22nd Infantry, was taking a 20

mile march for physical hardening prescribed by higher authority for officers and men. Major Arthur S. Teague, Infantry, was in command and the accused was the acting surgeon of the battalion (R.6-7).

The accused was in his jeep during the first period of the march, 6:30-7:30 a.m., and during the second period until Major Teague told accused to get out and walk with him. Major Teague stated to accused that the march was for him as well as the rest of the officers, and told him to get his equipment and walk. The accused replied that he would walk until the next halt, which came in about 10 minutes. During the third period, 8:30-9:20, the accused rode in his jeep. At the end of that halt Major Teague sent a runner back to have accused report to him. Major Teague told accused that he was not walking and asked if there was any reason why he should not walk. The accused hesitated and then said, "Not exactly". When Major Teague asked accused what he meant, the accused made no reply. Major Teague then asked accused if he was "for duty", to which the accused replied that he was. Major Teague said,

> "* * * I am going to give you a direct order, I want you to put your equipment on, get out of the jeep, and walk at the tail of the column. If any man falls out who needs medical attention I expect you to stop and render medical attention. You can put the man in the jeep, and get in yourself, and ride up to the tail of the column, at which you will start walking again" (R.8).

The accused made no response. At the request of Major Teague, First Lieutenant James C. Kemp, the Commanding Officer of L Company, repeated the order to the accused. The accused then stated, "I will have to refuse the order". Major Teague told accused, "O.K. you can be tried for it", and then turned and walked at the head of the column (R.7-8,11-13).

Thereafter, except for the ten minute halts, the accused traveled in his jeep, during the balance of the march, and did not have on his full field equipment or his gas mask at any time (R.8, 13-15,16).

Major Leslie H. Layman, Medical Corps, examined accused on August 22, 1942, two days after the hike, and found that accused was not suffering from any disease, had nothing wrong with him except that he was underweight, was physically fit for field duty and of sound physical ability to make a foot march.

Major Layman was of the opinion that the underweight would not affect ability of accused to march if he was not suffering from any disease and that accused could have made the march without detrimental result. The accused weighed 114 pounds. Upon cross-examination, Major Layman stated that accused could not have performed his best and most efficient medical service by marching all the way and working during the halts (R.18-19).

It was stipulated that the members of the medical board, if present, would testify as to his physical fitness for field duty, as stated in a certificate dated June 23, 1942, reading as follows:

> "OBJECTIVE FINDINGS: Entirely normal.
>
> "SUBJECTIVE FINDINGS: This Officer states that he has no specific pains or discomfort, but is completely exhausted following physical effort which requires several days to be relieved; also states that there is an average loss of six to eight pounds following physical effort.
>
> "CONCLUSION: From the normal physical examination, we are of the opinion that this man is qualified for field duty, however, if further study should substantiate the physical exhaustion, so claimed, and the marked loss of weight, we are of the opinion that he is not qualified for field duty." (R.17;Ex.C.)

4. For the defense the accused testified, that he was 30 years old and had been in service 28 months. Last year he made two or three hardening marches of ten or fifteen miles, with the fourth battalion, and this year made several marches with the second battalion, of which he was battalion surgeon. His last march was on August 20, 1942, with the battalion under command of Major Teague. During the second period of the march, Major Teague, called accused forward, told accused he was sending back several platoons of men at end of the next halt and wanted accused to walk back with them. The accused walked about twenty minutes of that period and had walked altogether, about four or five miles. There were casualties on the march and he had been busy with casualties during the rest periods. He received "this" order in the third halt and followed the order as far as taking care of casualties was concerned. He did not comply with the order to march because from past experience he noted that he was getting less efficient in taking care of a large number of men. He thought that his primary duty and his responsibility was to provide medical service to help the men (R.25-26).

Upon cross-examination and upon examination by the court the accused testified that the duties he was to perform under Major Teague on this march were to take care of the men. He did not feel that he did not have to take instructions from Major Teague, but felt that he would be better able to take care of the men if he was not fatigued himself. He did not have a chance to tell that to Major Teague or to tell Major Teague that he thought that he should not walk. Major Teague may have told him to march when accused stated that he would walk until the next halt, but they were talking about taking the men. Major Teague may have had in mind that he should walk but nothing was said after he told Major Teague that he would walk to the next halt. He thinks, now, that Major Teague could tell him where to walk in the column, but if Major Teague sent him to the head of the column he couldn't do any good there. In that respect he considered himself first and not Major Teague. He was asked by Major Teague if he had any medical excuse why he should not walk, but Major Teague did not ask him anything after the order was given (R.26-28).

Captain Eugene R. McNinch, Medical Corps, had taken marches with the accused in the Louisiana maneuvers.. He remembered two marches with accused, one of seven and a half to ten miles in which accused lagged considerably and was pretty well fatigued. Captain McNinch believed that an officer who marches twenty miles and works during the halts could not render the best medical service. He considered hiking as necessary in hardening medical officers as for line officers, but in the marches they had had for training purposes they had not been required to render medical services. (R.20-21).

Captain William G. Jardine, Medical Corps, a member of the board which examined accused, found that accused weighed 110 pounds and was 63 inches tall, for which the standard minimum weight at 30 years is 112 pounds. According to that standard accused was two pounds underweight, but according to the height standard the accused was but one pound under the minimum weight for 63 inches. He believed that medical officers should have hardening marches but should not perform their duties on the march. A man cannot perform medical duties to the best of his ability if he is too tired. His experience had been that most of the medical officers who had been inducted without regard to weight had been placed on limited service (R.21-22).

Captain John T. McNabb, Medical Corps, first examined accused on April 10, 1942, and found that he was suffering from sacro-ilac strain with right side sciatica. He next examined accused on September 3, 1942, at which time accused gave a history of loss of weight, weakness, nervousness and frequent colds for six months. Accused was 30 years old, 63½ inches tall and weighed 112 pounds. He found no diseased condition. Accused was poorly developed, underweight and somewhat emaciated, but otherwise the examination was negative. In Captain McNabb's opinion, a medical officer who makes a 20 mile march and cares for casualties during halts, could not possibly be efficient in his professional duties and would impair his efficiency to administer first aid (R.23-24a).

It was stipulated that Major A. A. Cardona, Medical Corps, Regimental Surgeon, 22nd Infantry, if present, would testify that he was familiar with the duties performed by accused in garrison during the period November, 1941, to June, 1942, and would rate accused as a satisfactory officer among the lower third of officers of that branch under his command; that he was not familiar with the work of accused in the field; that accused had never refused to carry out orders for him, nor did accused argue or debate with respect to them; and that spirit and attitude of accused were ungrudging and cooperative (R.25).

5. The evidence shows that the 20 mile hardening march was ordered to condition the officers as well as the men. It is clearly shown that after Major Teague had, during the second period, told accused the purpose of the march and told him to get his equipment and walk, that accused did walk for the balance of that period, about 10 minutes. During the halt at the end of the third period Major Teague sent for accused. When he asked accused if there was any reason why accused should not walk, the accused hesitated and replied "Not exactly". When asked what he meant, the accused made no reply. In reply to the question of Major Teague whether he was "for duty", the accused replied that he was. Major Teague then gave accused a direct order to put on his equipment and walk, to stop when necessary to give aid, use the jeep to ride up to the tail of the column and then start walking again. After Lieutenant Kemp repeated the order at the request of Major Teague, the accused stated that he would have to refuse the order. Major Teague told accused that he could be tried for it, turned and walked at the head of the column. The evidence shows that accused did not walk during the balance of the march.

The accused admitted that he received the order, followed it as far as taking care of casualties was concerned, but did not comply with the order to march because he had found from past experience that he was getting less efficient in taking care of a large number of men. He thought that his primary duty and responsibility was to provide medical service to help the men.

The accused, serving upon the staff of Major Teague, disobeyed the order of Major Teague given in the course of a prescribed hardening march, upon the theory that the fatigue of marching would render him less efficient in the performance of his medical duties to the members of his command. The accused failed to take advantage of the opportunity offered him by Major Teague to state any reason why he should not march. There can be no doubt that Major Teague was the superior officer of the accused and that the order was a lawful one addressed to a member of his staff during that march. If it was considered essential to prepare the command for marching when transportation would not be available, it was equally necessary that the medical officer serving the men upon such a march should be hardened to insure their presence to the end of the march. The accused presumed to substitute his own judgment for that of his commanding officer, an action fraught with danger in any military organization. Even if the professional ability of accused to perform his medical functions should be reduced during the march by fatigue, as stated in the testimony of the three medical officers, the decision upon that march rested in the hands of Major Teague and not in the accused.

> "* * * Obedience to orders is the vital principle of military life - the fundamental rule, in peace and in war, for all inferiors through all the grades from the general of the Army to the newest recruit. * * * The obligation to obey is one to be fulfilled without hesitation, with alacrity, and to the full; nothing short of physical impossibility ordinarily excusing a complete performance. * * * Even where the order is arbitrary or unwise, and its effect must be injurious to the subordinate, he should first obey, postponing till after compliance his complaints and application for redress" (Winthrop's Military Law and Precedents, Reprint p. 571-573).

6. Two of the eleven members of the court recommended clemency by remission of the confinement imposed because the evidence indicated that accused at the time was below the standard of physical fitness prescribed for commissioned officers, that accused did comply with that portion of the order requiring him to take care of the casualties and because they had learned since the trial that accused had a wife and two year old daughter dependent upon him for support.

7. Defense counsel submitted a request for clemency to the reviewing authority, the Commanding General, 4th Motorized Division, stating among other grounds that defense counsel learned after the trial that accused had received a triple typhoid vaccination upon the day preceding the march, which fact would, if known to them, have been urged as a mitigating circumstance.

8. The Board of Review has given careful consideration to letters from accused and his wife to the President and a letter from Senator R. B. Russel to The Judge Advocate General, inclosing letters from accused, his wife and Mr. Cecil R. Hall of Atlanta, Georgia.

9. The accused is 30 years old. The records of the Office of the Adjutant General show his service as follows:

Appointed first lieutenant, Medical Corps, Army of the United States, June 7, 1939; active duty December 15, 1939; active duty extended December 15, 1940; active duty extended December 12, 1941.

Three efficiency reports have been rendered upon this officer. One for the period December 15, 1939, to June 30, 1940, 6 16/30 months, gave him a general rating of satisfactory; one for the period December 15, 1940, to June 9, 1941, 5 26/30 months, gave him a general rating of satisfactory, as to which general rating the division commander stated that he would rate the officer as unsatisfactory, expressed the opinion that the officer was unreliable and that the present and potential value of the officer to the service was below minimum standards; and one for the period July 29, 1941, to October 24, 1941, 2 18/30 months, gave him a general rating of very satisfactory.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Death or such other punishment as a court-martial may direct is authorized upon conviction of violation of the 64th Article of War.

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

War Department, J.A.G.O., OCT 28 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Joseph Davis (0-382231), Medical Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The accused, serving upon a battalion staff, deliberately refused to obey the order of the battalion commander to march on foot, given in the course of a prescribed hardening march, upon the theory that the fatigue of marching would render him less efficient in the performance of his medical duties to the members of the command. He presumed to substitute his own judgment for that of his battalion commander. I believe that the direct disobedience involved warrants the forfeitures adjudged in addition to dismissal. I recommend that the sentence be confirmed but that the confinement at hard labor be remitted, and the sentence as modified be carried into execution.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action confirming the sentence, remitting the confinement at hard labor, and directing that the sentence as modified be carried into execution.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

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

SPJGH
CM 225638

NOV 23 1942

N.D

UNITED STATES	)	26th INFANTRY DIVISION.
v.	)	Trial by G.C.M., convened at A. P. Hill Military Reservation, Fredericksburg, Virginia, August 17, 1942. Dishonorable discharge (suspended) and confinement for eighteen (18) months. Disciplinary Barracks.
Private JOHN J. LOSS (33010332), Company B, 101st Engineer Battalion.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

1. The record of trial in the case of the soldier named above having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part, 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 I: Violation of the 58th Article of War.

Specification 1: In that John Joseph Loss did, at Camp Edwards, Massachusetts on or about April 4, 1942 desert the service of the United States in order to shirk important service, to wit: Movement with his organization to another station; and did remain absent in desertion until he was apprehended at Carlisle

Barracks, Pennsylvania on or about July 16, 1942.

He pleaded guilty to the Specification of the Charge excepting the words desert the service of the United States in order to shirk important service, and the words in desertion substituting therefore respectively the words absent himself without leave and without leave. To the Charge he pleaded "not guilty, but guilty to the 61st Article of War". He was found guilty of the Charge and the Specification thereunder and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for eighteen months. The reviewing authority approved the sentence, ordered its execution but suspended the dishonorable discharge and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Order No. 30, Headquarters, 26th Infantry Division, A.P. Hill Military Reservation, Fredericksburg, Virginia, September 23, 1942.

3. The evidence for the prosecution shows that the accused absented himself without leave from his organization on April 5, 1942, and was apprehended by a civilian police officer and returned to military authority on July 16, 1942.

On or about March 27, 1942, the members of the company of the accused "* * * were all gathered in the mess hall and warned * * *" of an impending move by the organization. On this occasion the company was informed that it would be about a week before the company moved and that the members of the organization would be given short leaves before that time. Thereafter on March 31st the accused was still with his company and received his pay on that day (R. 5-11, Ex. A).

4. The accused testified that he left his organization on a pass on March 28, 1942, and was at his home on March 31, 1942. On April 1st the accused started to return to his organization but on his way he telephoned his wife and upon being told that his mother was still ill, he decided to return home again. During his entire absence he wore his uniform and remained at home at Hanover, Pennsylvania, with his mother. One night after he had gone to bed a civilian policeman rapped upon the door and informed the accused that he was going to take him to headquarters. The accused grabbed his fathers trousers which were near his bed, put them on, and admitted the officer. The officer refused to permit the accused to get his uniform but took him forthwith to jail.

The accused testified that he was not paid on March 31st, that he did not know or hear that his company had been placed on the alert, that he was given a leave from his organization until April 4th, and

that he was never told by his company commander or by any of the members of his company that his company had been placed on the alert. The accused did not see any notice on the company bulletin board relative to placing the company on the alert. He testified further that he heard no announcement made in the mess hall relative to the movement of his organization (R. 11-17).

5. The Specification alleges that the accused deserted the service "* * * in order to shirk important service, to wit: Movement with his organization to another station; * * *". The evidence, however, fails to sustain this allegation. There is proof that the organization to which the accused was assigned was informed that the organization was on the alert and that it would be moved to an unknown destination within a short time. There is also evidence that the accused was with his organization during the period of time in which this notice was given. There is no evidence, however, that the accused received this notice or that he actually knew his organization had been placed on the alert or that its removal to a different station was impending. There is, therefore, no basis for the conclusion that the accused absented himself from his organization in order to shirk service in connection with the impending movement of the organization.

There is, furthermore, no evidence to show that the movement of the organization of accused from one station to another station was important service within the contemplation of the 28th Article of War. The Board of Review has stated that -

> "* * * transfers or movements for the organization or expansion of new units, or for training purposes of routine character, not directly related to the maintenance of internal order, embarkation for foreign duty, possible contact with the enemy, or other special functions of the Army, may not be classified as important service " (CM 224805, Conlon). (See also CM 151672, Lytle, and CM 225422 Barrett.)

6. Although the evidence in the present case may indicate that the accused absented himself from his company with the intent not to return, the allegations of the Specification did not raise such an issue, and accordingly the finding of guilty of desertion based upon the present Specification is not authorized. In CM 224765, Butler, the Board of Review stated -

> "The offense of desertion is defined as '* * * absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service ' (M.C.M., 1928, par. 130). Thus it is apparent that desertion

is an offense requiring a specific intent of mind. It is equally clear that the word 'desert' is a broad, inclusive term and when used in a specification is susceptible of attributing to the accused any one of the three intents of mind described above. When, therefore, the word 'desert' in a specification is modified, as in the present case, by the phrase '* * * in order to avoid hazardous duty * * *', its meaning is narrowed and the justiciable issues of the Specification are accordingly restricted. Furthermore, when a Specification alleges desertion with an intent to avoid hazardous duty, the proof must show such an intent. If the proof shows no such intent, but rather an intent not to return to the service, there is a fatal variance between the allegata and the probata and a finding of guilty of desertion based on such proof cannot be approved."

The evidence however, does show that the accused absented himself without leave from April 4, 1942, to July 16, 1942, a period of three months and twelve days. The maximum authorized punishment for this period of absence without leave is dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for six months (par. 104c, M.C.M., 1928).

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and the Specification thereunder as involves findings that the accused did, at the time and place alleged, absent himself without leave from his organization and did remain absent without leave until apprehended at the time and place alleged, in violation of the 61st Article of War, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for six months.

_____, Judge Advocate.

Chas. L. Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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

SPJGK
CM 225639

OCT 1 1942

UNITED STATES)	NORTHERN CALIFORNIA SECTOR WESTERN DEFENSE COMMAND
v.)	Trial by G. C. M., convened at Fort Ord, California, September 2, 1942. Reprimand.
First Lieutenant RUSSELL E. RAYMOND (0-167199), Medical Administrative Corps.)	

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 85th Article of War.

Specification: In that 1st Lieutenant Russell E. Raymond, Medical Administrative Corps, 1st Medical Regiment, was, at Fort Ord, California, on or about August 16, 1942, found drunk while on duty as officer of the day.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be reprimanded. The reviewing authority approved the sentence and in his action set forth a reprimand of accused. The proceedings, including the reprimand, were promulgated in General Court-Martial Orders No. 36, Headquarters Northern California Sector, Western Defense Command, September 19, 1942. The general court-martial order directed execution of the sentence.

3. The evidence is legally sufficient to support the findings of guilty. The only question requiring consideration here is whether the

record of trial is legally sufficient to support the sentence.

4. Article of War 85, violation of which was found, provides, in material part, that:

> "Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct".

Under it the punishment of dismissal is mandatory and additional punishment is discretionary for the offense found (par. 103a, M.C.M.). The court was empowered, in its discretion, to add the punishment of reprimand to the punishment of dismissal, but it had no discretion with respect to adjudging dismissal. As stated in paragraph 103a of the Manual for Courts-Martial in relation to mandatory sentences as prescribed by the Articles of War for certain offenses, including the offense here found:

> "Punishment as adjudged by the court for any such offense must be in conformity with the pertinent article".

The reprimand may not stand alone. It is authorized by the statute only if adjudged in conjunction with dismissal. The rule in military procedure is stated in Winthrop's Military Law and Precedents as follows:

> "In imposing sentence for the offences made punishable under these Articles (prescribing mandatory punishments), the province of the court is simply ministerial - to pronounce the judgment of the law. It has no power to affix a punishment either more or less severe, or other, than that specified; any different or additional punishment is simply a nullity and inoperative" (Reprint, p. 395).

A similar rule obtains in the Federal civil courts. See In re Mills, 135 U.S. 263; In re Bonner, 151 U.S. 242; Harman v. United States, 50 Fed. 921; Woodruff v. United States, 58 Fed. 766; Whitworth v. United States, 114 Fed. 302; De Benque v. United States, 85 Fed. (2nd) 202.

It follows that the sentence is illegal and must fall.

5. It is pertinent to inquire whether the sentence is merely erroneous in a legal sense or is to be treated as a nullity. Again Winthrop states, in reference to articles of war imposing specific punishments:

> "If more penalties than one are prescribed for the offence by the statute, all are to be included in the sentence; if any one is omitted the sentence is illegal and of no effect" (Reprint, p. 395).

The Board believes this view is sound in principle. The power of a court-martial to adjudge a sentence rests on the enabling statute and cannot go beyond it. Applying the general rule of strict construction of penal statutes or applying more liberal tests there can be no doubt that the Congress intended by Article of War 85 to authorize punishment in addition to dismissal only in the event dismissal should be adjudged. The lesser punishment, standing alone, was not a kind of punishment authorized by the article.

In an early case in which a Federal civil court had adjudged a sentence of fine and imprisonment when only a fine or imprisonment was authorized by the statute and in which the sentence had been partially executed, the Supreme Court of the United States expressed the view that the variation was merely erroneous and did not render the sentence void, and that any attempt to correct the sentence to conform to the statute would be ineffective as involving double punishment (Ex parte Lange, 18 Wall. 163). The Federal courts have, however, adopted the opposite view in subsequent opinions. In In re Mills, 135 U.S. 263, in which the validity of sentences to penitentiary imprisonment for one year where the statute permitted imprisonment in a penitentiary only if the term exceeded one year, was being considered, the Supreme Court said:

> "The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void. This is not a case of mere error, but one in which the court below transcended its powers".

In Harman v. United States, 50 Fed. 921, a United States circuit court held invalid a sentence to imprisonment and a fine when the statute authorized imprisonment at hard labor and a fine. The court said:

> "In the courts of the United States the rule is that a judgment in a criminal case must conform strictly to the statute, and that any variations from its provisions, either in the character or extent of the punishment inflicted, renders the judgment absolutely void".

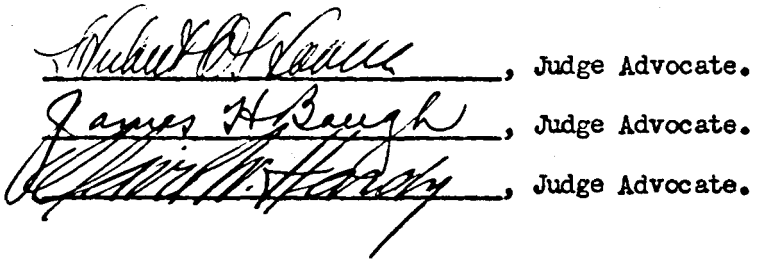
See also In re Bonner, 151 U. S. 242.

6. The sentence adjudged by the court-martial in this case being null and void it had no legal efficacy. The reviewing authority has the discretionary power therefore, should the record be returned to him, to revoke his action and order of promulgation and the court has the authority, upon proceedings in revision, to revoke its sentence and adjudge a new sentence in accordance with Article of War 85 (par. 87b, M.C.M.; A.W. 40). As a general rule proceedings in revision (except to correct the record to speak the truth) are not permissible after the proceedings have been published in a general court-martial order, that is, after the reviewing authority has completed his action (pars. 83, 87b, M.C.M.). This rule is in accord with the principle observed by civil courts that where a court adjourns for the term after sentencing an accused or where, if there is no term, the sentence has otherwise become final, the court thereby loses jurisdiction of the cause (16 C.J. 1315). But the rule is not applicable in a case in which action required by law and susceptible of correction has not been taken or in which the form of correctible action taken is null and void. The exception, as applied to sentences, has been stated thus by a United States circuit court of appeals:

> "The imposition of a void sentence is not an obstacle to the assumption by the court which imposed it of jurisdiction of the convict, in order that a legal sentence may be imposed. Where there is a conviction, accompanied by a void sentence, the court's jurisdiction of the case for the purpose of imposing a lawful sentence is not lost by the expiration of the term at which the void sentence was imposed. The case is to be regarded as pending until it is finally disposed of by the imposition of a lawful sentence" (Hammers v. United States, 279 Fed. 265).

Although proceedings in revision in this case are legally authorized the Board of Review does not, in view of the circumstances surrounding the commission of the offense (accused was under the influence of liquor when he entered upon his duties as officer of the day (R. 10)) and in light of the fact that a written reprimand has heretofore been published, recommend such action.

7. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings but legally insufficient to support the sentence.



_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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SPJGH
CM 225671

N.R

OCT 17 1942

UNITED STATES v. First Lieutenant WILLIAM B. LEE (0-311704), 553rd Signal Aircraft Warning Battalion, Separate.	THIRD AIR FORCE Trial by G.C.M., convened at Drew Field, Tampa, Florida, September 11, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 1st Lt. William B. Lee, 553rd Signal Aircraft Warning Bn., Sep., being restricted to the Post pursuant to General Court-Martial Order No. 31, Headquarters, Fourth Air Force, San Francisco, California, dated July 2, 1942 did, at Drew Field, Florida, on or about August 24, 1942, break said restriction by going to the Tampa Police Pistol Range.

Specification 2: In that 1st Lt. William B. Lee, 553 rd Signal Aircraft Warning Battalion, Separate, being restricted to the Post pursuant to General Court-Martial Order No. 31, Headquarters, Fourth Air Force, San Francisco, California, dated July 2, 1942 did, at Drew Field, Florida, on or about August 28th, 1942, break said restriction by going to Tampa, Florida and St. Petersburg, Florida.

Specification 3: In that 1st. Lt. William B. Lee, 553rd Signal Aircraft Warning Battalion, Sep., being restricted to the Post pursuant to General Court-Martial Order No. 31, Headquarters, Fourth Air Force, San Francisco, California, dated July 2, 1942 did, at Drew Field, Florida, on or about August 29, 1942, break said restriction by going to the Tampa Police Pistol Range.

Specification 4: In that 1st Lt. William B. Lee, 553rd Signal Aircraft Warning Bn, Sep, did, on or about August 28, 1942, order Private Albert Taylor, Plotting Co., 553rd Signal A.W. Bn, Sep, to drive a government motor vehicle at an excessive rate of speed, in violation of existing orders, to the prejudice of good order and military discipline.

Specification 5: In that 1st Lt. William B. Lee, 553rd Signal Aircraft Warning Bn, Sep., did, on or about August 28th, 1942, drive a government motor vehicle at an excessive rate of speed, in violation of existing orders, to the prejudice of good order and military discipline.

The accused pleaded not guilty to and was found guilty of the Charge and its Specifications. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows as to Specifications 1, 2 and 3, that the accused, before being transferred to Drew Field, Florida, was under sentence by general court-martial including restriction to the limits of his post for 3 months. The defense stipulated the validity of the sentence, and the order directing its execution (R. 5).

Upon his arrival at Drew Field, the accused reported to Captain Bull of the Personnel Section, 314th Base Headquarters and Air Base Squadron, who presented him to Major F. L. Ebersole, Jr., the executive officer of that organization. The accused was informed by Major Ebersole that the sentence would be enforced at Drew Field and that he would be confined to the area of the post for 3 months. Major Ebersole, at this conference, emphasized the necessity that the restriction be not broken. The defense admitted that the accused was under restriction

on the dates alleged in the Specifications. The restriction thus imposed upon the accused was subsequently qualified so as to permit the accused to go off the post for the purpose of checking "ration terms". It was clearly shown, however, that such modification did not relieve the accused from the necessity of procuring permission from his battalion commander for each separate duty trip from the post. The accused had not at any time been granted permission to visit the Tampa Police Pistol Range or the vicinity of St. Petersburg, Florida. The defense admitted that the accused went to the Tampa Police Pistol Range and to St. Petersburg on the dates alleged in the Specifications (R. 6, 8-12, 13).

The evidence for the prosecution shows, as to Specifications 4 and 5, that on August 28, 1942, the accused went to Bell Street in down town Tampa and from there to St. Petersburg. The accused made this trip in a Government truck which was driven by Private Taylor. On the way to St. Petersburg the accused asked Private Taylor what speed the truck would make and when informed that the truck would make "close to sixty miles an hour" the accused told him to "shove it down". Thereafter on the trip to St. Petersburg Private Taylor drove the truck at speeds of 50, 55, and 60 miles per hour (R. 19).

On the return trip from St. Petersburg the accused drove the truck himself at speeds of 50, 55, and 60 miles per hour. He drove at about 40 miles an hour around curves and about 55 miles an hour across the Gandy Bridge. When the accused met an Army vehicle he would reduce his speed. The maximum speed limit prescribed by the Commanding General at Tampa, Florida, for vehicles such as the one driven by the accused was 40 miles an hour (R. 19-20; Ex. B).

4. The accused testified that upon arrival at Drew Field on July 17, 1942, he reported to Captain Bull and was taken by him to the office of Major Ebersole, the base executive. There he waited outside of Major Ebersole's office until Captain Bull returned with the instruction that the sentence of restriction was still in force, that the accused would be restricted to the limits of the post, and that the accused was placed upon his honor as an officer and a gentleman not to violate the restriction (R. 25-26).

Concerning the visits to the Tampa Police Pistol Range on August 24 and 29, 1942, the accused testified that shortly after Lieutenant Trenner had been assigned as his assistant, Lieutenant Trenner invited the accused to his home for dinner. The accused declined the invitation and explained to Lieutenant Trenner that he (the accused) could not leave the post because he was under restriction. A few days later Lieutenant Trenner again invited the accused to his

home and again the accused declined the invitation. Thereafter, about August 24, Lieutenant Trenner suggested to the accused that they go to the range. The accused replied, "I would like to go but how about the restriction?" The accused testified that Lieutenant Trenner replied, "I have everything arranged and extra ammunition and extra machine gun". The accused then said, "Are you sure it is all right to go?" and accused testified that Lieutenant Trenner said, "Everything has been arranged". The accused testified that from this conversation he "assumed" that Lieutenant Trenner had "contacted the Major", and he, therefore, went to the range. He stated that there was no attempt at subterfuge. The accused left the post at about 2:30 in the afternoon and returned at about 4:30. The accused testified further that his second trip to the range on August 29 was made under practically the same circumstances as was the first. On each occasion the accused called "the office" by telephone and stated to Lieutenant Hyde, "I am going out", and when he returned he telephoned Lieutenant Hyde and told him, "I have come back" (R. 27-29).

Concerning the trip to St. Petersburg on August 28, 1942, the accused testified that he went first to Bell Street (the office of the Field Commissary in Tampa, Florida) to sign his regular Friday shipping ticket and to procure extra rations for 100 men who had been attached to his mess. Before going to Bell Street the accused called Lieutenant Hyde "and told him this was my regular Friday to go down and Lieutenant Hyde said 'All right'". When the accused could not get certain ice cream which he wanted at the Commissary on Bell Street he drove to St. Petersburg for it (R. 31-32).

As to Specifications 4 and 5, the accused testified that on the way to St. Petersburg he asked the driver of the truck if the truck "was governed" and that upon the driver stating that it was, the accused told him "We are going to have to step on it if we are going to get there and back" and that the driver then increased the speed of the truck to about 40 miles an hour. After reaching St. Petersburg the accused observed that the driver failed to observe a red stop light and that he practically stalled the truck at every intersection (R. 33).

When the accused finished his business in St. Petersburg he took over the driving of the truck and drove back to the post. On this return trip the accused drove the truck not in excess of 40 miles an hour. The distance to St. Petersburg from the post was about 14 miles (R. 28-34).

In concluding his testimony, the accused made the following statements:

"The only thing I have to tell the court is that I was rather surprised at the results of my first court-martial. Not only surprised but pleased to think I was given the sentence I was when it could have been ever so much more, and I assured my defense counsel at that time that I would do nothing that would hinder my serving that sentence in any respect. Inasmuch as the service of my sentence was to start June 2nd, according to the officers at March Field, I was under the impression that September 2nd I would be through with my three months restriction. There is, or was at that time, some question as to whether or not the ten days lapse of time en route from March Field here to Drew Field would be counted or would not be counted and Captain Bull had taken that up with a higher authority for a ruling and he himself thought that inasmuch as I was under orders and acting in all good faith at the time, it would count, but in any event September 12th would be the last day of having served the sentence. Therefore, gentlemen, why would anyone in his right mind with any common sense purposely and wilfully do anything that would complicate matters when, after all, it was only a matter of a few more days left to do. If I had had any inkling that I was not acting in all good faith, it's a lead pipe cinch I would not have done it." (R. 35).

Second Lieutenant Trenner, a witness for the defense, testified that he secured permission from his company commander to take a Thompson manchine gun to the range, that he procured ammunition, that he made all arrangements, for transportation, and that he asked the accused to go with him. He also testified that he made a second trip to the range with the accused. After the accused was arrested for breach of restriction, Lieutenant Trenner visited the accused and at that time the accused told Lieutenant Trenner that he thought that permission had been procured for him to go to the range. Lieutenant Trenner then told accused that he had not procured any such permission for accused (R. 37-38).

5. Specifications 1 and 3 allege that the accused "being restricted to the Post * * * did, at Drew Field, Florida", on August 24 and 29, 1942, "break said restriction by going to the Tampa Police Pistol Range". Specification 2 makes the same allegation relative to the act of the accused in going to "Tampa, Florida and St. Petersburg, Florida", on August 28, 1942.

The evidence shows clearly that the accused, during the

period of his restriction and on the dates alleged in the Specifications, made two visits to the Tampa Police Pistol Range and one visit to Tampa and St. Petersburg, Florida. It is clearly shown that the accused did not procure and did not have the permission of his commanding officer to leave the post on any of the three occasions. The testimony of the accused that he believed that Lieutenant Trenner had procured permission for him to go to the pistol range is not convincing. Lieutenant Trenner states that he did not procure such permission and did not tell the accused that he had.

The explanation offered by the accused in justification of his trip to St. Petersburg is equally unconvincing. The accused testified that before going to Tampa he telephoned to Lieutenant Hyde and made the statement that "this was my regular Friday to go down". It was not shown, however, that Lieutenant Hyde had authority to permit the accused to leave the post and certainly Lieutenant Hyde was not informed by this conversation that the accused intended to go beyond Tampa to St. Petersburg.

The evidence clearly shows that the accused breached his restriction on each of the three occasions as alleged in Specifications 1, 2, and 3. Such conduct is clearly prejudicial to good order and military discipline within the intent and meaning of the 96th Article of War.

6. Specification 4 alleges that the accused "did, on or about August 28, 1942, order Private Albert Taylor, * * * to drive a government motor vehicle at an excessive rate of speed, in violation of existing orders, to the prejudice of good order and military discipline". Specification 5 alleges that the accused himself did on the same day drive a Government vehicle at an excessive rate of speed in violation of existing orders. The existing order of the Commanding General of Drew Field limited the maximum speed of light trucks to 40 miles an hour, whereas the evidence clearly shows that the accused required the driver of the truck to drive the truck in his charge at speeds of 50, 55, and 60 miles an hour. The evidence also shows that thereafter the accused took over the driving of the truck and himself drove at the same speeds. Such conduct is clearly prejudicial to good order and military discipline and in violation of the 96th Article of War, as alleged in Specifications 4 and 5.

7. Evidence was introduced of one previous conviction of accused on July 2, 1942, of forging an indorsement on a Government check issued to a soldier, in violation of Article of War 93, and of uttering that check with intent to defraud, in violation of Article of War 96.

8. The accused is 38 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed second lieutenant, Coast Artillery Corps, Reserve, from Enlisted Reserve Corps, September 7, 1933; active duty, C.C.C., July 1, 1935, to October 30, 1935; appointed first lieutenant, Coast Artillery Corps, Reserve, December 31, 1936; active duty C.C.C., May 25, 1938 to April 30, 1939; extended active duty for one year, November 28, 1940; reappointed first lieutenant, December 31, 1941; continued on active duty November 28, 1941.

9. The court was legally constituted. 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 of guilty and the sentence. Dismissal is authorized upon conviction of violation of the 96th Article of War.

Lester S. Hill, Jr., Judge Advocate.

Charles Dressay Judge Advocate.

Abner E. Lipscomb Judge Advocate.

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

SPJGK
CM 225746

OCT 13 1942

UNITED STATES v. Private VICTOR R. HEWLETT (39022390), Headquarters and Headquarters Squadron (Special), Santa Ana Army Air Base, Santa Ana, California.	WEST COAST ARMY AIR FORCES TRAINING CENTER Trial by G. C. M., convened at Santa Ana, California, August 19, 1942. Dishonorable discharge and confinement for ten (10) years and one (1) day. Penitentiary. . .

REVIEW by the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

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

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

Specification: In that Private Victor R. Hewlett, Headquarters and Headquarters Squadron (SP), Santa Ana Army Air Base, Santa Ana, California, did, at Long Beach, California, on or about July 18, 1942, with intent to commit a felony, viz: Rape, commit an assault upon Mabel Marie Price, 443 East 53rd Street, Long Beach, California, by willfully and feloniously striking the said Mabel Marie Price on the head and body with his closed fists.

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

Specification 1: In that Private Victor R. Hewlett, Headquarters and Headquarters Squadron (SP), Santa Ana Army Air Base, Santa Ana, California, did, at Huntington Beach, California, on or about July 17, 1942, wrongfully take and use without the consent

of the owner a certain automobile to wit: a 1940 Model Chevrolet Master Coupe property of Genevieve H. Redline, 833 Frankfort Street, Huntington Beach, California, of a value of more than fifty ($50.00) dollars.

Specification 2: In that Private Victor R. Hewlett, Headquarters and Headquarters Squadron (SP), Santa Ana Army Air Base, Santa Ana, California, did, at Huntington Beach, California, on or about July 18, 1942, wrongfully take and use without the consent of the owner a certain automobile to wit: a 1935 Model Ford V-8 Sedan property of Ralph F. Wilcox, 411 1/2 Eighth Street, Huntington Beach, California, of a value of more than fifty ($50.00) dollars.

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specifications. He was found guilty of the Charges and Specifications. Evidence of one previous conviction by summary court-martial for breach of restriction was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for twenty years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, reduced the period of confinement to ten years and one day, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The evidence shows that at about 10:30 p.m., July 17, 1942, on a highway near Long Beach, California (R. 7), accused, at the driver's invitation (R. 3), entered an automobile containing Mrs. Mabel Marie Price, her husband, Mr. Robert H. Price, and Mr. Gary Washburn. Washburn was the driver. He, Price and Mrs. Price were returning from a fishing trip (R. 7).. Neither Price nor his wife had ever seen accused before (R. 36, 56). The car was a convertible club coupe with front and rear seats close together (R. 7, 32). The top was down. Price sat in the front seat with Washburn (R. 7). There was a large fishing tackle box on the rear seat directly behind the driver and Mrs. Price sat next to it (R. 7, 25). Upon entering the car accused sat in the rear seat to

the right of Mrs. Price (R. 14). Inasmuch as part of the seat was occupied by the fishing tackle box, accused and Mrs. Price were close together (R. 25).

Mrs. Price was dressed in slacks, a gray sweater and a coat loosely thrown over her shoulders (R. 16). There was attached to her sweater, on the right front, a fishing license bearing, in legible handwriting, her name and street address (R. 17, 46; Ex. A). She was about five feet tall (R. 58) and was of relatively slight build (Ex. D). She was 32 years of age (R. 32) and had a 14-year-old son (R. 40), the stepchild of Price (R. 60). She had a congenital deformity of the left hip, resulting in a limp and weakness of the left leg (R. 71). She testified that she "tired very easily" (R. 45). Price was a truck driver (R. 7). Price, Mrs. Price and Washburn had been in the Price home in Long Beach, California, during the late afternoon of July 17 and had gone on the fishing trip between 6 and 7 p.m. (R. 22). Each had consumed about two bottles of beer and had eaten dinner before they left (R. 27, 49). Neither Mrs. Price nor her husband consumed any liquor of any kind while fishing (R. 23, 49). Accused was 18 years of age (R. 92).

Soon after accused entered the car Price asked him where he was going and he replied that his car had stalled, that he had left it and that he did not have any special destination (R. 14, 18, 25). He put his left arm on the back of the seat and then about Mrs. Price's shoulders and drew her toward him (R. 8, 14, 24). He also placed his hand, apparently the right, on her thigh. She pushed his hands away from her (R. 14, 15) and asked him to desist (R. 24). Price saw what occurred and remarked to Washburn that if accused continued his behavior they would "let him out" (R. 33, 55). Washburn suggested that they "wait until we get to Town" (R. 55). At the suggestion of Washburn (R. 24, 49) the party stopped, within about five miles, at the "Circle Drive-In" where four bottles of beer were ordered, Price offering one to accused who accepted it (R. 24, 25, 49). Neither Mrs. Price nor any of the others drank all of the beer served (R. 25, 26, 50). Accused asked the names of the occupants of the car and Price gave them. Accused stated his name, said that he was from the "Santa Ana Air Base" and remarked that his father was a noted war correspondent (R. 18, 25). Washburn "looked at" accused when the latter stated that his parents were born in Germany and accused said, "I am no spy. I am no German *** I can prove who I am" and asked a waitress for a pencil (R. 26,

49, 50). A pencil was then placed on the tray where it remained. Price and Mrs. Price testified that no one did any writing (R. 26, 50). While at this place the open car was standing "under the lights" (R. 33) which were bright (R. 44, 59).

The party left the Circle Drive-In and proceeded about three miles to the Alamo Cafe at 17th and Alamitos Streets in Long Beach (R. 50). En route accused put his arm about Mrs. Price and attempted to kiss her (R. 18, 27) but "did not get to" (R. 18), and he leaned over her at another time (R. 27). Upon arrival at the cafe accused asked the others if this was the place they lived and Price said, "No, but this is where you get out" (R. 56). All got out of the car and Price, Mrs. Price and Washburn entered the cafe and ordered some beer (R. 9, 27). Accused later entered but the bartender refused to serve him (R. 9, 10). After drinking part of the beer (R. 27, 51) Mrs. Price suggested that they go home - the "main idea was to get rid of" accused (R. 51). The three, accompanied by two women friends of Washburn, then entered the car (R. 10, 27, 51). Price and his wife sat in the rear seat. Price "closed the door in" accused's face. Accused displayed anger, threw and broke a bottle on the sidewalk and exclaimed, "I'll be God damned" (R. 10, 11, 16). The party left accused at the cafe and drove to the Price home at 443 East 53rd Street, Long Beach (R. 13, 16). There Washburn changed his clothes (R. 16, 52) and about ten minutes after arrival left with the two extra women (R. 18, 52). Price went to bed and fell asleep in a room in the rear of the house (R. 52, 55), a five room bungalow (R. 34).

Mrs. Price entered her kitchen and prepared a sandwich for her son (R. 19, 60). She changed her clothing, putting on and fastening with a zipper a long housecoat (R. 19, 54). The knocker on the front door sounded and she answered it (R. 19, 38), opening the door. Accused was standing on the porch in front of the door.

Mrs. Price testified that she asked him "how he got there" and that he replied, "In a car" (R. 19). Accused then seized her right shoulder, pulled her from the doorway, off the porch and onto the ground (R. 19, 29, 42). She did not scream at this juncture because she did not know what was happening, did not wish to cause a commotion in the neighborhood and thought she would be "able to ward him off" (R. 43). The porch was about a foot or a foot and a half high (R. 29). She fell

on her back with her right arm "pinned under" her but with her left arm free. While "over" her accused told her "he had come out to get into" her "pants and that he was going to". He raised her housecoat (R. 20) "up just under my breasts" (R. 21). She testified:

> "Before that I started to get him with this hand, and he bit my thumb. I tried to ward him off by telling him I would call my husband, which I did. I called 'Bob'. I did not call any too loud, because I thought my calling would scare him off. It was then he struck me the first time when he seen I was going to call him. In the meantime he had this leg pinned out quite aways. He had my right leg out and the other leg was out this way. I was perfectly helpless. He started taking my underclothes off me. He took my underclothes off and took my pants off and threw them on the lawn" (R. 20).

While holding her with one hand he used the other to remove her underclothes, rolling her over. She struggled about trying to escape (R. 39). He "kept saying, 'I love you'" (R. 30). She testified that she told him she would report him to his commanding officer, and thought, up to the time that he started to remove her clothing that she would succeed in "frightening him off" (R. 30, 35). He struck her, however, six or seven times on the head and jaws (R. 40). His trousers were open, his penis was against her left leg "high up" (R. 21) and he attempted intercourse (R. 40). She continued to call her husband as loudly as she could (R. 20, 31). She finally lost consciousness momentarily (R. 41). She did not know at the time whether penetration was accomplished but

> "Within the hour I cleansed myself and it was then that I really believed that it happened" (R. 41).

She testified that she finally heard her son call her husband (R. 20) and that at this point accused ran away (R. 21).

Gene Ronald Ross, son of Mrs. Price, testified that after his mother went to the door he did not hear any conversation but a little later "heard a sort of moan" and looked out of his bedroom window. There was a street light across the street and by it he saw a man

wearing an enlisted man's service cap (R. 62). Witness testified:

> "He had my mother pinned down and was pulling her underwear off, and Mother was struggling and yelling 'Bob!'
>
> * * * * *
>
> "He was on top. You could see him. You could not see my mother very much. You could not see much, you could only see from here on up on the grass. The rest of the shadow was black.
>
> * * * * *
>
> "You could hear Mother yell and she would try to get up. The shadow went down. I seen the underwear flying out a little way so she could not reach it. She yelled and he hit her, and finally I called 'Bob'".

He heard sounds like blows several times. (R. 63) His mother came into his room and he took her to his stepfather's room (R. 64).

About forty-five minutes after accused left the scene the assault was reported to the police (R. 64, 73). A police officer testified that on the morning of July 18 he saw Mrs. Price and observed that her left eye was "black", that her jawbone on the right side was swollen and that she had "black" bruises on her right knee and on the right side of her neck "at the shoulder" (R. 73). She was examined on July 25 by a medical officer who testified that her skin then bore discolorations on her right shoulder, behind her left ear, over her left temple, on her left breast and on her right knee, and that her left eye was discolored (R. 71).

Accused testified that he reached the position on the highway at which he was picked up by using a car he had stolen (R. 89). Very soon after he entered the Price car he asked Mrs. Price her name. She told him "Mabel" and he thereupon put his arm about her, drew her toward him and kissed her a "couple of times" (R. 75). She permitted his advances (R. 88) and "came over towards" him when he placed his arm about her (R. 79). At this time he did not know that the man in the front seat was her husband (R. 91). At the Circle Drive-In accused requested her address. She asked the waitress for a pencil and with it wrote her address on a cigarette paper. She told accused he "could come up any

time". She gave accused part of her beer. The light was "pretty good" but accused did not see the fishing license on the woman's sweater (R. 80). Before reaching the Alamo Cafe he tried to kiss her again but she protested, said the men in the front seat were "very dear friends" and remarked that she would tell him when to kiss her (R. 79, 80). Accused followed the others into the cafe but became "bored" and left in a short time. Mrs. Price came out later looking "sort of bored, or mad, or *** maybe jealous" (R. 76). She started to leave her companions, including the two young women who had appeared, but "her husband" persuaded her to stay with them (R. 77). Accused did not attempt to get in the car and did not recall having broken a bottle or having cursed (R. 81). Mrs. Price did not tell him "anything about Bob" (R. 89). The party left accused (R. 77). He thought Mrs. Price was a young girl (R. 85, 89) and decided to "acquire a better relation" with her (R. 89), that is, wished to develop a "friendship" (R. 92) so he "could go to shows with her and take her out some time" (R. 85). He therefore decided to go to the address she had given him and caught a ride to the vicinity of her home (R. 82). When he knocked she came to the door and he saw her through a "peep hole" (R. 77, 88). The door was not opened but after the conversation about how he had reached the scene she said she would come outside shortly (R. 77). Later he saw her through a window and she again said she would "be out in a minute" (R. 77, 82). She soon came to him and voluntarily sat down with him at the side of the house (R. 77, 85). Accused testified that:

> "She sat down and I put my arm around her, kissed her two times and told her, I loved her. She said, 'You don't love me'. I sort of lay down on her and started kissing her. I had my hand down by her bloomers. She had hers there, too, helping me. After that when I was kissing her, she started hollering, 'Bob'. I was on top of her. She was facing towards the window. I hit her" (R. 77).

After accused kissed her he exposed his penis and as he lay on her his penis "was on top of her slip" (R. 85, 86), a garment which reached "close to her pants here" (R. 88). She was "willing to submit" (R. 86). When she commenced "screaming 'Bob,' 'Bob'" and struggled with him (R. 83, 84), however, accused became "frightened and panicky" (R. 84) and thought she was trying to "frame" him (R. 79). It was on this account that he struck her several times (R. 79, 83). When he became frightened by her screaming he fled (R. 77, 84).

4. The evidence, together with the pleas of guilty, establishes the offenses charged. There can be no doubt that accused assaulted Mrs. Price at the place and time and in the manner alleged with the intention of having unlawful carnal knowledge of her by force and without her consent. His assertions that she submitted to his advances and evidenced her intention to permit sexual relations are contrary to the other testimony and, upon the whole record, are unworthy of belief.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence. Penitentiary confinement is authorized for the offense involved in Charge I and its Specification, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 455, Title 18 of the Criminal Code of the United States.

Robert W. Kraus, Judge Advocate.

James H. Baugh, Judge Advocate.

Earl W. Hardy, Judge Advocate.

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

SPJGK
CM 225754

OCT 6 1942

UNITED STATES	)	82ND AIRBORNE DIVISION
v.	)	Trial by G. C. M., convened at Fort Benning, Georgia, September 16, 1942. Dismissal.
First Lieutenant EARL S. WYKOFF (0-401860), 504th Parachute Infantry.	)	

OPINION of the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that 1st Lieutenant Earl S. Wykoff, 504th Parachute Infantry, did, without proper leave, absent himself from his organization at Fort Benning, Georgia (Alabama Area), from on or about August 17, 1942, to on or about August 27, 1942.

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

3. Captain Edward N. Wellems, company commander of the Service Company, 504th Parachute Infantry, stationed at Fort Benning, Georgia, in what was described as the Alabama Area (R. 4), testified that on the late afternoon of August 17, 1942, he searched for accused, a member of his company, but did not find him. Accused was, at the time,

supply officer of the 2nd Battalion, 504th Parachute Infantry. Witness did not locate accused until the afternoon of August 18, when he saw him in "one of the Bachelor Officers' Quarters buildings at Fort Benning" (R. 5). Upon being questioned at this time accused said that he had been attending to some business "in town" and that he had not thought of asking for permission to leave the organization. Accused returned to the Alabama Area with witness and after a "long talk" between the two witness told accused, at about 6:30 p.m., that he intended to go to the Alabama Area at about 6:15 a.m. on the following morning and suggested that accused accompany him (R. 6). Accused agreed to meet witness at the hour indicated but did not appear. Witness did not see or hear from him again until accused reported to witness by telephone at 7:30 p.m. on August 27 (R. 6, 7). Upon receipt of the telephone call witness went to the Waverly Hotel in Columbus, Georgia, and there found accused. Witness brought him to the regimental area where he was placed in arrest. When found at the hotel accused was in the company of his wife. Witness believed that accused had "been drinking" but was in full control of his faculties (R. 8, 9). Accused did not have permission to be absent at any time during the period August 17 to August 27, 1942 (R. 6, 7).

Captain Wellems identified in court a morning report of the Service Company, 504th Parachute Infantry, containing entries, verified and initialed by witness, showing accused as absent without leave from 6 a.m., August 17, 1942, to 9 p.m., August 27, 1942 (R. 4; Ex. A).

Accused testified that about July 17, 1942, he asked the acting regimental adjutant "if there would be much chance of getting a leave". The reply was in the negative. No formal request for leave was made by accused at this time or later (R. 11, 14). On the afternoon of August 18, at the time accused talked to Captain Wellems, accused planned to go to his place of duty on the following day (R. 13). At about 6 a.m. on August 19, however, he decided to go to Atlanta, Georgia, where his fiancee was employed, and get married (R. 12, 14). He went by train to Atlanta, met his fiancee and then went to Salem Camp Grounds, Covington, Georgia, where his fiancee had relatives (R. 10, 12). En route they obtained a marriage license (R. 14). They were married and returned to Atlanta on the day of the marriage. Mrs. Wykoff became ill the next morning so the two again went to Salem Camp Grounds. While there a doctor advised that Mrs. Wykoff should not be moved and she protested when accused proposed returning alone to Fort Benning. Accused testified that:

> "While there she kept getting worse and she didn't want me to leave, so I stayed with her until she felt better. We came back to Atlanta on our way to Fort Benning. The day we got to Atlanta she had severe pains in her stomach and I did not think she would be well enough to come to Columbus, but she thought she would feel well enough to come. We came to Columbus, Georgia, and went to the Waverly Hotel. I got a room and called Captain Wellems and requested that he tell me what to do" (R. 10).

Accused also testified that there were no telephone or telegraph facilities within four or five miles of Salem Camp Grounds (R. 13). He did not make an effort to communicate with anyone in his regiment while he was in Atlanta (R. 12). Accused testified that his father is a lieutenant colonel stationed at Duke University (R. 11) and that most of the boyhood of accused was spent in the vicinity of "army camps" with his father (R. 13).

Mrs. Earl S. Wykoff, wife of accused, testified that she is 18 years of age. She and accused were married at her home at Salem Camp Grounds, Covington, Georgia, on August 21, 1942. On the same day they went to Atlanta. She became ill and the two returned on August 22 to her home. Her doctor there told her that if she "wanted to get well at all" she should not move. Accused proposed to return to Fort Benning. She knew he did not have permission to be absent from his organization but did not realize the seriousness of his unauthorized absence and urged him to remain with her. As soon as her condition allowed her to make the moves they went again to Atlanta and thence to Columbus, Georgia. After arrival in Columbus she was hospitalized for a time in the post hospital at Fort Benning on account of the same kind of illness from which she had suffered previously at her home and in Atlanta (R. 16, 17). Witness did not influence her husband against communicating with his organization "but it was practically impossible for him to do so" (R. 17).

4. It is undisputed that accused was absent without leave from his organization during parts of the days of August 17 and 18, 1942, and that he absented himself without leave on August 19 and remained absent without leave until August 27, 1942. Although it thus appears that accused was not continuously absent for the entire period alleged

in the Specification, the interruption of the status of absence without leave was of but a few hours duration on August 18 and 19. Accused was punishable for his absence on each day alleged. The variance involved is immaterial and the findings need not be disturbed. Violation of Article of War 61 is established.

5. War Department records show that accused is 26 years of age. He was appointed a second lieutenant, Infantry Reserve, on December 13, 1940. He entered on extended active duty on March 10, 1941, and was promoted to first lieutenant, Army of the United States, on August 12, 1942.

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

Richard D. Rawlins, Judge Advocate.
James H. Baugh, Judge Advocate.
Claire W. Hardy, Judge Advocate.

1st Ind.

War Department, J.A.G.O., OCT 20 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Earl S. Wykoff (0-401860), 504th Parachute Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Accused's absence without leave was deliberate and inexcusable. The punishment of dismissal is appropriate. The offense was purely military but I do not recommend suspension of the dismissal, as I might otherwise do, for the reason that, as appears from an attached letter from the Commanding General, 82nd Airborne Division, dated October 6, 1942, charges have been preferred and a second trial thereon has been recommended for a breach of arrest by accused occurring four days after completion of the present trial. It is improbable that accused has the necessary qualifications of an officer. In view of all the circumstances and in order that a second trial may be avoided, I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

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

SPJGK
CM 225837

DEC 4 1942

UNITED STATES	)	IX CORPS
v.	)	Trial by G.C.M., convened at Fort Lewis, Washington, July 14, August 24 and 25, 1942. Dishonorable discharge and confinement for life. Penitentiary.
Technician Grade IV GEORGE W. GRAY (20922171), Company A, 133rd Engineers.	)	

REVIEW by the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Grade IV George W. Gray, Company A, 133rd Engineers did, at Tacoma, Washington, on or about June 17, 1942, forcibly and feloniously, against her will, have carnal knowledge of Miss Vivian Mills.

He entered a special plea of "not guilty by reason of insanity" (R. 9). This plea was overruled (R. 36, 37). Thereupon he pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that Vivian Mills, an unmarried school teacher (R. 42, 129), aged 24 years (R. 71), residing in an apartment

at 721 Fawcett Avenue, Tacoma, Washington, with Sergeant Lee Giles, Medical Section, 1907th Service Unit, and his wife (R. 45, 56), spent the evening of June 16, 1942, from 10 p.m. until 12:30 or 1 a.m. at the Happy Days Tavern (R. 42), a popular resort or "beer joint" with a bar and facilities for dancing, located at 13th and Broadway streets in Tacoma, Washington (R. 55). Sergeant and Mrs. Giles were with Miss Mills until about 11:30 p.m. when they left and Miss Mills remained with other friends (R. 42, 53). During the course of the evening Miss Mills consumed two glasses of beer (R. 42) and danced with different men some of whom she had not known previously (R. 72, 77). She did not see accused at the tavern (R. 72) and did not know him (R. 41). She left the tavern between 12:30 and 1 a.m. without escort and proceeded to walk home (R. 42), a distance of seven blocks. She followed the direct course along Broadway to 9th Avenue, thence west two blocks to Fawcett Avenue on which she lived in the block north of 9th Avenue (R. 55). As she was proceeding on 9th Avenue and approaching the intersection of Fawcett Avenue, she heard the footsteps of accused behind her (R. 42).

Catching up with her across the street from a telephone building at the intersection (R. 71), accused put his arm around her and said "How are you?". Miss Mills jerked herself away from accused and replied, "You get your hands off me". She turned north on Fawcett Avenue and when she reached the middle of the block (R. 42) where there was a vacant lot 96 feet wide, covered with grass and slightly below the street grade at the point at which the lot abutted (R. 46, 112; Ex. A), accused again seized Miss Mills, put his hand over her mouth and knocked her down the bank into the grass lot where a struggle between the couple ensued which continued unabated for about an hour (R. 42, 43, 54). Miss Mills testified that she tried to scream but was unable to do so (R. 68). She had never screamed in her life (R. 64) and the accused's arm around her throat choked her (R. 68). Furthermore the accused threatened to kill her if she screamed (R. 68, 82). She did not call for help (R. 64). She tried to escape (R. 53), pulled his hair (R. 43) and tried to kick him (R. 64). During the struggle she lost her glasses and suffered various bruises to portions of her body (R. 43, 81). She endeavored to protect herself by biting accused's lip when he tried to kiss her. In retaliation accused slapped her several times. She withdrew a whiskey bottle from his pocket and tried to hit him over the head with it but failed when accused knocked it out of her hand. She then found a rock and after pulling loose from a grip accused had on her wrist, hit accused on the head with the rock two or three times (R. 43). Accused again slapped Miss Mills' face. She tried to choke him (R. 53). Finally she struggled free from accused and tried to get away but was knocked down again by accused and told to lie still or he would knock her out (R. 43). He removed her underwear (R. 66). She resisted to the utmost of her ability (R. 52). When she would not lie still accused struck her on the nose with such force that it bled and she became weakened (R. 132) and swallowed so much blood

that she practically lost consciousness, became dazed (R. 66) but knew that something was going on as accused was on top of her (R. 132) and his genital organs were in contact with hers (R. 136), and she lost her power of resistance (R. 52). She testified that it was during the consequential lull in the fight that she believed accused "accomplished his purpose" of having sexual intercourse with her (R. 43, 44). She testified that because she was practically unconscious at the time of the occurrence of the act she did not at the time know whether the accused's penis penetrated her genital organs but after regaining consciousness was positive that it had from other circumstances within her knowledge (R. 135, 136, 138, 139). These circumstances included: the accused had removed her underclothing (R. 44, 66); when she recovered consciousness accused was lying on top of her and his private organs were touching her own in an apparent attempt at penetration (R. 136); her genitals were irritated and painful although they had not hurt her before the act; they were bleeding to some extent (R. 54); and at one point during the assault accused said that he "hadn't done it" for about a "month or three months" before (R. 65).

Miss Mills testified that during the assault she detected the odor of liquor on the breath of accused, and noticed that his manner of talking was that of a drunken man (R. 65). He appeared to be drunk when he first accosted her (R. 71) but she did not know whether he was drunk or not (R. 74). In the struggle, accused was on top of her part of the time and they rolled over several times on the grass (R. 82). She later found that her underwear, which she recovered and put back on (R.46, 66), was dirty, grass stained, bloody to some extent and torn and that her stockings were torn. Her jacket and long sleeved blouse bore some blood stains. Her arms and legs were stiff and bruised. This caused her to limp (R. 76, 80). Her back was bruised, both eyes were black, her forehead was skinned and her nose was swollen. These were all caused by the assault (R. 81).

Miss Mills testified that she could "see hardly a thing" without her glasses (R. 49). Upon recovering consciousness she suggested that accused help her hunt for her lost glasses. Both arose and started the search, accused lighting matches, the better to see. She remarked that the glasses cost her $20, and accused said he would pay for them if not found (R. 46). Accused gave her his name and organization and she wrote them with a pencil he furnished, on the back of a picture he took from his wallet and gave to her (R. 47) after asking her not to tell anyone about the offense (R. 75). While accused was still hunting for the glasses Miss Mills climbed up the slope to the sidewalk (R. 47) and, with accused "just a step or two behind" (R. 73), went directly to the apartment house where she resided (R. 47), six doors north of the lot where the assault had taken place (Ex. A). At the entrance door of the apartment house accused overtook her and pulled her outside again,

started to raise her dress and said that he was "going to do it again". He desisted with the remark that someone might see them. She unlocked the front door and walked inside. Accused followed her. Miss Mills then said, "Well, this is where my girl friend lives and her husband is here so will you get out now and leave me alone?". Accused refused and followed her to the door of the apartment (R. 48).

Miss Mills entered the apartment followed closely by accused. Sergeant Giles, who had been asleep in the room into which the hall door opened, awoke and overheard Miss Mills ordering accused to leave the apartment. Accused asked Giles "what time it was". Giles arose and after some exchange of remarks forcibly evicted accused from the apartment (R. 49, 109, 110). Accused tried to strike Giles and the latter knocked him down several times. Giles testified that when he first saw accused he was hatless and his blouse was open and his pants were "wide open from the top button clear to the bottom in a 'V' shape". He did not have a garrison belt. His shirt tail was out, his underwear was gaping open, the hair around his crotch was exposed, his face was scratched, his upper lip was puffed, and his clothing, face and hair were bloody. There was a cut on the top of his head from which blood was coming (R. 111).

Miss Mills was given general and pelvic examinations at the Station Hospital, Fort Lewis, Washington, on June 17, 1942, about fifteen hours after the assault (R. 91, 92). The general examination revealed contusions of the head and ecchymotic or blackened condition of the eyes, blood in the right auditory canal and the external ear and one bruise on the right thigh (R. 91). The pelvic examination did not reveal any tears of the hymen but there was slight irritation of the genital organs external to the hymen (R. 97). There was a slight abrasion of the skin on the outer surface over the perineal region. There was a dried secretion in the upper vaginal vault from which a slide was made (R. 91-92). The slide revealed the usual contents of the seminal secretion with spermatozoa present. This spermatozoa showed the normal deterioration which occurs between 8 and 24 hours after ejaculation takes place (R. 94). The examination revealed no indication of pregnancy or of sexual intercourse prior to the time of the assault (R. 100, 104). Miss Mills testified that she had had no prior sexual intercourse within 48 hours prior to the assault (R. 127, 128). A medical officer testified that in his opinion the presence of semen in the upper portion of the vagina furnished positive proof of penetration by a penis (R. 100), and that the abrasions of the skin external to the hymen indicated that the penetration was forceful (R. 101).

On the morning of June 17 the grass in the vacant lot for a space of about 100 feet square had the appearance of having been trampled on or rolled on, "chewed up and churned up". The accused's

missing cap and belt were found there but Miss Mills' lost glasses were not found (R. 112). Grass stains on the knees of accused's trousers were observed (R. 113).

Accused testified that he enlisted in the National Guard of California at Redding, California, in January, 1941, and was included in the call to active duty on March 3, 1941 (R. 152, 153). He served with Company F, 115th Engineers until April 1942. Company A, 133rd Engineers, was organized and he was assigned to it (R. 153). He served as cook both in Company A of the latter regiment at Camp San Luis Obispo, California, and Fort Lewis, Washington (R. 154). On June 16, 1942, he worked in the kitchen at Fort Lewis all day. In the evening he went to Tacoma (R. 154) with Sergeant Richard A. Stahl, Mess Sergeant of his company, an old time friend who had taught accused how to cook. Stahl bought two pints of whiskey, and gave accused one. Then accused and Stahl separated with the understanding that they would meet again at a hotel at about 8 p.m. (R. 155). Afterwards Stahl brought his wife to the hotel at the appointed time (R. 156). While alone and waiting to be joined by Sergeant and Mrs. Stahl accused drank about four or five glasses of beer (R. 156, 166). He was joined by the Stahls in the bar in the rear of the hotel. There accused drank a bottle of beer. The three adjourned to Stahl's apartment where they drank the pint of whiskey that had been furnished to accused and in addition drank a bottle of whiskey Stahl produced (R. 157). Together accused and Mrs. Stahl drank about a quart of whiskey (R. 167). The party broke up at 10:30 p.m. Accused left the apartment and took the elevator to the first floor. He testified "When I got down to the bottom, why, everything seemed kind of funny and it felt like things had turned around different than what they were when I started to leave" (R. 158). From the hotel he went onto another street and into another "beer joint" where he drank four glasses of beer and three or four drinks of whiskey from another pint bottle (R. 158) which he bought (R. 187). There were no women in the place (R. 188) and no dancing (R. 189). He left this bar at about 11:30 p.m. planning to return to camp by bus. He lost his memory completely when he left the place (R. 158, 159) and did not regain it again until daylight the next morning when he awoke in a grass plot along the side of some street in Tacoma in a hilly part of town (R. 166). His lip was swollen and sore, his face and shirt were bloody (R. 161) and his head was cut (R. 176). His hat and belt were missing (R. 179) but his trousers were not unbuttoned and his shirt tail was not out (R. 163). He walked about three blocks and was directed by a civilian to the bus station where he met another soldier with whom he returned to his organization at Fort Lewis (R. 161, 162). He had his scalp wound dressed at the infirmary and went to bed (R. 186). He did not discover that there were grass stains on his trouser knees (R. 163). He did not recall having seen Miss Mills prior to June 17 (R. 163, 170). Accused testified that he had not committed the offense charged and had not gone to

the Giles apartment. He examined his clothes and found no evidence of an emission. His private organs were normal. He had never been in this kind of trouble before. He had not had much schooling (R. 165) but was a graduate of an Army cooks and bakers' school (R. 173). At that school he had a cooks and bakers' text book with recipes in it, but he did not study the book because he could not read. He did only what his first cook told him (R. 173). Since his enlistment he has learned to sign his name and read a little (R. 188). Accused also testified that because he had no recollection of what he did or where he went between 11:30 p.m., June 16, 1942, and daybreak June 17, 1942, he could not say positively that he had not raped Miss Mills (R. 170).

Sergeant Stahl testified that he bought two pints of whiskey for accused (R. 196), that accused had some beer and two large drinks of whiskey in the apartment (R. 197, 209), that about a pint of the whiskey was consumed by the group in the apartment (R. 209) and that when accused left he had an unopened pint of whiskey in his possession (R. 198, 209). When accused left the apartment he did not seem to have difficulty in walking (R. 206, 207). Witness testified that the Happy Days Tavern was "pretty loud and pretty rowdy * * * pretty boisterous * * * 'a whore's hangout'" (R. 201). Witness also testified that the walking time between the Happy Days Tavern and the intersection of 9th Avenue and Fawcett Avenue is about ten minutes (R. 204). Witness saw accused on June 17 at which time he had a bandage on his head (R. 199). He appeared to be "groggy" - "it didn't seem to be from liquor unless he had an awful bad hangover" (R. 200). Accused said to witness that he did not know what had happened to him (R. 199).

Captain Lewis E. Barenfanger, 133rd Engineers, Company Commander, and Captain Robert N. Schwartz, 133rd Engineers, a former company commander of accused, and Sergeant Sam Schwartz, Company F, 133rd Engineers, testified for the defense that the general character of accused and his reputation for truth, honesty, integrity and sobriety were good (R. 144, 146, 193).

4. The evidence of rape is unimpeached and convincing. The story of the criminal assault as related by Miss Mills stands undisputed. Accused precluded himself from convincingly denying it by testifying he had no memory of occurrences between 11:30 p.m. on June 16, 1942, and daybreak the following morning. That accused had carnal knowledge of Miss Mills is established by her clear account of events that took place and by her physical condition as disclosed by her testimony and by pelvic examination. That the act was done by force and without her consent is conclusively established not alone by the oral evidence of the woman but by the mute evidence of a struggle between her and accused as disclosed by her blackened eyes and body bruises, her torn underwear and stockings, her bloody hair, face and clothing, by the scalp cut on top of the accused's head, his swollen lip, his loss of his hat and belt, and by the condition of the grassy plot. Violation of Article of War 92 was established.

5. Upon arraignment accused raised the issue of insanity. The court thereupon directed the trial judge advocate to report to the appointing authority as authorized by paragraph 63, Manual for Courts-Martial, and adjourned (R. 9). The court reconvened on August 24, 1942. During the period of adjournment accused was examined by a board of medical officers convened at the Station Hospital, Fort Lewis, Washington (Court's Ex. 1). After examination of accused the board found:

> "a. Diagnosis: Mental deficiency. Mental age 9 1/6 years and an I.Q. of 57+.
> b. That this condition existed prior to entrance into the Military Service, was not incurred in the line of duty and is not due to his own wilful misconduct.
> c. That this soldier was not insane at the time of commission of the alleged act and that he is not insane at the present time.
> d. That this soldier did know right from wrong.
> e. That knowing right from wrong he nevertheless was unable to adhere to the right because of his low mental capacity, upon which was superimposed an inebriated condition which prevented him from adhering to the right.
> f. From the medical-legal standpoint found in 'Modern Clinical Psychiatry' by Noyes, it states, 'Not infrequently in medical-legal matters the question arises as to the responsibility of an alleged feeble minded person. In general it may be said that no limitation of responsibility should be recognized if the offender has a mental age exceeding 10 years.'
> g. It is the opinion of the Board that this man is incapable of conducting his defense intelligently."

Major Raymond L. Kessler, M.C., a member of the board with experience as a phychiatrist, testified in support of the board's findings (R. 16, 34) and the report of the board was received in evidence (Court's Ex. 1). The court, without receiving other evidence upon the issue of insanity, found that accused was sane at the time of the commission of his offense and at the time of trial and knew the difference between right and wrong (R. 37). It did not expressly find whether accused had mental capacity to adhere to the right.

Rape involves a specific intent of which a person committing that offense must be capable (Wharton's Crim. Law, 12th ed., sec. 1032; Iowa v. Donoval, N.W. (Iowa) 206). Paragraph 78 a, Manual for Courts-Martial, provides that:

> "a person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right".

It was necessary, therefore, for the court in some manner to determine whether accused could adhere to the right.

Although it was the duty of the court to determine the issue of insanity in all its aspects it was not required to make this determination as an interlocutory question and upon express findings. Determination of the issue as an interlocutory question was discretionary (par. 75 a, M.C.M.). It is clear that if no express findings had been made upon the issue or upon its special elements, the findings of guilty would have sufficed to cover the issue of insanity and all its elements (CM 157854, Ireland; CM 205621, Curtis; CM 211836). In view of the action of the court in making express findings as upon an interlocutory question regarding certain elements of the issue of insanity, was its omission to make express findings as to whether accused had the capacity to adhere to the right an error injuriously affecting the substantial rights of accused.

The board of medical officers found and the psychiatrist testified that accused was mentally deficient (R. 23), but the board and the psychiatrist based the conclusions of mental incapacity to adhere to the right largely upon a "superimposed" condition of drunkenness (R. 20; Court's Ex. 1). At the time the court considered the issue of insanity as an interlocutory question it did not have before it any competent evidence as to the nature of accused's acts or as to the degree of his asserted drunkenness. As a result it could not intelligently determine the degree of his drunkenness or the effect which his drunkenness might have had upon his mental capacity to adhere to the right. It is but reasonable to assume therefore that it purposefully limited its express findings to those elements of the issue of insanity which were clear and undisputed and deferred its findings upon the remaining element until it should find upon the general issue. Upon the whole record there is no sound basis for inferring that the court ignored the question as to whether accused could adhere to the right or that the court intended to find that accused did not have the mental capacity to do so.

The actions of accused were of a pattern to be expected in the commission of a crime of violence of the kind here involved, and the court, upon all the evidence, was fully justified in concluding

that accused was mentally responsible in all particulars and that he was not so drunk as to be incapable of entertaining the intent to rape.

The Board of Review is of the opinion that the omission by the court of an express finding that accused had the capacity to adhere to the right was not error injuriously affecting the substantial rights of accused.

5. The court was legally constituted and had jurisdiction of the person and offense involved. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 457 Title 18 of the United States Code.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGH
CM 225856

MAR 1 3 1943

UNITED STATES	)	5th INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Curtis, Iceland, Septem-
Second Lieutenant ROBERT	)	ber 1, 2, 3, 4, and 5, 1942.
C. HATHAWAY (O-402612),	)	Dismissal and total for-
Infantry.	)	feitures.

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

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

SPECIFICATION: In that 2d Lieutenant Robert C. Hathaway, 10th Infantry, did, at or near Fossvogur, Iceland, on or about August 19, 1942, forcibly and feloniously, against her will, have carnal knowledge of Elin Valdimarsdottir.

CHARGE II: (Findings of Not Guilty).

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

SPECIFICATION: In that 2d Lieutenant Robert C. Hathaway, 10th Infantry, did, at Camp Hvaleyri, Iceland, on or about August 19, 1942, violate the provisions of paragraph 4, Appendix No. 7, Bulletin No. 1, Headquarters United States Army Forces, February 25, 1942, by driving

without authority a government motor vehicle.

CHARGE IV: (Acquitted upon motion of defense).

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

SPECIFICATION: In that 2d Lieutenant Robert C. Hathaway, 10th Infantry, did, at or near Reykjavik, Iceland, on or about August 16, 1942, commit an assault and battery upon Guolaug Bjorgvinsdottir by wrongfully and unlawfully grasping, holding, fondling and laying his hands upon and about her body in an intimate, indecent and disgraceful manner forcibly and against her will and in the immediate presence of other persons.

ADDITIONAL CHARGE II: (Findings of Not Guilty).

The accused pleaded not guilty to all Charges and Specifications. He was acquitted, upon motion of the defense, of Charge IV and the Specification thereunder (R. 170). He was found of the Specification, Charge I, not guilty, but guilty of the following substituted Specifications: Specification 1: of wrongfully and unlawfully committing an assault and battery at the time, place, and upon the woman alleged, by striking, grasping, holding, and pushing her body with his hands; Specification 2: of wrongfully and unlawfully committing an assault and battery at the time, place, and upon the woman alleged, by intentionally causing an emission of semen from his penis upon her person; of Charge I, not guilty, but guilty of violation of the 96th Article of War; of Charge II and the Specification thereunder, not guilty; of Charge III and the Specification thereunder, guilty; of the Specification, Additional Charge I, guilty except the words "grasping, holding, fondling, hands", and "and about", substituting for the word "hands" the word "hand", and of Additional Charge I, guilty; and of Additional Charge II and the Specification thereunder, not guilty. Evidence of one previous conviction for absence without proper leave from his place of duty for 5½ hours was introduced in evidence. 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 "though deemed inadequate", and forwarded the record of trial for action under the 48th Article of War.

3. Specification, Additional Charge I:

a. The pertinent evidence for the prosecution is substantially as follows:

At about 2 a.m., August 17, 1942, Master Sergeant Hallvard Sollie, Norwegian Army, was in a car with accused in Reykjavik. The accused invited one Einar, who was walking with three girls, to get in the car. After some discussion, Einar and one girl, identified as Miss Guolaug Bjorgvinsdottir, entered the car. Sollie sat on the front seat with the driver, and Guolaug sat on the rear seat between Einar and accused (R. 133-135, 150-155).

Guolaug testified that while Einar went into the house of an uncle, the accused began to play around with her skirt and stockings, and put his hand underneath her pants; that she became afraid, began to cry, and asked Einar to take her home, and to let her sit on the other side; and that the Norwegian promised to help her and to drive Einar and her back to town. Sollie testified that accused was a "little fresh" to Guolaug and put his hand up beneath her dress and that Guolaug began to cry, hit accused, and asked Einar for help, but Einar was too drunk to help. Sollie moved Guolaug to the other side of Einar. He planned to get transportation at his camp to take Einar and Guolaug home, but when the car arrived at his camp the accused said that he would take them home (R. 135-136, 150-161).

Einar became so drunk at the camp of the Norwegian that he was barely able to stand up. The accused pushed both Einar and Guolaug into the car, and told Sollie that he could not come along. Guolaug climbed into the front seat with the driver because she was afraid of the accused. Accused and Einar were in the rear seat. After the car started away, the accused bent over the seat, tried to get her to come to the back seat, pulled at her, asked her to come back and help sober up Einar, played around her skirt and stockings, and put his hand under her pants. Guolaug was scared, began to cry, and asked the accused and then the chauffeur to drive to Reykjavik instead of in the opposite direction. She also asked Einar to help her. Accused grabbed her by the wrists and threw her pocketbook and umbrella up behind the back seat. When Guolaug saw the door by Einar opening, she told accused she would come to the back seat. She climbed over in the direction of Einar, grabbed her pocketbook, and threw herself out of the car into the street. She then rose to her feet, ran screaming to an automobile coming in the opposite direction, and was taken home in that automobile (R. 136-139).

This automobile which took her home was followed by the car

of accused. When she reached home at about 4 o'clock she left the automobile and called for her mother. Einar then got out of the car of accused and tried to get her in, but she struck Einar and jumped to the inclosure back of the house, where the man who lived downstairs (Paul Olafsson) came out, took her in, and closed the door. Guolaug is 19 years old, lives with her mother, grandmother, brothers, and sisters, and never had been out with an American soldier before. When Paul Olafsson heard Guolaug call for help, he found that she was extremely nervous, her coat was all dirty, and her stockings were "downward". Guolaug's mother heard the call for help and found Guolaug in the areaway. She stated that Guolaug's coat was dirty, her petticoat dirty in front, and one stocking torn to pieces and dirty (R. 139-148, 162-167).

b. The pertinent evidence for the defense is substantially as follows:

Private First Class William C. Hug testified that he was dispatched to drive the accused on the night of August 16, 1942. At some time after 2 a.m., when a Norwegian officer and accused were in the car, an Icelandic fellow and girl got in the car. The Norwegian was on the front seat. On the trip taking the Norwegian to his camp, the girl was crying, but Hug did not know why, as he kept looking to the front. At the camp the Icelandic man was drunk and was carried into the back of the car. The accused also got in the back, but the girl got in the front. Hug was directed by accused to drive toward Alafoss, which was away from Reykjavik. The accused told the girl to get in back and get the man straightened out so they could take him home. The girl got into the back of the car and after a short while she either jumped out or fell out. The car was then traveling between 5 and 10 miles per hour because another car was approaching. The girl hailed a truck coming up the road. After she talked to an officer in the truck, the officer came over and talked to the accused. The girl rode home in that truck, while the man and accused were in the car driven by Hug. After the girl went around the side of the house, the accused held out an umbrella to her and she started hollering. A man and a woman came down to the girl. Accused then came in the car and they took the Icelandic man home (R. 175-190).

The accused testified that he met Einar Palsson and Guolaug Bjorgvinsdottir at about 2:30 a.m., on the morning of August 17, 1942, at a street corner in Reykjavik. When Einar invited several girls to go, Guolaug entered the car of accused. The three sat on the back seat, with Guolaug in the center. When they stopped at a house, accused put his hand under Guolaug's leg. Guolaug did not like it,

pushed his hand away, said something to Einar, got up, moved over and sat next to Einar. The accused was tired, was not having a good time, and told his driver, Hug, to take the Norwegian (Sergeant Sollie) home. Nothing happened en route to Herskola, where all got out of the car. Sollie offered to take Guolaug and Einar home, but accused said that he would and that it was not necessary for Sollie to come along. Accused did not touch Guolaug after the first stop, or at Herskola. Accused and Einar, who was pretty drunk, sat on the back seat, while Guolaug sat in front. He told Hug to drive toward Alafoss to try and sober up Einar. When Einar passed out and leaned against him, accused asked Guolaug to come in the back seat, but she refused. He told Hug to drive slowly to sober up Einar, and noticed the back door was open a little. When he again asked Guolaug to come back and help sober up Einar, she consented. Accused stood up, received Guolaug's purse, took her by the elbow, and she came over and sat down. Almost like a flash Guolaug was out of the door. He hollered to Hug to stop the car, and got out and went back. Guolaug got up as soon as she hit the ground, stopped a truck, and was talking to a lieutenant in the truck when accused reached it. When the lieutenant asked what was the matter, accused stated that he did not know and that she either jumped or fell out of the car. Accused said "* * * all right" when the lieutenant stated that Guolaug wanted the lieutenant to take her home. Guolaug got in the front seat of the truck, which turned around and started on in. When accused got in the car he noticed the umbrella belonging to Guolaug in the car, and told Hug to turn around and followed them to a house. Guolaug left the truck and walked in front of the car of accused to a house. When accused left his car with the umbrella, Guolaug screamed and ran in an archway behind the house. Accused followed her, tossed the umbrella about 8 feet to her, she screamed again, and then accused walked out. Accused then took Einar home and went home himself (R. 206-213).

c. The court called the following witnesses:

Second Lieutenant Frank Levi, Quartermaster Corps, Company B, 23rd Quartermaster Regiment, was proceeding from Reykjavik at about 4 a.m. one morning when he saw a girl, whom he identified as Guolaug, running from the road. The driver stopped, and Lieutenant Levi and Lieutenant Schlitt left the weapon carrier to see what was the trouble. The accused was there and explained that the girl and her Icelandic boy friend in the car had a quarrel. The girl was very excited. Upon the request of the girl, Lieutenant Levi took her to a place in Reykjavik. The girl left the car at a house, and went to the door. The Icelandic man in the car with accused was intoxicated (R. 264-267).

Einar Palsson, who is 21 years old, met Guolaug on August 16, 1942. He remembers riding to an American camp in an auto with Guolaug, a Norwegian, and two Americans, of whom one was an officer. He saw the officer place his hands on Guolaug against her will, saw him turn up her dress, and thinks he saw the officer put his hands on her in an indecent manner. Guolaug cried and called for help. Later in the evening, Guolaug threw herself out of the automobile. Guolaug was afraid because he was drunk and because of the way the officer looked at her. He could not now recognize the American officer (R. 302-309).

d. Under this Specification the accused was, by exception and substitution, found guilty of an assault and battery upon Guolaug, by wrongfully and unlawfully laying his hand upon and about her body, in an indecent and disgraceful manner, forcibly, against her will, and in the presence of other persons, in violation of the 95th Article of War.

The evidence shows that the accused, while in the car on the early morning of August 17, 1942, on two occasions assaulted Guolaug Bjorgvinsdottir, placed his hand under her pants and about her body in an indecent, intimate, and disgraceful manner, against her will, and in the presence of other persons.

Winthrop cites as an instance of violation of the 61st (95th) Article of War, "Offending against good morals, in violation of * * * public decency and propriety", and insulting behavior to, or indecent assault upon, a respectable woman (Winthrop's Military Law and Precedents, Reprint, p. 718).

The record, in the opinion of the Board of Review, supports the findings of guilty of Additional Charge I and of the Specification thereunder, in violation of the 95th Article of War.

4. The Specification, Charge I, and the Specification, Charge III.

a. The pertinent evidence for the prosecution is substantially as follows:

The court took judicial notice of Bulletin 1, Headquarters United States Army Forces, February 25, 1942, with particular reference to paragraph 4, Appendix 7. There is no copy of that bulletin attached as an exhibit, nor is a copy of the bulletin available in Washington. The Staff Judge Advocate, in his review, quotes paragraph 4 as follows:

> "4. Officers Driving Government Vehicles. - No officer, other than a duly appointed motor transport officer,

is authorized to drive a government motor vehicle. Motor Transport Officers are authorized to drive government motor vehicles only when such action is necessary to insure proper testing or inspection of vehicles".

The accused, in a command car driven by Private William C. Hug, left Camp Hvaleyri at about 6:45 p.m., August 18, 1942, and attended an officers' school at Camp Liberty. At about 9:30 p.m. he left Camp Liberty in the command car with Second Lieutenant Gerald R. Wiser, 10th Infantry. About an hour later they drove into Reykjavik and near the Borg Hotel picked up two naval officers, a Lieutenant Harnett and a Norwegian captain. The accused soon left the car at a house, and told Lieutenant Wiser to take the two naval officers down by the docks (R. 22-23, 27-28).

At about 11:30 p.m., Mr. Halldor Sigurbjorasson met the accused at the house of Captain Geir Sigurdsson in Reykjavik. The accused told Halldor that if would provide a "party", the accused would provide whiskey. Halldor drove accused in a rented car to the house of a girl friend, Elin, whom he later identified as Elin Valdimarsdottir. Halldor went into the house and found Elin in bed. He returned to the car while Elin dressed in a black dress with white trimming, and in a gray fur coat. Elin's face was normal at that time. When Elin joined them in the car Halldor drove back to Vesturgata. At about 12 o'clock accused, Elin, and Halldor entered the car of accused and sat on the rear seat. Lieutenant Wiser and the driver, Hug, occupied the front seat. When the car arrived at Camp Hvaleyri, at about 1:45 a.m., August 19, 1942, the car stalled (R. 54-60, 62-66, 28,32-33, 89-90, 126-127, 129-130).

The accused left the car, entered the camp, went to the tent of Corporal Archie W. Christian, transportation corporal of the antitank platoon, Antitank Company, 10th Infantry, and asked for a key and a driver for the half-ton weapon carrier. Christian gave him the key of car W-22382, assigned to the platoon commanded by accused, and stated that he would get Private Hug as the driver. Accused said that Hug was out in the stalled command car, and that he would drive the weapon carrier himself. The accused, dressed in a parka, drove the weapon carrier out of the camp between 2:30 and 3 a.m., with Elin and Halldor as passengers, to the house of Halldor in Reykjavik. During the trip a bottle of whiskey fell out of the car and was broken. They drank beer and whiskey at the house until Halldor became quite intoxicated. Elin went a short distance in the car with accused to a place where accused secured a second bottle of whiskey, and returned to the house. The accused served whiskey to Elin and Halldor, but Elin drank a very little. The accused tried to kiss her, but she struck him in

the face, and sat in another chair (R. 32-34, 38, 40-45, 58-59, 67, 91-95, 106).

Elin left the house of Halldor with accused, who was going to drive her home. She asked Halldor to go along, but he was not able to go with her because he was ill. As accused drove out to the Hafnarfjordur Road, Elin told him that he was not taking the right road. Accused said that he would turn at the next corner. He failed to turn, in spite of her requests to be taken home. The accused stopped the car at the end of a side road near two concrete posts. The accused was then dressed in gray pants, a coat, and an overcoat (parka). When Elin asked him to drive her home, accused stated he would drive her home after "I let him be with me". He said often "I will have intercourse with you", or something like that. They fought about that, and the fight continued outside the automobile. Accused threw her down on the ground, tore her pants, hit her often with a closed fist, giving her a bloody nose and split her lips. Among other things, he said he was going to kill her. The blood from her nose almost choked her. She kicked, and when she was able to tear his hand away from her mouth, she screamed. Then he arose when, as she thought, he saw some movement. The accused said he would drive her home. She entered the automobile because she thought she had no further reason to fear him, and the accused lighted a cigarette (R. 67-71, 78-80, 97,102, 112).

The accused said he would take her home after he had intercourse with her. The accused then attacked her again. The fight continued, and she kicked and pushed, and did everything she could until he overcame her. He threw her on her back, with her head close to the steering wheel, struck her, laid on top of her, and inserted his penis in her vagina. There was nothing she could do until she got him off of her, and then she rose. Accused threw her down again, and inserted his penis in her vagina again, so far that his body was against her body, while she hung half way out of the automobile. Accused then pulled his penis out and she raised up and sat in the seat. When accused told her to take his penis in her mouth, she put her arms in front of her face and screamed, and he made an emission all over her dress. Elin then left the car, and accused in the car buttoned up his clothing. The face of accused was bloody and his nose scratched. Elin washed her face with some whiskey which was in the car (R. 71-75, 82, 110).

The accused told her to get in the car because he was going to drive her home. When they reached her home shortly before 6 a.m., her clothing was all disarranged, and her stockings down around her ankles. While she was arranging her clothing, accused said something to her, and placed some money in the bosom of her clothing. She returned the money to him and told him "to go to hell" (R. 75).

After Elin entered her house she began to cry, went to the room which she occupied with her sister Ester, undressed, rolled up her dress and put it under the clothes closet. Her dress and her pants, which Elin stated were both in substantially the same condition as when she removed them, and her coat, which then had more dirt at the bottom than now, were received in evidence. Ester, who was awakened when Elin came in at about 6 a.m., observed Elin undress, and stated that Elin was in the same clothes as when she got up and left at about 11 p.m. When Mrs. Sigridur Palsdottir next saw her daughter, Elin, at about 11 a.m. the next morning, Elin's face was swollen, her left eye black, her lower lip split, had a scratch on her cheek, a bloody appearance about her hair, and her gray fur coat had a considerable amount of sand and clay earth on it and blood on a shoulder (R. 75-78, 129-131).

Mr. Gunnar Stefansson was, on August 18-19, 1942, living in his summer house about a half mile from Camp Hilton, and at the end of a road which turns off from, and about two and one-half kilometers from the Reykjavik-Hafnarfjordur Road. He awoke at about 5:30 a.m., August 19, 1942, and saw, about 25 meters down the hill from his house, a greenish colored truck, open in back, which was occupied by a woman with light hair and a grayish fur coat, and an American soldier with an outer garment with a hood. During the five minutes he observed the truck before it left, he saw the man get out of the car and look under the rear wheels, then reenter the car, light a cigarette, and drive away. While the man lighted his cigarette, the woman was in the car combing her hair with her fingers. He neither heard any screams nor saw any struggling during the five minutes he observed them. He would be unable to identify either occupant of the truck (R. 118-124).

At about 6 a.m., August 19, 1942, the accused came into the hut in which he and Lieutenant J. M. McCulley were quartered. He then had a parka on. When Lieutenant McCulley awakened accused at about 7:15 a.m., accused had three or four scratches, with dried blood, on the side of his face, a nick on his nose, and a slight scratch on his ear (R. 24-26).

In the course of lengthy cross-examination, Elin stated that she was four months pregnant, that the father of her expected child was an Englishman, and that the father was the only person who knew of her condition (R. 186-187).

b. The pertinent evidence for the defense is substantially as follows:

Captain Irving F. Kanner testified that the accused telephoned him at Camp Keighley at about 2:30 a.m., August 19, 1942, requesting

him to trade a bottle of scotch that night for a bottle of bourbon the next day. In about 15 minutes the accused came in, said that he had broken a bottle, and took the bottle of scotch. Captain Kanner saw nothing unusual about the face of accused at that time (R. 192-194).

Captain Richard F. Northrop, Medical Corps, saw Elin at her home at about 11:30 p.m., August 21, 1942, and accompanied her to the hospital. She then had a small amount of black and blue area over her left eye. Elin stated that she was pregnant, and that the father of her expected child was an Icelander with whom she had relations for a very long time (R. 194-202).

Within a month prior to date of trial (Sept. 1, 1942), the accused asked Second Lieutenant Lawrence A. Madill, First Battalion motor officer, if he could obtain a driver's license. Lieutenant Madill replied that he, Madill, was the only officer in the First Battalion authorized to drive, and that he would ask the battalion commander if he would authorize a driving license for the accused (R. 203-204).

The accused testified that after school on August 18, 1942, he met Halldor in the house of an Icelander. Accused said that he could get some whiskey if Halldor would like to have a party, and could get some girls. They went in a cab to a house where Halldor found a girl, Elin, who came to the car in about five minutes. When his command car arrived, the three joined Lieutenants Wiser and Harnett, and drove out to the Hvaleyri Ridge Camp to get a bottle of whiskey. After he gave them all a drink, his driver, Hug, was unable to start the command car. Captain McQuail told Hug, at about 2 or 2:30 a.m., that he had better get a truck and take the Icelanders home. Accused went into the camp and to the hut of Corporal Christian for a truck and a driver. Christian gave him a key and accused said that he would drive, as the motor officer had told him that in an emergency "you will drive". He thought that this was an emergency. He went in and secured his parka for himself, and a comforter for Elin. The truck was open. Accused and Elin sat in the front seat, and Halldor sat in the rear. En route to Reykjavik to Halldor's house, he identified himself to a patrol in a jeep, and later the bottle of whiskey rolled out of the truck and broke. After they had some beer at Halldor's house at about 3 a.m., accused asked Elin for a kiss and finally got it. Accused and Elin drove out to Camp Keighley, borrowed a bottle of whiskey from Captain Kanner, and returned directly to the house of Halldor, where he served them at least two drinks, after Elin and accused had kissed in the bathroom (R. 213-227).

At some time after 4:30 a.m., Elin agreed to let accused take

her home. The sun was almost up and he wanted to take a ride. He remembers that he drove round, took a turn to the left, and while turning round, became stuck in the sand. They both had drinks, talked, accused put his arm around her, they kissed, and accused went to the rear of the truck. Elin then got out and went to the rear of the truck. They kissed, with his arms around her under her coat, and then, like a flash, accused was on the ground and Elin was on top of him, clawing, kicking, and fighting him. He pushed her in the face, got hold of her arm, moved a bit, felt something break, was able to get up on his knees, and then they got up and into the truck. He denied that he threw her to the ground, that he reached under her clothes, tore her pants, attacked her, or inserted his penis in her vagina (R. 228-233).

Accused gave Elin a drink at her request, lit a cigarette, got out and went to her side of the car, and asked her to have intercourse with him. She said no, but after his second request she said to take her home, and he replied "I will after". Then she asked him if he had "gummi", which in Icelandic means rubber. He said yes, took a rubber out of his kit, unzipped his pants, and put on the rubber. When he asked if that was "O.K.", she did not answer, but turned her head away. She never said "yes" to his request for intercourse, but he assumed "it would be all right" when she asked him if he had "gummi", and he had put the "gummi" on. He was "kind of disgusted; a little worked up", and just took the rubber off and masturbated on her. He got off the running board, zipped up his pants, walked around the car, pulled his parka down, and sat down. He had some trouble starting the car in the loose sand, drove down to the Hafnarfjordur-Reykjavik road, went into Reykjavik, and took Elin home. He did not offer her any money. When he asked if he should take her to work, she said "Go to Hell", and ran into the house. He then returned to Camp Hvaleyri. Accused denied that he attacked Elin, or had intercourse with her, made any approach to compel her to have sexual intercourse with him, or had his hands upon the lower part of her body except while struggling with her on the ground (R. 230, 234-242, 254).

Accused stated that he is 28 years old, that during the entire period of August 16 to 19, 1942, was married, that the name of his wife is "Charolette", and that he was not married to Elin (R. 247).

Mr. Jon Jonsson had known Elin about four years. They had lived together for awhile, but were not married. About ten months ago she had failed him by running away with another man (R. 256-260).

Miss Gudny Helgadottir had known Elin about five months. She did not know Elin's reputation for truth and veracity, but Elin had frequently told untruths and Gudny did not like her and would not believe her under oath (R. 261-264).

First Lieutenant William G. Sullivan testified that the accused was his subordinate in the Anti-Tank Company; he had known accused about one and one-half years; the accused was excellent in the discharge of his duties; and that the reputation of accused in the regiment as a law abiding citizen and as an obedient officer is "all right" (R. 268-270).

The accused, except for about one month, had been assigned to the Anti-Tank Company since coming to active duty on April 1, 1941. He was also special service officer of the 3rd Battalion, 10th Infantry, had started that job from nothing, had procured a projector and started showing movies at seven or eight camps, which involved working up to midnight three nights a week. He was also post exchange officer, and had established a post exchange at all camps. He had all of these assignments when he overslept in the morning (R. 316-317).

First Lieutenant Henry W. Scharf, Assistant Adjutant, 10th Infantry, identified Defense Exhibit A as the record of all regimental duties assigned to accused (R. 315-316).

c. In rebuttal for the prosecution, Elin testified that Captain Northrop did not ask who was the father of her expected child, nor did she tell him that the father was an Icelander. She denied that she threw accused to the ground while the car was parked, that she voluntarily embraced or kissed accused, or asked him if he had a "gummi" (a cover). The accused did not have a cover with him to her knowledge. She first got out of the car when she "jumped" over to the pillar, intending to go to the house just below, but the accused caught up to her at the pillar. She weighs about 116 pounds. She complained to the police three days after the occurrence (R. 271-278).

d. Witnesses for the court:

Lieutenant Colonel William M. Breckinridge was Executive Officer, 10th Infantry, and had known accused about one year. The reputation of accused in the regiment for truth and veracity was below average and he would not believe accused under his oath (R. 284-287).

Major Robert J. Harper, 10th Infantry, had known accused about one year. The accused had a rather low reputation in the regiment for truth and veracity. He would not believe accused under oath (R. 287-289).

Captain Julian H. Martin, 10th Infantry, was the commanding officer of accused for about one year. The reputation of accused in the regiment for truth and veracity was not too good. He would not believe accused under oath. The accused had told him twice, when accused was late, that he was sick, but on further questioning had admitted that he was not sick, but had overslept (R. 290.293).

Colonel Robert P. Bell, Commanding Officer, 10th Infantry, testified that the name of accused was not on the list of second lieutenants whom he recently recommended for promotion (R. 309-310).

Second Lieutenant June Wise, A.N.C., testified that when Captain Northrop asked Elin at the hospital if the father of her expected child was an Icelander, Elin said "Ja", which she understood to mean yes (R. 298-301).

Mr. Pall Gudnason, testified that he was interpreter at the United States Military Police Headquarters in Reykjavik. Elin came in to his office on the afternoon of August 20, 1942, and complained that she had met with an attack by an American "captain" (R. 310-314).

e. The veracity both of Elin and of the accused was questioned. One witness, a girl, stated that she would not believe Elin under oath. Three superior officers of his regiment, Captain Martin, Major Harper, and Lieutenant Colonel Breckinridge, testified that they would not believe the accused under oath. They testified, respectively, that his reputation in the regiment for truth and veracity was not too good, rather low, and below average. It is difficult to give credence to the explanation by the accused of the occurrence on the ground, as to which he states that while he had his arms around and under the coat of Elin - who weighed 116 pounds - like a flash he was on the ground and she was on top of him, clawing, kicking, and fighting him. Elin's swollen face, her black eye, split lip, and the dirty, bloody, and torn condition of her clothing lend support to her version of the assault. In this connection, consideration should also be given to the fact that accused, a married man, was charged with assaults upon two Icelandic girls within a period of three days, and that in each case the male Icelandic companion of the girl became so drunk that he was unable to be of assistance to the girl.

f. The Specification, Charge I, alleges that the accused, at or near Fossvogur, Iceland, on or about August 19, 1942, forcibly and feloniously, against her will, had carnal knowledge of Elin

Valdimarsdottir, in violation of the 92nd Article of War.

The accused was found not guilty of that Specification, "but guilty of the following specifications:

"Specification 1: In that Second Lieutenant Robert C. Hathaway, 10th Infantry, did, at or near Fossvogur, Iceland, on or about August 19, 1942, wrongfully and unlawfully commit an assault and battery upon Elin Valdimarsdottir by striking, grasping, holding, and pushing her body with his hands.

"Specification 2: In that Second Lieutenant Robert C. Hathaway, 10th Infantry, did, at or near Fossvogur, Iceland, on or about August 19, 1942, wrongfully and unlawfully commit an assault and battery upon Elin Valdimarsdottir by intentionally causing an emission of semen from his penus upon the person of said Elin Valdimarsdottir."

The testimony of Elin Valdimarsdottir supports the allegation of rape contained in the Specification referred for trial. In fact she testifies to two separate offenses of rape committed within an unstated short period of time. Her testimony clearly supports the findings of guilty of the two substituted Specifications, in violation of the 96th Article of War. The accused denies any rape, intercourse, or any attack upon Elin. He does state, however, that on the ground at the rear of the truck he had his arms around Elin under her coat, that they were kissing each other, when "like a flash" he was on the ground and Elin was on top of him, clawing, kicking, and fighting him. He then pushed her in the face, got hold of her arm, moved a bit, and was able to get up, and both entered the truck. He admits that shortly thereafter he asked her to have intercourse with him, thought that he had her assent, but after he made certain preparations andasked her if it was "O.K.", she failed to answer him. He then became disgusted and "masturbated on her".

It is clear that the substituted Specification 1 is a lesser included offense of the offense of rape alleged in the Specification as referred for trial, and that the record supports the finding of guilty of the substituted Specification 1 (par. 148b, M.C.M., 1928).

After finding the accused guilty of substituted Specification 1, the court purported to find accused guilty of Specification 2, substituted under the original Specification. The court has thus found

accused not guilty of the original Specification, but has found him guilty of two separate offenses substituted for the single offense of rape charged in the original Specification referred for trial.

It is stated in paragraph 78, Manual for Courts-Martial, 1928 -

> "One or more words or figures may be excepted and, where necessary, others substituted, provided the facts as so found constitute an offense by an accused which is punishable by the court, and provided that such action does not change the nature or identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such offense. * * *.
>
> "If the evidence fails to prove the offense charged but does prove the commission of a lesser offense necessarily included in that charged, the court may by its findings except appropriate words, etc., of the specification, and, if necessary, substitute others instead, finding the accused not guilty of the excepted matter but guilty of the substituted matter. A familiar instance is a finding of guilty of absence without leave under a charge of desertion. * * *".

When the court, after its finding of not guilty of the original Specification alleging a single offense, found accused, in effect, by exception and substitution, guilty of substituted Specification 1, it had exhausted its authority to make a further finding under the original Specification, and was not authorized to find accused guilty of a second and separate offense under the original Specification.

Moreover, the substituted Specification 2 alleges a distinct and separate transaction, of different nature and identity, and not necessarily included within, or inferable from the use of force alleged in the offense charged in the original Specification. While the substituted Specification alleges an assault and battery, the qualifying description demonstrates that it is not the kind of an assault and battery inferable from the allegation of the use of force and rape contained in the original Specification. The accused was not by the

original Specification put on notice that he would be called upon to defend himself against the type of assault alleged in th substituted Specification. It follows that the offense found under the substituted Specification 2 is not included in that charged and that the record of trial is not legally sufficient to support the finding of guilty of this Specification.

g. The Specification, Charge III, alleges that accused, on August 19, 1942, violated the provisions of paragraph 4, Appendix No. 7, Bulletin No. 1, Headquarters United States Army Forces, February 25, 1942, by driving without authority a Government motor vehicle. That paragraph provides that no officer other than a duly appointed motor transport officer is authorized to drive Government motor vehicles, and the motor transport officer only in necessary testing or inspection of vehicles.

The evidence shows that the accused secured a half-ton weapon carrier assigned to his platoon and did drive it out of Camp Hvaleyri at about 2:30 a.m., August 19, 1942, with his two Icelandic passengers, and to Reykjavik. Second Lieutenant Madill, motor officer, was the only officer in the First Battalion authorized to drive a Government motor vehicle. About August 1, accused had asked Lieutenant Madill if accused could obtain a driving license, and was told that in an emergency "you will drive". The accused testified that he thought that the situation he was in constituted an emergency. It is clear that the accused drove the vehicle without authority, and that the emergency to which Lieutenant Madill referred was one affecting the military situation and not one involving the personal social relations of accused with his guests.

5. The accused is 28 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed second lieutenant, Infantry-Reserve, from C.M.T.C., January 3, 1941; extended active duty, April 25, 1941.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Specification 1, substituted by the court under the Specification, Charge I, and of Charge I in violation of the 96th Article of War; legally insufficient to support the finding of guilty of Specification 2, substituted by the court under the Specification, Charge I; legally sufficient to

support the findings of guilty of Charge III and the Specification thereunder, and of Additional Charge I and the Specification thereunder; and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of violation of the 95th Article of War, and authorized upon conviction of violation of the 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

ℓ DEPARTMENT
ices of Supply
The Judge Advocate General
shington, D. C.

SPJGK
CM 225871

OCT 12 1942

UNITED STATES)	90TH MOTORIZED DIVISION
)	
v.)	Trial by G. C. M., convened at
)	Camp Barkeley, Texas, September
Private LLOYD R. ANGLIN)	22, 1942. Dishonorable dis-
(6957618), Company A,)	charge and confinement for twenty
359th Infantry.)	(20) years. Penitentiary.

REVIEW by the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Lloyd R. Anglin, Company "A", 359th Infantry, did at Camp Barkeley, Texas, on or about 0645, May 1, 1942, desert the service of the United States, and did remain absent in desertion until he was apprehended at Camp Carson, Colorado, on or about August 25, 1942.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about April 30, 1942, accused, in the company of Private James E. Henry, Company A, 359th Infantry, and two other soldiers, absented himself without leave from his organization at Camp Barkeley, Texas (R. 16). The morning report of Company A, 359th

Infantry, shows that he was dropped from "duty to AWOL 6:45 AM" on May 1, 1942 (R. 7). He remained absent until "picked up" by military police in the vicinity of Colorado Springs, Colorado, about August 23, 1942 (R. 20, 42; Exs. A, B).

Henry testified that upon absenting himself accused went with his companions as far as Camden, Arkansas (R. 16), and that about five days later Henry and the other two soldiers returned to Camden to join accused according to a previous agreement to return to Camp Barkeley. Accused and Henry, however, went to Eldorado, Arkansas, where they spent one night at the home of accused. Accused's wife was the only person witness saw there (R. 24). The following day accused and Henry went to Henry's home in Conway, Arkansas, and thence to Colorado Springs, Colorado, where the accused's "wife's folks were" (R. 17). They stayed in Colorado Springs for one night and then went to Gunnison, Colorado, where they secured employment for a few days on a ranch. They wore their uniforms, telling their employer that they were on furlough (R. 18, 23). After about three weeks Henry decided he would return to Camp Barkeley but accused "said that evening he wasn't coming back right then". The two parted (R. 19). Henry testified that during the entire period they were together accused never said anything that indicated he did not intend to return to the service (R. 24), said nothing about being dissatisfied, and made no plans for permanent civil employment.

Upon investigation of the charges, after having been warned by the investigating officer that he might remain silent and that whatever he said might be used against him (R. 30, 31), accused stated that when he reached his home in Eldorado, Arkansas, he visited his wife and baby. Later, at Camden, he told his erstwhile companions that he

> "wouldn't go back to camp with them as he thought they would try him for desertion on his previous absence. A Lt. Gibbons in California had told him if he ever got in trouble in the army again they would try him for his old offense".

After he and Henry arrived at Colorado Springs accused tried to see his wife's parents but they were away. The two then went to Gunnison, Colorado and worked on the ranch. When Henry left accused changed to civilian clothes, leaving his uniform at Gunnison. He returned to

Colorado Springs and then went to Colusa, California, where he again found work. About three weeks later his employer transferred him to Santa Rosa, California, where he worked about a week. He then proceeded to Anaheim, California, where he went to work for the Lockheed Aircraft Corporation as an inspector. He had had his picture and fingerprints taken upon going to work at this place and thought the authorities "might catch up with him so quit after working about three weeks". He then "started back for the army", stopping in Colorado Springs, Colorado, to see his wife who had returned to her parents' home. His wife told him she had had a miscarriage so he decided to stay for a time. He secured employment but about two weeks later his "wife's grandfather notified the military authorities" and the military police arrested him. (Ex. B)

Accused testified that he did not return to Camp Barkeley because he found his wife in "such a bad condition in Arkansas" (R. 35) and he wished to earn money and care for her. She was living with his mother and stepfather but his stepfather "had such a hate for me that it went in to her". Accused's wife worked "hopping cars for $5.00 a week and paying $2.50 for some lady to keep care of the baby" (R. 36). He did not return with Henry but told him, in substance, that he had been absent without leave before "and the way Lt. Gibbons *** in California told me, if I ever went AWOL again I would be tried for desertion" (R. 44). Before seeing her in Eldorado he had not known of his wife's condition inasmuch as she had written him that "she was in the best of health and getting along fine and I thought she was until I got home". His wife had been very ill at the birth of her baby some eight months before (R. 35). He went to Colorado Springs in the hope that he could persuade his wife's parents to take her into their home (R. 36). Upon arrival in Colorado Springs the parents were not there so he went to California in an attempt to find them (R. 37). He sent part of the money earned on his various jobs to his wife (R. 38). He left the Lockheed plant because he was afraid the military authorities would detect him from his fingerprints before he could surrender, as he intended to do (R. 38) as soon as he had made adequate provision for his wife's support (R. 41). He wore civilian clothes "to keep from being picked up" (R. 44). He was married on January 1, 1941, after his enlistment, but did not make any allotment of pay to his wife (R. 41).

4. The evidence shows that accused absented himself without leave at the place and time alleged and remained absent until apprehended at about the place and time alleged. In view of his absence for a prolonged

period, his civil employment, the great distance traveled, his statement that he feared trial for desertion and his statement that he absented himself to care for his wife for an indefinite period, there can be no doubt that he intended to desert, as found by the court.

5. 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. Confinement in a penitentiary is authorized by Article of War 42 for desertion in time of war.

Robert W. Kennedy, Judge Advocate.
James H. Baugh, Judge Advocate.
Glenn W. Hardy, Judge Advocate.

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

SPJGK
CM 225896

NOV 5 1942

UNITED STATES v. First Lieutenant PAULL B. SMYTH (0-401250), 474th School Squadron (Special), Air Corps.	GULF COAST ARMY AIR FORCES TRAINING CENTER Trial by G. C. M., convened at Enid Army Flying School, Enid, Oklahoma, August 26, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, 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. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 92nd Article of War. (Nolle Prosequi).

Specification: (Nolle Prosequi).

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

Specification 1: In that First Lieutenant Paull B. Smyth, Air Corps, 474th School Squadron (Sp), Enid Army Flying School, Enid, Oklahoma, was, at Enid, Oklahoma, on or about July 25, 1942, drunk and disorderly while in uniform in a public place, to wit, at or near North Grand Street, Enid, Oklahoma.

Specification 2: In that First Lieutenant Paull B. Smyth, Air Corps, 474th School Squadron (Sp), did, at or near Enid, Oklahoma, on or about July 25, 1942, wrongfully and unlawfully commit an assault and battery on Elizabeth E. Smith, a woman not his wife, by kissing, fondling and embracing her against her will.

Specification 3: In that First Lieutenant Paull B. Smyth, Air Corps, 474th School Squadron (Sp), did, at Enid, Oklahoma, on or about July 24, 1942, wrongfully, unlawfully and feloniously operate an automobile on a highway, to wit, Independence Street, while under the influence of intoxicating liquor.

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

Specification 1: In that First Lieutenant Paull B. Smyth, Air Corps, 474th School Squadron (Sp), was, at Enid, Oklahoma, on or about July 25, 1942, drunk and disorderly while in uniform in a public place, to wit, at or near North Grand Street, Enid, Oklahoma.

Specification 2: In that First Lieutenant Paull B. Smyth, Air Corps, 474th School Squadron (Sp), did, at or near Enid, Oklahoma, on or about July 25, 1942, wrongfully and unlawfully commit an assault and battery on Elizabeth E. Smith, a woman not his wife, by kissing, fondling and embracing her against her will.

Specification 3: In that First Lieutenant Paull B. Smyth, Air Corps, 474th School Squadron (Sp), did, at Enid, Oklahoma, on or about July 24, 1942, wrongfully, unlawfully and feloniously operate an automobile on a highway, to wit, Independence Street, while under the influence of intoxicating liquor.

A nolle prosequi was entered with respect to Charge I and its Specification. He pleaded not guilty to and was found guilty of Charges II and III and their Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Charge I and its Specification, to which a nolle prosequi was entered, alleged rape of Mrs. Elizabeth Smith, in violation of Article of War 92.

4. The evidence shows that on the evening of July 24, 1942, approximately between the hours of 6 and 8 and 9:30 and 11:30, accused was at the officers' club of the Enid Army Flying School, Enid, Oklahoma, in the company of Second Lieutenant Thomas Eugene Turner, Air Corps, and other officers (R. 10). The intervening period was spent in Enid where accused and Lieutenant Turner had dinner (R. 17, 18). In the time spent at the officers' club before dinner accused had about three or four drinks of whiskey (R. 13, 18, 86) and at the club after dinner he drank about the same amount (R. 86). While at dinner accused had one bottle of beer (R. 86). At about 11:30 p.m., accused left the officers' club in his car accompanied by Lieutenant Turner and drove into Enid (R. 10). Lieutenant Turner testified that at this time accused appeared to be "definitely drunk". He drove at what witness considered excessive speed (R. 11) - "over the state limit" (R. 20), his "judgment" seemed to be "poor" (R. 11), and he drove "more or less in the center of the road" (R. 21) and passed too close to several other cars (R. 13, 21). Upon arrival in Enid he slowed down (R. 11). Asked concerning accused's driving on Independence Street in Enid, Lieutenant Turner testified:

> "His actions on Independence street, or any street after we got into town, off of the highway, would not justify my saying that he was under the influence of liquor; but, however, if he was on the highway, he would have to have been in town — the few minutes that it took to get into town could not make any difference as to his condition" (R. 12).

After arrival in Enid accused and Lieutenant Turner parted (R. 12, 13).

A few minutes after leaving Lieutenant Turner, at about 12:10 a.m., July 25, accused stopped his car in the vicinity of the intersection of Broadway and Monroe Streets in Enid and accosted Mrs. Elizabeth Alluwe Smith who was walking along Broadway (R. 22, 40). Accused was in uniform (R. 41, 43). Mrs. Smith had never seen him before (R. 42). She was a divorcee, 43 years of age and the mother of eleven children, two of whom were dead (R. 23). On July 24, from about 8 a.m., to midnight, she had been in attendance at a vocational "National Defense School" in Enid and, when accosted by accused, was walking toward her home (R. 24). She testified that when accused spoke to her he suggested that he would take her home and that she replied, "Sir, I can very well walk home by myself", that accused, who had alighted, took her by the arm and led her

to his car, pushed her into the car (R. 25) and climbed into the car over her (R. 57).

Mrs. Smith further testified that accused assured her that he was her "defender". He asked for her home address and she gave it to him. They proceeded in the direction of her home for a time, engaging in some conversation about her vocational work. Accused drove past a street intersection at which he should have turned. She protested and accused replied, "Oh, I will just drive around a little bit; then I will take you home" (R. 25). He identified himself as "P. B. Ham" and asked witness to call him "P. B." (R. 27). Witness became alarmed and made a further protest, whereat accused put his arm around her neck, drew her toward him and held and kissed her - "one of those old slobbery kisses" (R. 26). Witness smelled liquor on the breath of accused and reached the conclusion that he was drunk (R. 26, 44). She continued to protest and again asked him to take her home. He said to her, "I won't harm you if you relax, but if you don't relax I will hurt you". She seized the wheel of the car and turned it part way, whereupon accused straightened out the car and said, "Now, you son-of-a-bitch, you better not do that no more" (R. 26). She was frightened (R. 57), again protested (R. 26) and "wiggled and struggled" but accused held her (R. 27). Realizing accused was drunk, not wishing to antagonize him for fear of his hurting her, and thinking she could divert him, she tried to pull his watch from his wrist. He told her harshly, "You son-of-a-bitch, you leave that bracelet watch alone — that is one thing you will leave alone" (R. 27). She released her hold upon the watch (R. 50). They proceeded further and onto a "dirt road" which was a continuation of North Grand Street of Enid. Witness "wiggled just a little bit harder" and sounded the horn of the car. Accused said, "Don't do that again; it will be too bad for you if you do", told her to "relax" and added, "Now, if you don't behave yourself, I am going to stop this car and I am really going to fuck you" (R. 27). They continued along the road to a spot where there were some trees of a "bushy type". Here accused drew to the left side of the road and stopped (R. 28).

Mrs. Smith further testified that when the car stopped accused "put his other arm around me", and opened her dress (R. 28). Witness renewed her protests, asserted that she was "not that kind of a woman" and urged accused to take her home. Accused replied, "Oh,

just relax, and I will be through in five minutes and I will let you go and I will take you back home". She testified that thereupon,

> "he took my breast out, of course, and I tried to — I used all of the strength I had then to resist him, and he says, 'If you will resist me, I will tear the clothes off of you', and he did; he tore my dress in the back, and he took my pants and he just tore them to pieces" (R. 28).

He also tore her brassiere (R. 28). He put his hand beneath her "dress and he used it". Accused pushed her over to a partially prone position on the seat and took a position "above her". She continued "wiggling and trying to resist" and accused took her by the calves of her legs and pulled her out of the car onto the ground and "threw himself on top" of her and unbuttoned his trousers (R. 29). Witness' testimony as to what then occurred was excluded by the court (R. 29, 30).

After the occurrence described the two got into the car. Mrs. Smith threatened to report the matter to the police. Accused drove away for a short distance but turned about and returned to the scene, stating that he had lost his watch and that it must be found before they returned. Both searched along the road for the watch but it was not found. Accused charged Mrs. Smith with having taken it. She denied the accusation and handed him her pocketbook which he searched, kept (R. 30) and refused to return (R. 31). Accused again started to drive away but again returned to the scene and the two renewed the search (R. 31). During part of the search the two walked arm in arm (R. 52). Accused finally showed signs of exhaustion and, at Mrs. Smith's suggestion, he got in the back seat of the car. Mrs. Smith joined him and accused soon fell asleep (R. 31, 32, 50, 51). Mrs. Smith then left the car and walked to the paved road where a truck driver gave her a ride into Enid (R. 32). The truck driver testified that she was apparently calm and did not mention the assault (R. 73, 76). She went to the police station, however, and made a complaint (R. 32, 64). Upon her arrival at the station it was observed that her dress was badly torn. She was not hysterical and appeared to be calm (R. 64, 65).

A police matron was called to the police station at about 3:45 a.m., July 25, and there examined Mrs. Smith. She found,

> "Mrs. Smith's dress was unbuttoned, except one button. It was torn on the shoulder - left shoulder —, and in the back. (Indicating). It was rumpled. Her hands were trembling as she told me what had happened; and I asked to see her under-clothes, and I found her underwear torn; found her legs bruised red, and her legs trembled with either fright or exhaustion, or both. She had a bad bruise here (indicating) on the muscle of her left arm. Her left elbow was — it was an abrasion — just the skin was scuffed; and here (indicating) above her elbow was welts — looked to be the welts of three fingers there — from a hard lick or a tight hold; and the blood was to the surface in those three welts.
>
> * * * * * *
>
> "The insides of her legs were red — from bruises. She was not in a hysterical mood, but in a very calm mood, but yet very trembly, and seemed exhausted" (R. 60).

A strap on her brassiere was broken (R. 60). A medical officer examined Mrs. Smith on July 25 and found her to have a small bruised and discolored area on the upper part of her left arm, superficial scratches on the upper part of her back and some minor abrasions on the posterior surfaces of her elbows (R. 69).

About 3:30 a.m., July 25, police officers went to the vicinity of the scene of the assault as described by Mrs. Smith and there found accused asleep in his car (R. 66-68) and apparently drunk. He was taken to the police station (R. 67). There it was observed that his shirt was dirty, soiled and wrinkled and two buttons were missing. His eyes were red (R. 64) and "drowsy". He spoke rationally but "thick tongued" (R. 61). A police officer testified that accused was "soggy; he was just getting off of a drunk, and he was still stupid" (R. 64).

Accused testified that he is married and that he lived with his wife in Enid, Oklahoma, until the "time of this alleged offense" (R. 83). While Lieutenant Turner was with him he drove on the right side of the road at about 40 miles an hour, did not have any collisions, did not run up on any sidewalk, did not strike any pedestrian and did not narrowly miss collisions with any pedestrians or automobiles (R. 75, 76, 80). He first saw Mrs. Smith on the corner of Broadway and Independence Streets, pulled alongside the curb and asked her if she would "like to have a lift". She came up to the car, whereupon he opened the door without alighting

and she got in (R. 76). When he put his arm around her and drew her toward him she offered no resistance and "moved in close" (R. 78). She commented that he was not taking her toward her home and he "passed it off" (R. 79). She did not try to get his watch while the car was moving and did not seize the wheel at this time (R. 79). When he stopped he kissed Mrs. Smith a few times and "played around with her breast for a little while, and attempted to get underneath her dress". She offered no resistance whatever. Accused testified that,

> "A time or two she did say, 'No, no', but they were very weak and there wasn't any emphasis to them, and I didn't think she meant them" (R. 80).

She did not tell him she was a mother and did not identify herself (R. 80). Accused did not pull Mrs. Smith from the car by her legs (R. 85). They remained where the car was stopped for about 45 minutes or an hour (R. 81). Accused did not know what caused the scratches and bruises on Mrs. Smith's body (R. 84) but scratches on her back might have been caused by stubble alongside the road (R. 87, 88). He caught his shirt on the door handle of the car in getting out and tore the buttons off (R. 89). Mrs. Smith helped accused search for his watch, the two walking with their arms around each other. When they got in the back seat he put his head on her shoulder and went to sleep (R. 82). He was, during the evening, under the "influence of liquor to a certain extent" (R. 92).

5. The evidence leaves no doubt that accused was drunk, in uniform, while in and near Enid, Oklahoma, on the night of July 24-25, 1942.

It is undisputed that at the place and time alleged in Specification 2, Charge II, and in Specification 2, Charge III, accused, while drunk, kissed, fondled and embraced Mrs. Elizabeth Alluwe Smith, a woman not his wife. Accused asserted, in effect, that the woman's resistance to his advances was so slight that he believed and had the right to believe that she intended to and did consent to his acts. She testified, on the other hand, that she resisted him to the extent of her ability, that she did not consent to his acts, and that the acts were committed against her will. All of the circumstances of the case, including the woman's physical condition and the condition of her clothing following the incident, support her testimony in this

regard. Upon the entire record there can be no reasonable doubt that accused's acts as described in the Specification were wrongful and unlawful and amounted to an assault and battery, as charged.

Mrs. Smith testified that in addition to kissing, fondling and embracing her, accused held her with his hands and arms, forced her to a semi-prone position on the seat of the car, dragged her from the car by her legs and threw himself upon her. Accused expressly denied dragging the woman from the car and tacitly denied any other violence, but, again, the circumstances convincingly support the woman's testimony. It is thus proved beyond reasonable doubt that at the place and time alleged in Specification 1, Charge II, and Specification 1, Charge III, accused was disorderly, as well as drunk, while in uniform. It is alleged in these Specifications that the wrongful acts occurred in a "public place, to-wit, at or near North Grand Street, Enid, Oklahoma" (underscoring supplied). The evidence shows that substantially all the violence occurred in or near the car while it was parked on a dirt road which was an extension of North Grand Street of Enid. There is no proof that any person other than the two participants observed the occurrence or that the roadway was a public place in the sense that the public was present. The record is not legally sufficient to support that part of the findings of guilty of these Specifications involving the words, "in a public place".

Accused's drunkenness was not gross but his disorderly conduct and his assault upon the woman, as above described, were characterized by such indecency and lawlessness as to mark him as lacking the moral standards expected of an officer. His conduct must be considered as unbecoming an officer and gentleman and as violative of Article of War 95 (Specifications 1 and 2, Charge II), as well as violative of Article of War 96 (Specifications 1 and 2, Charge III). The Specifications alleging drunkenness and disorderly conduct and assault and battery, as laid under Article of War 95, are identical with the corresponding Specifications laid under Article of War 96. Accused is punishable for the acts only in their most serious aspect (par. 80a, M.C.M.).

With respect to Specification 3, Charge II, and Specification 3, Charge III, the evidence shows that while under the influence of intoxicating liquor accused drove his car on Independence Street in Enid, Oklahoma, as charged. This was wrongful and unlawful, as alleged. It was not felonious under any Federal statute or under the laws of Oklahoma (sec. 93, Tit. 47, Okla. Stat., 1941), and the finding that the operation of the car was felonious must fall. Although discreditable to the

military service and violative of Article of War 96, accused's operation of the motor vehicle was not characterized by any disorders or disgraceful acts or omissions and may not properly be classified as conduct unbecoming an officer and gentleman within the purview of Article of War 95. The evidence is legally sufficient to support the finding of guilty of Specification 3, Charge III, but is legally insufficient to support the finding of guilty of Specification 3, Charge II.

6. It was alleged in Specification 2, Charge II, and in Specification 2, Charge III, that the assault was committed on "Elizabeth E. Smith". According to the proof the woman's middle name is Elizabeth Alluwe Smith. There is nothing in the record to indicate that more than one person was assaulted, and it is manifest that the woman upon whom the assault was in fact committed was the woman described in the Specifications. Accused could not have been misled. The variance is immaterial.

7. War Department records show that accused is 23 years of age. He attended Oregon State College for 3 years. After a course of instruction as a flying cadet he was commissioned a second lieutenant in the Air Corps Reserve, December 20, 1940, and was ordered to extended active duty on the following day. He was promoted to first lieutenant February 1, 1942.

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 of Charges II and III and of Specification 2 under each Charge, legally sufficient to support the finding of guilty of Specification 1 under each Charge except the words, in each case, "in a public place", legally insufficient to support the finding of guilty of Specification 3, Charge II, legally sufficient to support the finding of guilty of Specification 3, Charge III, except the words, "and feloniously", and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGH
CM 225909

OCT 22 1942

UNITED STATES	)	WEST COAST ARMY AIR FORCES TRAINING CENTER
v.	)	Trial by G.C.M., convened at Williams Field, Arizona, August 24, 25, and 26, 1942. Dismissal.
Captain CHARLES H. VEIL (0-901992), Air Corps.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

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

Specification 1: In that Captain Charles H. Veil, A.C., did, without proper leave, absent himself from his proper station at Williams Field, Arizona, from about June 11, 1942, to about June 12, 1942.

Specification 2: (Not Guilty).

Specification 3: (Not Guilty).

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

Specification 1: In that Captain Charles H. Veil, A.C., was, at Williams Field, Arizona, on or about May 14, 1942, drunk and disorderly in the Officers' Club.

Specification 2: Nolle Prosequi.

Specification 3: In that Captain Charles H. Veil, A.C., was, at Williams Field, Arizona, on or about June 7, 1942, drunk in station.

Specification 4: In that Captain Charles H. Veil, A.C., was, at Williams Field, Arizona, on or about June 17, 1942, drunk in station.

Specification 5: Nolle Prosequi.

Specification 6: (Not Guilty).

Specification 7: In that Captain Charles H. Veil, A.C., did, at Williams Field, Arizona, on or about May 7, 1942, render himself unfit for duty by the excessive use of intoxicating liquor, this to the prejudice of good order and military discipline.

Specification 8: (Not Guilty).

Specification 9: In that Captain Charles H. Veil, A.C., did, at Williams Field, Arizona, on or about May 31, 1942, render himself unfit for duty by the excessive use of intoxicating liquor, this to the prejudice of good order and military discipline.

Specification 10: (Not Guilty).

Specification 11: In that Captain Charles H. Veil, A.C., having received a lawful order from Colonel B. A. Bridget, A.C., his superior officer, to sign the Officers' Register when leaving the station on an authorized absence during duty hours, the said Colonel Bridget being in the execution of his office, did, at Williams Field, Arizona, on or about June 11, 1942, fail to obey the same.

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

Specification: (Not Guilty).

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

Specification: (Not Guilty).

CHARGE V: Violation of the 85th Article of War.

Specification 1: In that Captain Charles H. Veil, A.C., was, at Williams Field, Arizona, on or about May 8, 1942, found drunk while on duty as Squadron Engineering Officer.

Specification 2: In that Captain Charles H. Veil, A.C., was, at Williams Field, Arizona, on or about May 31, 1942, found drunk while on duty as Squadron Engineering Officer.

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

Specification: In that Captain Charles H. Veil, A.C., did at Williams Field, Arizona, on or about June 22, 1942, render himself unfit for duty by the excessive use of intoxicating liquor, this to the prejudice of good order and military discipline.

The accused pleaded guilty to Specification 1, Charge I, and to Specification 11, Charge II. A nolle prosequi was entered by direction of the appointing authority as to Specifications 2 and 5, Charge II, The accused pleaded not guilty to all other Specifications and to all Charges. He was found not guilty of Specifications 2 and 3, Charge I, of Specifications 6, 8, and 10, Charge II, of Charge III and its Specification, and of Charge IV and its Specification. He was found guilty of Specification 1, Charge I and of Charge I, of Specifications 3, 4, 7, 9, and 11, Charge II and of Charge II, of Specifications 1 and 2, Charge V and of Charge V, and of the Additional Charge and its Specification. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Charge V and Specifications 1 and 2 thereunder, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The accused was found guilty under Charge II, Specification 1, of being drunk in the Officers' Club on May 14, 1942, and under Specifications 3 and 4, of being drunk in station on June 7, and June 17, 1942, respectively.

a. The evidence in support of the finding of guilty under Specification 1, Charge II, shows that the Headquarters alert officer, in response to a call from the post operator, entered the Officers' Club at about 11:15 p.m. on May 14, 1942, and found the accused and two other officers there. The three officers were very boisterous and appeared to be pouring their own drinks. The officers were making remarks about the bartender and he appeared to be very disturbed and tears were in his eyes. The alert of-

ficer told them that it was the desire of the commanding officer that the club be cleared at 11 o'clock. The accused retorted with the question "Oh, who the Hell do you think you are?" The alert officer told the three officers that he was Headquarters alert officer and that he would give them three minutes to leave the club - that he was going to Post Headquarters and that if they were not gone when he returned he would call the guard and have them put in the guardhouse. The alert officer left and when he returned the accused and the two other officers had left the club and were "out in the road". The accused was described as having bloodshot eyes, a flushed face, slurred speech, and as being unsteady. In the opinion of the alert officer the accused was drunk (R. 24-28).

The evidence in support of the finding of guilty under Specification 3, shows that on Sunday afternoon of June 7, 1942, the accused was lying on a bed in Lieutenant Hollyfield's room. He awakened, got up, stumbled around, banged himself against the door as he passed through, and entered Lieutenant Nelson's room where a group of officers were assembled. The accused had a drunken appearance. His uniform was wrinkled, his hair uncombed, his walk was decidedly uncoordinated, he talked with a thick tongue, and his conversation did not make sense. In the opinion of the three officers present the accused was drunk. The general conversation in the room ceased and one at a time the officers left the room and went to Captain Rainen's room. The accused followed the group. He entered Captain Rainen's room and then stepped out, whereupon Captain Rainen closed the door and locked it (R. 36-42, 43-48, 48-52).

The evidence in support of the finding of guilty under Specification 4 shows that on June 16, 1942, the accused entered the Bachelor Officers' Mess at approximately 12:30 p.m. As the accused entered his gait was unsteady. The accused seated himself near Lieutenant Sheffield and Major Ulery. He sat down rather uneasily and accepted only a portion of potatoes and salad, and made the remark that he was feeling "somewhat under the weather". His breath had the distinct odor of liquor. His face was flushed, he handled his plate unsteadily, and appeared to be drunk. After a few bites of food the accused excused himself and left the room (R. 53-56).

b. The accused testified concerning Specification 1, Charge II, that on the evening of May 14, 1942, he was in the Bachelor Officers' Mess for about an hour. During that time the accused drank a couple of bottles of beer. At about 11 o'clock the bartender announced that he was closing the bar. The accused then asked him for a cup of coffee.

While the bartender was in the kitchen preparing the coffee, Captain Von Tunglen went in and threatened him with a cooking implement. The accused, with the aid of others, persuaded Captain Von Tunglen to desist from his attack. Thereafter the bartender thanked the accused for his assistance. When Captain Von Tunglen refused to leave the Officers' Mess the bartender called the officer of the day or the alert officer. The bartender then told the accused that since he had had no connection with the disturbance he should leave in order not to be implicated in it. The accused remained a few minutes and then left the place for the evening. The accused had no recollection of seeing either Lieutenant Ullstrom or Lieutenant Taylor on that evening (R. 178-180).

In connection with Specification 3, Charge II, the accused testified that on June 7, 1942, he was in the hospital the entire day, that he did not have any clothes there, that he could not have left the hospital on that day if he had wanted to, and that he was not in the Battalion Officers' Quarters on that day (R. 180-181).

As to Specification 4, the accused testified that he did not know Lieutenant Sheffield until the time of the investigation of this case and that he did not know Major Ulrey. He testified that he did not remember sitting opposite either of these officers at lunch on June 16. The accused further testified that he did not drink during the day and that he thought he had not had a drink prior to lunch on June 16 (R. 181-182).

c. The findings of guilty of drunkenness as alleged in Specifications 1, 3, and 4, Charge II, are clearly supported by the evidence.

As to Specification 1, the Headquarters alert officer testified that the accused, in company with two other officers, was drunk in the Officers' Club after the closing hour of the club on May 14, 1942. In support of his opinion that the accused was drunk, the witness described the accused as being very boisterous, as having bloodshot eyes, flushed face, slurred speech, and as being unsteady.

In support of Specification 3, three officers testified that in their opinion the accused was drunk in station on June 7, 1942. These witnesses described the accused as entering Lieutenant Nelson's room in a drunken manner, with his uniform wrinkled, his hair uncombed, his walk uncoordinated, and talking in a manner that did not make sense. Although there is evidence that the accused was a patient in the local hospital for the day on the date of this alleged drunkenness, this evidence does not preclude the reasonable possibility that the accused was

also present and drunk in the officers' quarters. In view of the clarity of the testimony of the three officers, there can be no reasonable doubt that the accused was drunk as alleged.

The evidence as to Specification 4, shows that the accused entered the officers' mess in a drunken condition. Two officers testified that in their opinion the accused was drunk, that the breath of the accused had the distinct odor of liquor, that he handled his plate unsteadily, and that his face was flushed.

The drunken condition of the accused on the three occasions described was clearly conduct "of a nature to bring discredit upon the military service" within the intent and meaning of the 96th Article of War (M.C.M., 1928, par. 152 a).

4. The accused was found guilty under Charge II, Specifications 7 and 9, and under the Additional Charge and the Specification thereunder, of rendering himself unfit for duty by the excessive use of intoxicating liquor on May 7, May 31, and June 22, 1942, respectively.

a. The evidence in support of Specification 7 shows that the accused was required to be on duty on May 8, 1942, from 6 a.m. to 6 p.m. On that day, in the opinion of the commanding officer of the 536th School Squadron, the accused was not fit for duty. The accused was described as having a flushed face, bloodshot eyes, and appearing to be under the influence of liquor. During the afternoon of May 8 the accused was so argumentive and repetitious in his conversation at a meeting of officers that Colonel Grills asked the accused to go with him to the hospital. The accused was examined at about 5:30 p.m. by a medical officer for sobriety. This officer testified that in his opinion the accused was at that time suffering from acute alcoholism. He described the accused as having staring eyes, a face flushed more than ordinary, and as staggering when he was required to walk a straight line. The accused was unable to balance on one foot with his eyes closed and did not appear to realize that he was being given a sobriety test. In fact, the accused, during the examination, appeared to have "grandiose ideas" and to be "feeling kind of high". In the opinion of the medical officer the accused was unfit for duty at the time he was examined. The accused admitted to the medical officer that he had had a drink at 10 o'clock the night before but asserted that he had not taken a drink since that time. The medical officer stated that in his opinion a person who had built up a tolerance for intoxicating liquor would require a longer period to reach a state of acute alcoholism than a person who only requires a small amount of liquor to cause acute alcoholism (R. 65-92, Ex. C).

The evidence in support of Specification 9 shows that Sunday, May 31, was a day of duty for the accused. During the morning of that day Colonel Bridget, the commanding officer at Williams Field, in response to a request from the accused's squadron commander, entered the office used by the accused. The accused was lying on a bed with his face covered by a newspaper. Colonel Bridget engaged in a conversation with the two officers who were accompanying him, but the accused did not awaken. Colonel Bridget finally awakened the accused by calling him by name. Colonel Bridget then told the accused that he (Colonel Bridget) thought that the accused was not in any condition to perform work as an engineering officer and directed him to go to the hospital for observation. In the opinion of Colonel Bridget the accused was drunk (R. 100-107, Ex. 7).

The medical officer who examined the accused at the hospital testified that the accused came to the hospital on May 31, 1942, at about 10:30 a.m. This officer described the accused as being very nervous, having high blood pressure, and as looking like a sick man and one that "had a hangover". When asked whether he had been drinking, the accused replied that he had not been drinking on that day but that he had a drink on the previous evening. The accused passed a sobriety test and was left in the hospital until June 8. On June 8, after a final examination, the condition of the accused was diagnosed as chronic alcoholism (R. 112-120).

Under cross-examination the medical officer admitted that he had not examined a previous entry in the hospital record of April 25, 1942, which states, "diarrhea, was better, but feels worse all around, chills, fever, had malaria 8 years ago, has had several exacerbations continually, feels like he did when he had dysentary in Mexico 5 years ago". The medical witness testified that although he did not examine the accused for all the conditions which might have contributed to his illness, he was nevertheless of the opinion that his diagnosis of "chronic alcoholism" was correct (R. 127-135).

The evidence in support of the findings of guilty of the Specification under the Additional Charge shows that on June 22, 1942, the accused was examined by First Lieutenant Anderson at the Station Hospital, Williams Field, Arizona, and the condition of the accused was diagnosed as "acute gastritis, hypertrophic, secondary to chronic alcoholism". This medical witness explained that he arrived at his diagnosis from the previous hospital record of the accused, from symptoms at the time the accused was admitted, and from laboratory findings. The accused was admitted to the hospital on the morning of June 22, at which time he was not fit to perform any military duties. On cross-examination the witness stated that

although Lieutenant Katzenbach had at one time diagnosed the condition of the accused as gastritis, acute, severe, dietetic, he had also made the final diagnosis of chronic alcoholism (R. 144-151).

b. Although the accused did not testify as to the allegation of Specification 7 and the Specification under the Additional Charge, he testified as to the allegation of Specification 9 that at about 9:30 a.m. or 10 a.m. he entered his office and worked for a time on a letter requesting a transfer. He then lay down to rest and because the flies were bad he placed a newspaper over his face. While he was in this position Lieutenant Deckert came in for a parachute. The accused uncovered his face to see him. After getting up and looking out on the field he again lay down and covered his eyes with the paper. There was constant walking near his office and he did not hear Colonel Bridget, Captain Hill, and Captain Wilson when they entered his office. Colonel Bridget asked the accused by whose authority he was lying down while on duty. The accused replied, "I don't know, it was just done, that is all. I have been out on the line all morning where it is pretty hot and the light is very intense". The accused was excited and very angry. Colonel Bridget asked the accused if he felt well and he told him that he did. Colonel Bridget then said, "I don't believe you are in good condition", and ordered the accused to go to the hospital. There was some brief delay on the part of the accused while getting a few things, and Colonel Bridget told the accused that he was to go to the hospital immediately. The accused testified that he had not had a drink that day or the night before, and he was not drunk (R. 196-197).

Concerning his past military experience, the accused testified that he joined the French foreign legion in May 1917, as a second class soldier, that later he was trained as a pilot, that in November 1917 he became a member of the Lafayette Escadrille, that he destroyed six enemy planes, that he was decorated with the Lafayette Escardille Medal of Honor, Medaille Militaire, and the Croix de Guerre with three palms, that in October 1918 he transferred to the United States Air Service with the rank of first lieutenant, that he was recommended for the Distinguished Service Cross but did not receive it, that he was hospitalized because of injuries to his teeth and ribs, that he was honorably discharged in September 1919, that he joined the Polish Army as a flying officer with the rank of a captain, that he destroyed eight planes in the Polish Campaign and was decorated with the Order of Merit, that in either 1921, or 1922, he joined the Turkish Army with the rank of a major and destroyed four planes in the Greek-Turkish War, for which acts he was decorated with the Star and Crescent, that in 1923 he left the Turkish Army, and that in January or the first of February 1942 he volunteered for service with the American Armed Forces (R. 206-210).

c. The findings of guilty of rendering himself unfit for duty by the excessive use of intoxicating liquor on May 7 and 31, and June 22, 1942, as alleged in Specifications 7 and 9, Charge II, and in the Specification of the Additional Charge, are clearly supported by the evidence.

As to Specification 7, the evidence shows that the accused was present on May 8, 1942, at a conference of officers in an argumentive mood, with flushed face, bloodshot eyes, and in such a condition as to be unfit for duty.

The evidence in support of Specification 9 shows that the accused on May 31, 1942, was found asleep in a bed in his office with a newspaper over his face. When examined by a medical officer the accused's condition was diagnosed as chronic alcoholism.

The Specification under the Additional Charge is sustained by evidence showing that the accused was examined by a medical officer on the morning of June 22, 1942, and found unfit for duty by reason of "acute gastritis hypertrophic, secondary to chronic alcoholism".

The conduct of the accused which resulted in his unfitness for duty on the three occasions alleged was clearly "to the prejudice of good order and military discipline" within the intent and meaning of the 96th Article of War. The manual states that "Instances of such disorders and neglects in the case of officers are * * * rendering himself unfit for duty by excessive use of intoxicants or drugs; * * *" (M.C.M., 1928, par. 152 a).

5. The accused pleaded guilty to absence without leave for one day as alleged in Specification 1, Charge I, but not guilty of Charge I. The plea of guilty was, however, a clear admission of the facts constituting the alleged offense, and the court was warranted, therefore, in finding the accused guilty of a violation of the 61st Article of War as set forth in Charge I.

6. The accused is 46 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed first lieutenant, Air Service, to rank from August 26, 1918; honorably discharged September 19, 1919; appointed captain, Army of the United States, for duty with the Army Air Forces, April 2, 1942; active duty, April 17, 1942.

7. The court was legally constituted. 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 of guilty and the sentence. Dismissal is authorized upon conviction of violation of the 61st and 96th Articles of War.

Curtis S. Hill Jr., Judge Advocate.

B. Brassibbesson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

SPJGH
CM 225909

1st Ind.

War Department, J.A.G.O., NOV - 5 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Charles H. Veil (0-901992), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the approved findings of guilty and legally sufficient to support the sentence and to warrant confirmation of the sentence.

Separately considered, each offense is of a relatively minor nature. The total effect, however, of these offenses shows a serious breach of duty and discipline. I recommend, therefore, that the sentence of dismissal be confirmed and ordered executed.

3. Inclosed herewith are the draft of a letter, for your signature, transmitting the record to the President for his action, and a form of Executive action confirming the sentence and directing that the sentence be carried into execution.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

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

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

CM 226034

OCT 9 1942

UNITED STATES	)	29th INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Blanding, Florida, August 28, 1942. Dishonorable discharge and confinement for three (3) years. Federal Reformatory, Chillicothe, Ohio.
Private CHARLES F. BROWN (6888025), Battery A, 110th Field Artillery Battalion.	)	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, 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 found guilty of assault with intent to do bodily harm in violation of Article of War 93 (Charge I), and of willful disobedience of the lawful command of his superior officer in violation of Article of War 64 (Charge II). He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial under Article of War 50½.

3. Confinement in a Federal reformatory is not authorized in this case. Paragraph 90 b, Manual for Courts-Martial, provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated."

War Department letter dated February 26, 1941 (AG 253 (2-6-41)E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorized confinement in a Federal reforma-

tory only when confinement in a penitentiary is authorized by law (CM 220093, Unckel).

Penitentiary confinement is not authorized by Article of War 42 for assault with intent to do bodily harm nor for willful disobedience, of which this accused was convicted. Neither offense is punishable by confinement in a penitentiary for more than one year by some statute of the United States of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by law of the District of Columbia.

4. There is no maximum limit of punishment prescribed by paragraph 104 c, Manual for Courts-Martial, 1928, for the offense of willful disobedience of a lawful order of a superior officer in violation of Article of War 64, committed in time of war.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years in a place other than a penitentiary, Federal correctional institution, or reformatory.

Lewis S. Hill Jr., Judge Advocate.

Chas. L. Bussey, Judge Advocate.

Abna E. Lyscomb, Judge Advocate.

vol 14 Army JAG Bd. Rev.

vol 14 Army JAG Bd. Rev.

TITLE

DATE	BORROWER'S NAME	EXT.