OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
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Judge Advocate General's Department

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

SPJGH - CM 294880

13 DEC 1945

UNITED STATES v. Second Lieutenant Robert C. Rives, Jr. (0-680715), Air Corps.	FOURTH AIR FORCE SAN FRANCISCO, CALIFORNIA Trial by G.C.M., convened at Mountain Home Army Air Field, Mountain Home, Idaho, Dismissal and confinement for one year.

OPINION of the BOARD OF REVIEW
TAPPY, BECK, STERN and TREVETHAN, Judge Advocates.

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

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

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

Specification: In that Second Lieutenant Robert C. Rives, Junior, Air Corps, Squadron A, 238th Army Air Forces Base Unit, did, at Boise, Idaho, on or about 15 February 1945, with intent to defraud, wrongfully and unlawfully make and utter to the Logsdon Motor Company, a certain check in words and figures as follows:

American Trust Company, California and Filmore Street Branch, San Francisco, California

February 15, 1945

Pay to the Order of Logsdon Motor Company $100.00

One hundred and 00/100- - - - -Dollars

No._____ /s/ Robert C. Rives, Jr.
Counter Check.

and by means thereof, did fraudulently obtain from R.M. Logsdon, doing business as the Logsdon Motor Company,

Boise, Idaho, labor, material and services of the agreed value of $100.00, then well knowing that he did not have and not intending that he should have sufficient funds in the American Trust Company, California and Filmore Street Branch, San Francisco, California, for the payment of said check.

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

Specification 1: In that Second Lieutenant Robert C. Rives, Junior, * * *, did, at Los Angeles, California, on or about 25 February 1944, present for approval and payment, a claim against the United States by presenting to L. L. Gocker, Colonel, Finance Department, Los Angeles, California, an officer of the United States, duly authorized to approve and pay such claims, in the amount of $246.80, for services alleged to have been rendered to the United States by Second Lieutenant Robert C. Rives, Junior, for the period of 1 January 1944 to 31 January 1944, which claim was false and fraudulent, in that Second Lieutenant Robert C. Rives, Junior, had previously rendered a voucher for services performed for the same period of time and had received payment thereon, which claim presented to said L. L. Gocker, Colonel, Finance Department, was then and there known by the said Second Lieutenant Robert C. Rives, Junior, to be false and fraudulent.

Specification 2: In that Second Lieutenant Robert C. Rives, Junior, Air Corps, Squadron A, 238th Army Air Forces Base Unit, did, at Casper, Wyoming, on or about 7 March 1944, present for approval and payment, a claim against the United States by presenting to C. J. Barnes, Major, Finance Department, Casper, Wyoming, an officer of the United States, duly authorized to approve and pay such claims, in the amount of $210.00 for services alleged to have been rendered to the United States by Second Lieutenant Robert C. Rives, Junior, for the period 1 February 1944 to 29 February 1944, which claim was false and fraudulent, in that Second Lieutenant Robert C. Rives, Junior, had previously rendered a voucher for services performed for the same period of time and had received payment thereon, which claim presented to said C. J. Barnes, Major, Finance Department, was then and there known by the said Second Lieutenant Robert C. Rives, Junior, to be false and fraudulent.

Specification 3: In that Second Lieutenant Robert C. Rives, Junior, * * *, did, at San Francisco, California, on or about 2 June 1944, present for approval and payment a claim against the United States by presenting to R. H. Bradshaw, Colonel, Finance Department, San Francisco, California, an officer of the United States, duly authorized to approve and pay such claims, in the amount of $111.80 for services alleged to have been rendered to the United States by Second Lieutenant Robert C. Rives, Junior, for the period of 1 May 1944 to 31 May 1944, which claim was false and fraudulent, in that Second Lieutenant Robert C. Rives, Junior, had previously rendered a voucher for services performed for the same period of time and had received payment thereon, which claim presented to said R. H. Bradshaw, Colonel, Finance Department, was then and there known by the said Second Lieutenant Robert C. Rives, Junior, to be false and fraudulent.

Specification 4: In that Second Lieutenant Robert C. Rives, Junior, * * *, did, at Los Angeles, California, on or about 2 June 1944, present for approval and payment a claim against the United States by presenting to L. L. Gocker, Colonel, Finance Department, Los Angeles, California, an officer of the United States, duly authorized to approve and pay such claims, in the amount of $321.80 for services alleged to have been rendered to the United States by Second Lieutenant Robert C. Rives, Junior, for the period of 1 May 1944 to 31 May 1944, which claim was false and fraudulent, in that Second Lieutenant Robert C. Rives, Junior, had previously rendered a voucher for services performed for the same period of time and had received payment thereon, which claim presented to said L. L. Gocker, Colonel, Finance Department, was then and there known by the said Second Lieutenant Robert C. Rives, Junior, to be false and fraudulent.

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

3. The evidence shows that accused had his damaged automobile repaired by the Logsdon Motor Company, Boise, Idaho. The repair bill was $497.18, of which amount all but $100.00 was covered by a policy of insurance. The Logsdon Company agreed to look to the insurance company for $397.18 of the repair bill. On 15 February 1945 accused made and

gave to the Logsdon Company a check for $100.00, drawn on the American Trust Company, California and Filmore Street Branch, in payment of the repair bill less the amount covered by the insurance (R. 7-13; Pros. Ex. 1). The check was returned unpaid to the Logsdon Company by the bank and the bank debited the Logsdon Company account with $100.00, the amount of the check (R. 10, 13). The check was introduced in evidence (Pros. Ex. 2). On 15 February 1945 accused's account in the bank on which the check was drawn was overdrawn in the amount of $9.57 and during the period, 1 November 1944 to 15 February 1945, the largest balance to accused's credit in that bank was $46.52 (Pros. Ex. 3).

On 1 February 1944 accused presented to Captain Q. D. Howell, Finance Department, a voucher for $246.80, covering pay and allowances for the month of January 1944 and received therefor a check which check was indorsed by accused and paid by the Treasurer of the United States. (Pros. Exs. 4, 5). On 25 February 1944 accused presented a voucher to Colonel L. L. Gocker, Finance Department, for $246.80 covering pay and allowances for the month of January 1944 and received therefor $246.80 in cash (Pros. Ex. 6).

On 31 May 1944 accused presented to Major C. J. Barnes, Finance Department, a voucher covering pay and allowances for the month of May 1944 in the amount of $328.40, less a partial payment of $200 and a deduction for insurance of $6.60 and received therefor a check in the amount of $121.80 which accused indorsed and which was paid by the Treasurer of the United States (Pros. Exs. 10, 11). On 2 June 1944 accused presented to Colonel R. H. Bradshaw, Finance Department, a voucher covering pay and allowances for the month of May 1944 in the amount of $328.40, less a partial payment of $210.00 and a deduction for insurance of $6.60 and received therefor cash in the amount of $111.80 (Pros. Ex. 12). On the same day accused presented to Colonel L. L. Gocker a voucher covering pay and allowances for the same month (May 1944) in the amount of $321.80 and received therefor $321.80 in cash (Pros. Ex. 13).

On 25 February 1944 accused presented to Colonel Gocker a voucher in the amount of $210.00 covering a partial payment and received that amount in cash therefor (Pros. Ex. 7). On 7 March 1944 accused presented to Major Barnes a voucher for pay and allowances for the month of February 1944 in the amount of $244.00 and received therefor a check in that amount which check was indorsed by accused and paid by the Treasurer of the United States (Pros. Exs. 8, 9).

On the dates the vouchers were presented to them, Colonel Gocker, Colonel Bradshaw, Major Barnes, and Captain Howell were officers of the United States authorized to approve and pay claims presented by military personnel for services rendered (Pros. Ex. 15-19).

4. Accused, having been fully informed of his rights, elected to make an unsworn statement to the court through the defense counsel. In

this statement accused said that he had been under considerable mental strain due to the death of his father, the illness of his mother, marital difficulties, the death of an infant son, and his own physical condition (R. 31-33; Def. Exs. B, G). Accused had been suffering from a rectal condition and had undergone four operations therefor (R. 35; Def. Exs. C, D, E, F).

In a pre-trial statement by accused received in evidence he claimed that restitution of the monies had been made (Pros. Ex. 14). The testimony of one witness tended to corroborate this claim (R. 29). Prosecution's exhibit 13 showed that $321.80 had been repaid.

5. The evidence clearly shows that accused at the time and place alleged in the Specification of Charge I made and uttered to the Logsdon Motor Company a check for $100 and that the check was dishonored by the bank on which it was drawn. At no time during a period of two and a half months prior to the making and uttering of the check did accused have sufficient funds in the bank to pay the check. From these facts the court was authorized to infer that accused knew that he did not have sufficient funds to his credit in the bank to pay the check and that he did not intend to have. From the facts and circumstances the court was likewise justified in finding that the making and uttering of the check was wrongful, unlawful and with intent to defraud.

The evidence further clearly shows that on the dates and at the places alleged in the Specifications of Charge II accused made false claims against the United States by presenting false vouchers to officers of the United States who were authorized to pay such vouchers and by receiving cash and checks which he indorsed in payment of those vouchers.

The evidence supporting the findings of guilty of the Specifications under Charge II consists of the introduction in evidence of copies of the fraudulent vouchers, and supporting receipts and checks signed and indorsed by accused; by the introduction of copies of vouchers showing prior valid payments to accused for the same periods covered by the fraudulent vouchers; and by evidence showing that the signatures on the copies abovementioned were those of accused. It was thus shown that after accused had presented vouchers for pay and allowances to which he was entitled he subsequently presented vouchers for pay and allowances covering periods for which he had already received payment and that he received payment for those false vouchers. The court was, therefore, justified in its findings of guilty.

There is some evidence that accused made restitution of at least a part of the funds which he received as a result of presenting the false claims. Restitution, however, is not a defense but may be considered in mitigation.

Accused, prior to making the false claims, had been under considerable emotional strain due to the premature birth and subsequent death of his son and other family troubles. He was suffering from a physical condition which necessitated four operations. Despite considerable pain he continued his training. In the statement made by his counsel accused said that these troubles brought him "to a high pitch of desperation. I did not know where to turn or what to do. Things had been getting steadily more horrible for me. I was losing all the things I held dear while tied down by duty and undergoing a series of terribly painful physical and psychological experiences. Things went out of control." There is nothing in the record to indicate that accused was not responsible for his acts. On the contrary, a psychiatrist testified that accused "knows right from wrong and is not insane."

6. Records show that accused is 24 years of age and that he is divorced. He graduated from high school and attended the University of Southern California, from 1939 to 1942 but did not graduate. He enlisted in 1942 and became an aviation cadet. He was commissioned a second lieutenant on 24 May 1943.

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

Thomas N. Tobby, Judge Advocate.

Wm J Berry Jr, Judge Advocate.

Joseph J. Stern, Judge Advocate.

Robert C. Trevithan, Judge Advocate.

SPJGH - CM 294880 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JAN 1 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert C. Rives, Jr. (0-680715), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully and unlawfully making and uttering a check in the amount of $100 with intent to defraud, in violation of Article of War 96, and of presenting four false claims totalling $890.40 against the United States, in violation of Article of War 94. He was sentenced to dismissal, total forfeitures and confinement for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. After having his damaged automobile repaired, accused made and gave to the repairing company a check for $100 in part payment for the repair bill. The company agreed to look to an insurance company for the balance of the bill. On the date accused made and uttered the $100 check his account in the bank was overdrawn. For more than three months immediately preceding the making and uttering of the check, accused's bank account was never large enough to cover the check. The check was returned to the company unpaid by the bank.

During the period 25 February 1944 to 2 June 1944 accused made and presented for payment to finance officers of the United States four false vouchers and received $890.40 in payment thereof. These vouchers were for pay and allowances for periods for which accused had previously presented vouchers and received payment. Accused in a pre-trial statement stated that he had made full restitution of all money received on the false vouchers. The prosecution introduced evidence showing that restitution of $321.80 had been made.

Prior to his present difficulties, accused's record of service was without blemish. Prior to and about the time he became involved in his present difficulties accused and his wife were divorced; his infant son died; his father died; and accused underwent four operations for a rectal condition. It is apparent that accused was under considerable physical and mental strain at the time the offenses were committed.

(8)

He has made restitution of the funds obtained by reason of the false vouchers.

In view of the foregoing, I recommend that the sentence be confirmed but that the forfeitures and confinement be remitted and that the sentence, as thus modified, be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures and confinement remitted, as modified ordered executed. GCMO 21, 25 Jan 1946).

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

SPJGH - CM 294895

26 DEC 1945

UNITED STATES	44TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Chaffee, Arkansas, 23 November 1945. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private JAMES E. HATFIELD (35764854), Company F, 324th Infantry.	

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HOLDING by the BOARD OF REVIEW
TAPPY, BECK, STERN and TREVETHAN, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James E. Hatfield, Company "F", 324th Infantry, did, at Camp Chaffee, Arkansas, on or about 30 August, 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at Columbus, Ohio on or about 8 October, 1945.

Accused 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 one year. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

2. The prosecution introduced competent evidence to show that on 30 August 1945 accused absented himself without leave from his organization at Camp Chaffee, Arkansas, and remained absent until 8 October 1945 when he was confined in the post guardhouse, Fort Hayes, Ohio (R. 8; Pros. Exs. C, D). In addition to the foregoing, the prosecution introduced the depositions of certain individuals to establish that on or

about 23 September 1945 accused sought and obtained the employment he had held prior to his entry into military service, telling his employer that he had been discharged from the Army, and that on 8 October 1945 he was apprehended by military police at his place of employment. The deposition evidence further establishes that accused was dressed in civilian clothes when apprehended and that he informed the arresting policeman that he was "tired of the Army" (R. 9; Pros. Exs. E, F).

4. After his rights had been fully explained to him, accused elected to give sworn testimony in his own behalf. He testified that after return from his recuperation furlough he absented himself without leave and went home because his wife was "stepping out" with other men. After deciding to divorce her he obtained employment in order to earn sufficient funds to finance a divorce (R. 10). He denied that he told his employer that he had been discharged from the Army and he also asserted that he offered no resistance when military police came for him (R. 11).

5. Accused was tried and convicted of desertion, a capital offense in time of war (A.W. 59; Executive Order 9048, February 3, 1942). Deposition testimony is not admissible against an accused in a capital case (A.W. 25), except, however, that:

> "Under express consent of the defense made or presented in court, but not otherwise, a court may admit deposition testimony not for the defense in a capital case" (MCM, 1928, par. 119a).

When the depositions were here offered and admitted in evidence it does not appear that the defense expressly waived its objection under Article of War 25 and consented to their admission. Defense counsel merely stated that the "defense has no objection as such, but I reserve the right to object to any particular question" contained in the depositions (R. 9). Subsequently defense counsel objected to a portion of one of the depositions but his objection was overruled (R. 9).

The failure of defense counsel to object to the introduction of a deposition against an accused in a capital case does not constitute express consent to its use and a waiver of accused's rights under Article of War 25 (MTO 6543, Thacker; MCM, 1928, par. 119a). Even if a statement by defense counsel that he has no objection to the introduction of a proferred deposition should constitute something more than a failure to object, nevertheless it falls far short of constituting the express consent here requisite. In our opinion the defense can be said to have expressly consented to the introduction of a deposition against an accused in a capital case only if the defense in clear and unequivocal terms expressly agrees to waive the accused's rights under Article of War 25. Not only does the brief statement of defense counsel here fail

expressly to state that accused's rights under Article of War 25 were waived but furthermore it is not even clear that defense counsel realized that accused possessed particular rights under that Article of War. Accordingly, we are of the opinion that these depositions were improperly admitted in evidence. It thus becomes unnecessary for us to consider the further question of whether "express consent of the defense" means merely the consent of defense counsel or whether it also includes the express consent of the accused himself.

When a conviction of an accused rests upon both competent and incompetent evidence, the conviction can only be sustained if the competent evidence is of such quality and quantity as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If the incompetent evidence is eliminated from the record and the competent evidence remaining is not of such probative force as virtually to compel a finding of guilty, the finding must be disapproved (Dig. Op. JAG 1912-30, sec. 1284, p. 634; CM ETO 1693, Allen). It is not enough that the competent evidence, if standing alone in the record of trial, would have tipped the scales against accused and warranted the court's finding of guilty; the competent evidence itself must be so conclusively determinative of the issues involved that there exists no reasonable prospect that the court's findings would have been different had the incompetent evidence not been before it (CM ETO 2625, Pridgen).

The incompetent evidence is overwhelming in evidencing an intent permanently to remain away from the military service and there can be little doubt but that it contributed immeasurably in influencing the court's decision. The competent evidence, on the other hand, establishes little more than an unauthorized absence of 39 days duration and standing alone falls far short of possessing such probative value as practically to compel a finding of guilty of desertion. Accordingly, the record of trial is legally sufficient to support only so much of the findings of guilty as involve findings of guilty of absence without leave in violation of Article of War 61 for the period of time alleged and legally sufficient to support the sentence.

Thomas N. Tappy, Judge Advocate

W. T. Beck Jr., Judge Advocate

Joseph J. Stern, Judge Advocate

Robert C. Trevethan, Judge Advocate

SPJGH-CM 294895 1st Ind MAR 26 1946
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War

1. In the case of Private James E. Hatfield (35764854), Company F, 324th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of absence without leave for the period of time alleged, in violation of Article of War 61, and legally sufficient to support the sentence.

2. I concur in the holding by the Board of Review and for the reasons therein stated recommend that so much of the findings of guilty of the Charge and its Specification be vacated as involves findings of guilty of an offense by accused other than absence without leave for the period of time alleged, in violation of Article of War 61, and that all rights, privileges and property of which accused has been deprived by virtue of that part of the findings so vacated be restored. The approved sentence in this case involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year. Since the sentence is based upon a finding of guilty of desertion and since the Board of Review has found the record of trial legally sufficient to support a finding of guilty of absence without leave only, it is recommended that the period of confinement be reduced to six months and that the execution of that portion of the sentence involving dishonorable discharge be suspended and that a post stockade be designated as the place of confinement.

3. This case is submitted for the action of the Secretary of War for the reason that this office has been informed that the 44th Infantry Division was inactivated on or about 30 November 1945.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Findings vacated in part. Confinement reduced to six months, but execution of portion involving dishonorable discharge suspended. As modified sentence executed. GCMO 36, 5 March 1946).

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

(13)

SPJGK - CM 294896

28 DEC 1945

U N I T E D S T A T E S	)	FORTY-FOURTH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Chaffee, Arkansas, 15 November 1945. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
	)	
Private First Class MARCUS FAULKNER, JR (17014759), 44th Cavalry Reconnaissance Troop, 44th Infantry Division.	)	

HOLDING by the BOARD OF REVIEW
MOYSE, KUDER and WINGO, Judge Advocates.

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

2. Accused was charged with two absences without leave, one for 31 days (Specification 1 of Charge I) and the other for less than 1-1/2 days (Specification 2 of Charge I), and was found guilty only of the latter unauthorized absence. The record of trial is legally sufficient to support this finding. He was additionally charged with larceny of an automobile as follows:

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

Specification: In that Private First Class Marcus Faulkner, Jr., 44th Cavalry Reconnaissance Troop, did at Fort Smith, Arkansas, on or about 10 October 1945, feloniously take, steal, and drive away a privately owned automobile, Willys Model 441, Americar, 4 Door Sedan, Year 1941, Motor Number 72636, Serial Auto Body Number 72178, License Number 1D5897, New York State, Value about $982.00, the property of CH (Captain) Beller, 44th Infantry Division.

The findings of the court as to this charge and its specification were as follows:

"Of the Specification of Charge II: Not guilty.
"Of Charge II: Not Guilty, but guilty of violation of Article of War 96, in that you were, in the vicinity of Clarksville, Arkansas, on or about 10 October 1945, wrongfully in possession of a privately owned automobile, Willys Model 441, Americar, 4 Door Sedan, Year 1941, Motor Number 72636, Serial Auto Body Number 72178, License Number 1-D5897, New

York State, value about $982.00, property of Captain Beller, 44th Infantry Division, known by you to be stolen and did on the same date seriously damage same."

One previous conviction by a summary court-martial for failure to repair at the fixed time for night drill on 17 January 1945 was considered by the court. In that case accused was sentenced to confinement at hard labor for one month and forfeiture of $18.06 of his pay. In the instant case 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 and forwarded the record of trial for action under Article of War 50½.

3. The form of the findings is contrary to that recommended in both the Manual for Courts-Martial, 1928 (pars. 78b and c, and Appendix 6, p. 267), and War Department TM 27-255, Military Justice Procedure (Secs. 105-107, and Appendix, p. 156), and is subject to marked criticism, but the Board of Review considers that the real issue involved is whether or not the offense of which the court sought to find accused guilty is a lesser included offense of that charged, namely, larceny. Since the Board has resolved this question in the negative, a consideration of the technical sufficiency of the form of the findings would be superfluous.

4. The controlling principle in the determination of the propriety of the substitution of an included offense by a court-martial is found in the following extract from paragraph 78c, Manual for Courts-Martial, 1928, page 65 (see also TM 27-255,par.106):

"Lesser Included 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. * * *" (Underscoring supplied).

Larceny is the "taking and carrying away, by trespass, of personal property which a trespasser knows to belong either generally or specifically to another with intent to deprive such owner permanently of his property therein" (MCM, 149g) (underscoring supplied). Unless there is a trespass by the offender in the appropriation of the property or an intent to convert an article at the time it is purportedly borrowed or hired, or unless the possession is obtained by some means which may be assimilated to trespass by reason of the artifice employed in obtaining possession there can be no larceny (idem). As set forth in the Manual (idem) the elements of the offense are:

"(a) The taking by the accused of the property as alleged; (b) the carrying away by the accused of such property; (c) that

such property belonged to a certain other person named or described; (d) that such property was of the value alleged, or of some value; and (e) the facts and circumstances of the case indicating that the taking and carrying away were with a fraudulent intent to deprive the owner permanently of his property or interest in the goods or of their value or a part of their value."

While, therefore, at least temporary possession of a stolen article by the offender is necessary (idem) the required possession is clearly that which the offender obtained by virtue of his having "taken the property" in one of the inhibited methods previously described, and it is unlawful possession thus obtained and only such possession that is necessarily included in larceny. The very finding negatives such possession - by its action the court specifically found that accused had not stolen the automobile but merely had unlawful possession of it with knowledge of its having been stolen, very apparently by some third person, for otherwise it may be safely presumed that the court would have found accused guilty of larceny. Certainly it would be charging the jury with doing a vain, inconsistent and meaningless act to conclude that it intended to exonerate the accused of having stolen the automobile and at the same time to hold that accused had unlawful possession of an automobile which he had stolen. In our opinion the court's finding is equivalent to a conclusion that accused obtained possession of or received stolen property other than by having stolen it himself, an offense not included in but separate and distinct from larceny (see CM 120948, 120949, Dig. Op. JAG 1912-40 (451) (43), p. 327).

It goes without saying that unlawful possession may be obtained in numerous ways. As pointed out in CM 151032, Yewell et al, in which the Board of Review held that a finding of unlawful possession of certain personal property was not a lesser included offense of larceny:

"5. The offense of which Privates Yewell, Strakey and Liles were convicted, i.e., unlawfully having the automobile in their possession, to the prejudice of good order and military discipline, in violation of the 96th Article of War, is not necessarily included in the offense of larceny of the automobile. A charge of larceny obviously includes the element of being in unlawful possession of the thing alleged to have been stolen, but it does not include all kinds of unlawful possession of that thing. For example, one might innocently and in good faith purchase a stolen article from a thief, believing the latter to be the owner thereof, and thus come into unlawful possession of such article; but such unlawful possession would not be the kind included in larceny. Here the accused were found guilty of unlawful possession without specifying the kind of unlawful possession. Since all kinds of unlawful possession not included in larceny were not excluded from the findings of guilty the convictions in this case are not of an offense necessarily included in the offense alleged and for which the accused were tried

and the findings of guilty were therefore unauthorized and illegal."

This holding was approved by The Judge Advocate General in an opinion rendered to the reviewing authority in CM 198798, Sherwood, which involved the identical question:

> "5. The case of Yewell, et al, has not been overruled. There may be wrongful possession which is in no way connected with larceny, and not a lesser included offense of larceny, and therefore is not 'necessarily included in that charged' (Par. 78 c, M.C.M., 1928; CM 151032, Yewell, et al).
>
> "6. While the evidence in the instant case may have warranted conviction of larceny on the theory that accused was found in possession of recently stolen property and made no explanation of such possession, the court by its finding acquitted him of larceny. Undoubtedly, therefore, the court was not convinced that he came into possession of the property by trespass. The findings do not indicate how he acquired possession of the tickets which they describe as 'wrongfully' in his possession. Trespass being eliminated and the kind of wrongful possession not being specified, it cannot be said that the offense found was necessarily included in that charged - larceny.
>
> "The Board of Review has held recently that on a charge of larceny of an automobile, an accused may be found guilty of wrongful conversion, but there the identical trespass and asportation remain and only the intent permanently to deprive is changed in the findings or action. Such cases furnish no precedent for sustaining the findings in this case."

The opinion is thus summarized in Digest of Opinions of The Judge Advocate General, 1912-1940, section 451 (43), page 328:

> "Accused was charged with larceny of six Y.M.C.A. coupon books, under A.W. 93, and found not guilty of larceny but guilty of wrongful possession of them, under A.W. 96. The court by its finding acquitted him of larceny. The findings do not indicate how he acquired possession of the tickets which they describe as 'wrongfully' in his possession, but undoubtedly the court was not convinced that he came into possession of the property by trespass. Trespass being eliminated and the kind of wrongful possession not being specified, it cannot be said that the offense found was necessarily included in that charged, viz, larceny. There may be wrongful possession which is in no way connected with larceny, and not a lesser included offense of larceny. C.M. 198798 (1932)."

It is, of course, apparent that the finding that accused "did on the same day seriously damage same" (the automobile) is not a lesser included offense

of larceny. As the Board finds the record of trial legally insufficient to support the findings of guilty of Charge II and its specification, the only offense of which accused was properly found guilty was absence without leave from about 2000 10 October 1945 to about 0630 12 October 1945. Therefore, while the sentence imposed is legal in the opinion of the Board it is excessive.

3. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Charge II and its specification, and legally sufficient to support the finding of guilty of Charge I and Specification 2 thereof and the sentence.

Herman Moyse, Judge Advocate

William B. Nuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 294896 1st Ind

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

TO: The Secretary of War

1. In the case of Private First Class Marcus Faulkner, Jr. (17014759), 44th Cavalry Reconnaissance Troop, 44th Infantry Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Charge II and its specification, and legally sufficient to support the finding of guilty of Charge I and Specification 2 thereof and the sentence.

2. I concur in the holding by the Board of Review and for the reasons therein stated recommend that the finding of guilty of Charge II and its specification be vacated. As the only offense of which accused was properly found guilty was absence without leave from about 2000 10 October 1945 to about 0630 12 October 1945, I further recommend that only so much of the sentence be approved as provides for confinement at hard labor for two months and forfeiture of two-thirds of accused's pay per month for a like period, and that a post guardhouse be designated as the place of confinement.

3. This case is submitted for the action of the Secretary of War for the reason that this office has been informed that the 44th Infantry Division was inactivated on or about 30 November 1945.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Findings and sentence vacated in part. GCMO 38, 5 March 1946).

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

SPJGN
CM 294897

U N I T E D S T A T E S	)	44TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Chaffee, Arkansas, 15 November 1945. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private JOHN H. DUNCAN (44033117), Company F, 114th Infantry.	)	

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

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

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

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

Specification: In that Private John H Duncan, Company F, 114th Infantry, having been restricted to the limits of the Regimental Area, did at Camp Chaffee, Arkansas, on or about 10 October 1945, break said restriction by going to Fort Smith, Arkansas.

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

Specification: In that Private John H Duncan, 114th Infantry, Company F, did at Fort Smith, Arkansas, on or about 10 October 1945, feloniously take, steal and aid and abet in driving away a privately owned automobile, Willys Model 441, Americar, 4 Door

Sedan, Year 1941, Motor Number 72636, Serial Auto Body Number 72178, License Number 1D5897, New York State, Value about $922.00, the property of CH (Captain) Beller, 44th Infantry Division.

The accused pleaded not guilty to both Charges and Specifications and was found guilty of Charge I and its Specification and not guilty of Charge II and its Specification, "but guilty of violation of Article of War 96, in that you were in the vicinity of Clarksville, Arkansas, on or about 10 October 1945, wrongfully in possession" of the car described in the Specification, "known by you to be stolen and did on the same date seriously damage said automobile." After evidence was introduced of a previous conviction by summary court-martial of absence without leave for two days, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence is legally sufficient to support the findings of guilty of Charge I and its Specification. The findings as to Charge II and its Specification which, as drawn, alleges the larceny of an automobile in violation of Article of War 93 presents the only problem requiring discussion. Despite the gross irregularity as to form, it is clear that the court found the accused not guilty of the larceny of the car but guilty of wrongful possession of the car knowing it was stolen, in violation of Article of War 96. That part of the finding which alleges that accused damaged the car bears no relationship to the offense charged and may be rejected as irrelevant and non-prejudicial surplusage.

4. The finding that accused was in the wrongful possession of the automobile knowing it was stolen is supported by the evidence, but the question arises whether such finding is permissible under a Specification alleging larceny. The court cannot by substitutions and exceptions find an offense different in "nature or identity" from the offense charged, although it may find an offense "necessarily included in that charged" (MCM, 1928, par. 78c).

The specific problem here presented was considered by the Board of Review in CM 294896, Faulkner, a companion case to the present one. It was there held that the offense of wrongful possession of an automobile knowing it was stolen was not necessarily included in the offense of larceny of the car. This conclusion is sound, and it is hereby adopted and followed.

5. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge II and its Specification. Furthermore, since the maximum sentence for the only offense sustained, breach of restriction, is forfeiture of two-thirds pay and confinement at hard labor for one month, the Board of Review holds the record of trial legally sufficient to support only that much of the sentence.

Abner E. Lipscomb, Judge Advocate.

T. Hart Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 294897 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War

1. In the case of Private John H. Duncan (44033117), Company F, 114th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the findings of guilty of Charge I and its Specification, and only so much of the sentence as provides for forfeiture of two-thirds pay and confinement at hard labor for one month.

2. I concur in the holding by the Board of Review and for the reasons therein stated recommend that the findings of guilty of Charge II and its Specification and so much of the sentence as is in excess of forfeiture of two-thirds pay and confinement at hard labor for one month be vacated and that all rights, privileges and property of which accused has been deprived by virtue of that part of the findings and sentence so vacated, be restored, and that the sentence as thus modified be ordered executed.

3. This case is submitted for the action of the Secretary of War for the reason that this office has been informed that the 44th Infantry Division was inactivated on or about 30 November 1945.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Findings and sentence vacated in part. GCMO 37, 5 March 1946).

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

SPJGK - CM 294 913

17 JAN 1946

UNITED STATES v. First Lieutenant DUDLEY K. DRAPER (O-1548740), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Turner Field, Albany, Georgia, 5 November 1945. Dismissal.

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

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: In that First Lieutenant Dudley K. Draper, Squadron B, 2109th AAF Base Unit, Turner Field, Albany, Georgia, did, at Fort Jackson, South Carolina, on or about 31 March 1943, present for payment a claim against the United States by presenting War Department Form 336, Revised, Pay and Allowance Account, for the month of March 1943, to Finance Officer, at Fort Jackson, South Carolina, an officer of the United States duly authorized to approve and pay such claims, in the amount of Two Hundred Seventy-two Dollars and Forty-eight Cents ($272.48), for services alleged to have been rendered to the United States by the said First Lieutenant Dudley K. Draper, which claim was false and fraudulent in that it omitted as a debit on said Pay and Allowance Account a Class "E" Allotment in the sum of One Hundred Twenty-five Dollars ($125.00), made by the said First Lieutenant Dudley K. Draper, and was then known by the said First Lieutenant Dudley K. Draper to be false and fraudulent.

NOTE: Specifications 5 to 22 inclusive are identical in form with Specification 4 except as to date presented and period covered,

place where presented, location of the finance officer to whom presented and amount, which excepted matters are as follows, respectively:

Spec.	Date presented and period covered	Place where presented	Location of Finance Officer to whom presented	Amount
5	30 Apr 1943	Fort Jackson, South Carolina	Fort Jackson, South Carolina	$ 268.98
6	31 May 1943	"	"	272.40
7	30 June 1943	"	"	174.60
8	31 July 1943	Maxwell Field, Alabama	Maxwell Field, Alabama	50.00
9	31 Aug 1943	"	"	185.10
10	30 Sept 1943	"	"	95.97
11	31 Dec 1943	Newport AAFld, Newport, Arkansas	Camp Jos T. Robinson, Ark.	288.74
12	31 Jan 1944	"	"	289.99
13	29 Feb 1944	"	"	288.59
14	31 Mar 1944	"	"	289.99
15	30 Apr 1944	Blytheville AAFld, Blytheville, Ark.	Walnut Ridge AAFld Walnut Ridge, Ark.	197.63
16	31 May 1944	"	"	381.66
17	27 June 1944	"	Blytheville AAFld, Blytheville, Ark.	245.00
18	20 July 1944 for June 1944	Maxwell Field, Alabama	Maxwell Field, Alabama	44.29
19	31 July 1944	"	"	313.99
20	31 Aug 1944	"	"	289.99
21		(Finding of Not Guilty)		
22	31 Oct 1944 for Sept. 1944	Blytheville AAFld, Blytheville, Ark.	Blytheville AAFld, Blytheville, Ark.	139.30

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

Specification 1: In that First Lieutenant Dudley K. Draper, * * *, did, at Fort Jackson, South Carolina, from about December 1942 to about June 1943, with intent to deceive, officially certify on War Department Form 336, Revised, Pay and Allowance Account, for pay and allowances each month beginning with the month of December 1942, to and including the month of June 1943, to the Finance Officer, at Fort Jackson, South Carolina, that the statement and account as stated on each of the said War Department Forms 336, was true and

correct, which statements were known by the said First Lieutenant Dudley K. Draper, to be untrue in that a Class "E" Allotment in the sum of One Hundred Twenty-Five Dollars ($125.00) theretofore authorized by the said First Lieutenant Dudley K. Draper, was not listed as a debit upon said forms.

NOTE: And six additional specifications identical in form with Specification 1, except as to period covered, place where certified, and location of finance officer to whom presented, which excepted matters are as follows, respectively:

Spec.	Time made and period covered	Place of Certification	Location of Finance Officer to whom presented
2	July 1943 to Sept 1943 incl	Maxwell Field, Alabama	Maxwell Field, Alabama
3	Dec 1943 to March 1944 incl	Newport AAFld, Newport, Ark.	Camp J. T. Robinson, Arkansas
4	Apr 1944 to May 1944 incl	Blytheville AAFld, Blytheville, Ark.	Walnut Ridge AAFld, Walnut Ridge, Ark.
5	June 1944	"	Blytheville AAFld, Blytheville, Ark.
6	July 1944 to Sept 1944 incl	Maxwell Field, Alabama	Maxwell Field, Alabama
7	Oct 1944 for Sept 1944	Blytheville AAFld, Blytheville, Ark.	Blytheville AAFld, Blytheville, Ark.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and all its Specifications except Specifications 1, 2, 3 and 21 and was found guilty of Charge II and all its Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The competent evidence for the prosecution as established by stipulation and from examination of documents properly admitted in evidence is summarized as follows:

On 2 October 1942 accused authorized a Class E allotment in the sum of $125 per month for an indefinite period of months, to the First National Bank, Aberdeen, Maryland (R. 8, Pros. Exs. A-A, B). On the dates, for the periods, and in the amounts alleged in the Specifications, accused presented for payment claims (War Dept Forms No. 336 - Revised, Pay and

Allowance Account) to various Finance Officers at Fort Jackson, South Carolina, Maxwell Field, Alabama, Camp J. T. Robinson, Arkansas, Walnut Ridge Army Air Field, Blytheville Army Air Field, Blytheville, Arkansas, Walnut Ridge Army Air Field, Walnut Ridge, Arkansas, and in each claim certified that the statement was true and correct (R. 8, Pros. Exs. A-A, D-Y). In each claim he omitted to debit any amount as a Class "E" Allotment (Pros. Ex. D-Y).

Beginning with the month of December 1942, and for each month thereafter to and including the month of February 1945, the sum of $125 was paid by the United States by check to the First National Bank, Aberdeen, Maryland and credited to accused's account (Pros. Exs. A-A, C). These were the only deposits credited to his account for the period between December 1942 and October 1943. On 5 January 1943 his account showed a credit balance of 90 cents. Although no checks were drawn against this account from 5 January 1943 to 19 April 1943, accused made a withdrawal of $375 on the latter date and made withdrawals regularly thereafter (Pros. Ex. C). During the entire period from December 1942 to February 1945 accused received monthly statements of his account with this bank for "most" but not all months (Pros. Ex. A-A).

It was stipulated that accused "has reimbursed the government of the United States completely and in full for the amount improperly collected by him" (Pros. Ex. A-A).

On 21 April 1945, accused, after an explanation of his rights under Article of War 24, voluntarily signed the following statement:

"I made a Class E Allotment during September 1942 while stationed at Aberdeen Proving Ground, Maryland.

"Upon transfer to Ft Jackson, South Carolina, my allotment was continued and deductions made until I discontinued the Class E Allotment in December 1942 while still at Fort Jackson.

"I realized I was still receiving a credit to my bank account at the First National Bank, Aberdeen, Maryland, in the amount of $125.00 monthly. I didn't know from what source this money was coming since I had discontinued my Class E Allotment in December 1942.

"At no time during the period of December 1942 and September 1944 did I contact any Personnel Officer or Finance Officer about this $125.00 monthly credit to my bank account because I felt it would be corrected automatically.

"I had $125.00 per month deducted from my pay for Class E Allotment while stationed at Buckley Field, Colorado, from October 1944 through February 1945 pursuant to instructions from Major Norris Shealy, Finance Officer, Blytheville Army Air Field, Ark, prior to my departure from Blytheville AAF to Buckley Field, Colorado.

"My mother and father both died when I was a very small boy. They were living in California and I was in a convent in Montreal, Canada at the time of their death.

"I am willing to make complete retribution of the full amount of this overpayment providing I can make the necessary arrangments at this time to borrow sufficient money from a private source in order to clear this account.

"I have been advised of my rights under the 24th Article of War." (R. 7,8, Pros. Ex. A)

4. Accused, after being apprised of his rights as a witness, elected to remain silent (R. 10).

5. The accused is charged with presenting 22 false claims to the United States knowing them to be false and of falsely certifying to their correctness with intent to deceive.

The evidence is clear and uncontradicted that on 2 October 1942 accused authorized a Class E allotment in the sum of $125 to be paid monthly to a named bank and that during the period from December 1942 to October 1944 such bank received monthly checks in the sum of $125 and credited such amounts to accused's account. It is clear that on each of the 22 occasions alleged in the specifications the accused signed a War Department Form No. 336-Revised (Pay and Allowance Account), certified to its correctness, omitted to make thereon any deduction for a Class E allotment, and then presented the voucher to a finance officer for payment. Thus the fact that the claims were presented by accused and that they were false in that no deduction was made for a Class E allotment is clearly established.

The only question warranting discussion with reference to the Specifications of Charge I of which accused was found guilty is whether or not at the time he presented the false claims he knew or had reason to know they were in fact false. It is well settled that intent to defraud is not an essential element of proof in a specification alleging presentment of a false claim in violation of Article of War 94, but only that accused knew the claims were false (CM 253323, McClure; CM 241208, Russell; CM 243683, Bowling; Winthrop, Military Law and Precedents, 2d Ed. Rev., p. 701). In discussing this offense, Winthrop says,

"It is not the object or purpose of the party in transaction, but his knowledge that the claim is false or fraudulent which is made by the Article the gist of the offence. If he knew, or the circumstances of the case were such as properly to charge him with the knowledge, that the claim was a fictitious or dishonest one when made or presented, &c., he is amenable to trial under this part of the Article; * * *." (Winthrop, Military Law and Precedents, 2d Ed. Rev, p. 701; see also CM 243683, Bowling; MCM, 1928, par. 150a.)

It is our opinion that the evidence is compelling that accused knew or should have known the claims were false. An examination of a consolidated statement of his bank account for the period between 30 September 1942 and 17 April 1945 reveals that for the first 13 months after 30 September 1942

no deposits were made to his account except those made in the amount of $125 per month, yet checks were being regularly drawn on this account, except for the period between 5 January 1943 and 19 April 1943, and on 30 October 1943 his account showed a balance of $325.67. It is therefore clear he knew the allotment was being regularly paid, for to assume otherwise would be tantamount to assuming that when he was drawing the checks he was issuing fraudulent checks. It is also clear that he was receiving his bank statements for "most" months and even a cursory examination of such statements would have revealed that he was having the allotment credited to his account. Under such circumstances the conclusion is inescapable that accused had knowledge or should have had knowledge of the falsity of his claims.

The accused made a bare assertion in a pre-trial statement that he discontinued his allotment in December 1942 but in no way attempted to substantiate this claim by evidence or explanation. Any doubt, however, created by this assertion, supported by a possible inference that could be drawn from the fact that for a short period after 9 January 1943 he drew no checks on his account, was resolved in his favor by the court's action in finding him not guilty of the presentation of false claims knowing them to be false the first three months subsequent to his alleged discontinuance.

6. The court's action in finding accused not guilty of presenting false claims in the months of December 1942 and January and February 1943 has no bearing on the legality of its finding that he certified to the correctness of all the claims as alleged in Charge II. Even were such findings inconsistent, it has been held repeatedly that the "better rule on principle and authority is that inconsistent verdicts of guilty and not guilty in the same criminal proceeding do not vitiate the former" (CM 197115, Froelich, 3 B.R. 81; CM ETO 1453; CM 255203, King).

It is the opinion of the Board of Review, however, that the circumstances which created a reasonable doubt in the minds of the court that accused presented false claims knowing them to be false in the months of December 1942 and January and February 1943 should under similar reasoning have created a reasonable doubt that he certified to those claims with intent to deceive. The court apparently concluded that for a short period of time accused may have believed that his allotment was terminated and therefore he had no knowledge of the falsity of those claims presented during that period. If this reasoning be correct it would be contrary to reason and logic to find that he certified to their correctness with intent to deceive. It is therefore the opinion of the Board that the record of trial is legally insufficient to support the findings that accused certified the claims of December 1942 and January and February 1943 with intent to deceive. It is clear however that the certifications in the remainder of these claims were made with intent to deceive. At the time the certification was made in each of these claims the accused knew such claim to be false, and this, coupled with the additional circumstances clearly established the fraudulent intent.

On the face of the record it appears that the trial of the offenses alleged in Specifications 1 and 2 of Charge II, which include the first ten of the false certifications, is barred by the Statute of Limitations set forth in Article of War 39, since the commission of the offenses occurred more than two years prior to the arraignment of accused. The accused however did not assert his right to plead the Statute of Limitations in bar of trial either by a special plea or by evidence of the statute and its applicability under his plea to the general issue. In the absence of such an assertion, a plea of the Statute of Limitations in bar of trial is not asserted by a plea of not guilty to the general issue (CM 231504, Santo, 18 B.R. 235).

7. War Department records disclose that this officer is 26 years of age, is married, and attended high school for 3-1/2 years but did not graduate. He served as an enlisted man in the United States Army from 22 July 1937 to 23 May 1940. He reentered the service on 11 October 1940 and upon later attendance at and completion of the course prescribed by the Ordnance Officer Candidate School, Aberdeen Proving Ground, Maryland, was commissioned a temporary second lieutenant in the Army of the United States on 5 September 1942. He was promoted to first lieutenant on 13 March 1943. As a civilian his occupations were mechanic's helper, laborer, and carpenter's apprentice.

8. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 Specification 1, Charge II, as involves a finding that accused did make false official certifications as alleged from March 1943 to June 1943, legally sufficient to support all of the other findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 94.

Norman Mayo, Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 294913 1st Ind JAN 22 1946

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Dudley K. Draper (O-1548740), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of presenting to the United States 18 false claims knowing them to be false in violation of Article of War 94 (Specifications 4-20, 22, Charge I), and of falsely certifying to the correctness of 22 claims with intent to deceive, in violation of Article of War 95 (Specifications 1-7, Charge II). No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1, Charge II, as involves a finding that the accused did make false official certifications as alleged from March 1943 to June 1943, but legally sufficient to support all of the other findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

On 2 October 1942 the accused authorized a Class E allotment in the sum of $125 per month to be paid to a named bank. Between March 1943 and October 1944, while the allotment was being regularly paid to the bank each month, he certified as true and correct and presented to various finance officers of the United States, 18 claims for pay, failing in each claim to make any deduction for the Class E allotment. He received monthly statements of his account with the bank for "most" months and starting in April 1943 made regular withdrawals from the account. No affirmative action on his part was taken to correct the overpayments.

Accused's only explanation for his conduct was contained in a pre-trial statement in which he asserted that he "didn't know from what source this money was coming since I had discontinued my Class E allotment in December 1942," and that he took no action with reference to the overpayments because he "felt it would be corrected automatically."

Despite the fact that full restitution has been made, such

conduct on the part of an officer over so extended a period clearly warrants dismissal. I therefore recommend that the sentence be confirmed and carried into execution.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

SPJGN-CM 294971

U N I T E D S T A T E S	)	SERVICES OF SUPPLY CHINA THEATER
v.	)	Trial by G.C.M., convened at APO 627, c/o Postmaster, New York, N. Y., 28 September 1945. To be shot to death with musketry.
Private First Class WILBORN K. STEVENS (34370799), 527th Ordnance Heavy Maintenance Tank Company.	)	

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

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

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

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

Specification: In that Private First Class Wilborn K. Stevens, 527th Ordnance Heavy Maintenance Tank Company, APO 272, alias Kelly Stevens, alias Steve Kelly, did, at Chanyi, China, on or about 29 July 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private First Class William L. Waller, 34636308, 527th Ordnance Heavy Maintenance Tank Company, a human being, by shooting him with a pistol.

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

Specification: In that Private First Class Wilborn K. Stevens, 527th Ordnance Heavy Maintenance Tank Company,

> APO 272, alias Kelley Stevens, alias Steve Kelly, did, at Chanyi, China, on or about 29 July 1945, with intent to do him bodily harm, commit an assault upon Private Earl V. Rowe, 34675098, 527th Ordnance Heavy Maintenance Tank Company, by shooting him in the body with a dangerous weapon, to wit, a pistol.

Accused pleaded not guilty to, and was found guilty of, all Specifications and Charges. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General of the China Theater, who confirmed the sentence, but withheld the order of execution, and transmitted the record of trial to the Branch Office of The Judge Advocate General in that theater. Subsequent thereto the Commanding General of the China Theater was divested of the powers heretofore conferred upon him to confirm sentences imposed as the result of trial by general court-martial, and the Branch Office of The Judge Advocate General for that theater was inactivated. The record was accordingly forwarded to this office where it has been reviewed pursuant to Articles of War 48 and 50½.

3. The evidence for the prosecution shows that at about 8:00 p.m. on 29 July 1945 the accused, who was then stationed near Chanyi, China, returned to his quarters and stated to a tentmate that he had been downtown during the afternoon and had been in a fight with Private First Class William L. Waller and Private Earl V. Rowe, and that one of them had bitten his nose. He asked his tentmate to lend him a .45 caliber automatic pistol. The request was refused and the explanation made that the gun could be used only for guard duty or convoy duty. After playing a few phonograph records and examining his injured nose in a mirror, the accused left his tent at about 9:00 o'clock stating that he was going to the dispensary to have his nose dressed. His tentmate, who had known the accused for two or three years, testified that the accused's conduct and appearance seemed to be natural and no different from other times (R. 5-7).

At about 10:00 o'clock on the same evening the accused came to the tent occupied by Privates Waller, Rowe, and others. He "fumbled with the door," "mumbled something," and was let in by Private Raymond Winsatt who recognized the accused's voice. Winsatt observed that the accused had a "skinned" nose and "kidded about" it. The accused asked for Waller and Rowe and Winsatt pointed to their beds where they were asleep. The accused's further actions, as described by Private Winsatt, were, as follows:

> "[The accused] walked over to Waller's bed, shook Waller a couple times and said, 'Waller, Waller ol' boy.' He brought the 'skid bar' up with his left hand, with his

right hand he leveled the pistol, and shot into Waller twice. He pivoted to his right, shot once into Rowe and he turned around and walked out of the tent; didn't bother me or say a word" (R. 15).

About 10:00 o'clock the accused returned to his own tent. His nose had been dressed and he seemed to be natural. After entering he stated, "Well, I got 'em," and started playing the phonograph. When asked what he meant by his statement, he replied, "Rowe and Waller," and added that "they won't find the gun," explaining that he had thrown it away (R. 7-8, 13).

A medical examination which was made of Private First Class William L. Waller on the evening of 29 July 1945 showed that he was dead as the result of gun shot wounds in the chest (R. 4, 17; Pros. Ex. 1). Private Earl Rowe was found to be suffering from a bullet wound which pervaded the spinal column causing him to be completely paralyzed from the chest down. His prospects of recovery were described as "practically nil" (R. 16-17).

4. Sergeant Clayton Dishman and Technician Fifth Grade Zelmer Gosser testified for the defense that the accused had a good reputation, had been awarded the Good Conduct Medal, and was well liked in his organization. They had never heard of the accused's being in trouble and could not believe that he could have committed such offenses as those charged against him (R. 18-20). These witnesses also testified that the reputation of Rowe and Waller was not good, that they drank "right smart," and "when they got together they thought they were tough" (R. 20).

The accused, after being advised of his rights to testify or remain silent, elected to testify under oath. On the afternoon of 29 July 1945 he and Gosser had gone into Chanyi where they had consumed two quarts of gin and shared another bottle with a third soldier (R. 22, 27). Accused had then returned to his camp, and, after changing his clothes, had again gone to Chanyi with another soldier. On this occasion he had met Rowe and Waller who invited him to have a drink with them. He and his companion joined Rowe and Waller, and together they consumed two bottles of gin with the result that the accused became drunk (R. 22, 28). After drinking Rowe and Waller ate dinner while the accused waited for them. As the group started from the restaurant at the conclusion of the meal, the accused was struck behind the right ear and knocked half way across the room. A fight ensued between himself and Rowe and Waller in which he was bitten on the nose and cut on the ear. He was beaten as though with a bat and the pain lasted about two weeks (R. 22-23, 26).

The accused did not remember all of the events which occurred

on that day subsequent to the fight, except that he did recall being at the Military Police police station, going to his tent, visiting the dispensary, returning to his tent in a warrant officer's jeep, and being in his company's orderly room. He also recalled playing the phonograph, but not the names of the records he played, thinking about the fight, and looking in a mirror at his injuries. He did not remember, however, asking for or taking a gun, nor of being in the tent occupied by Rowe and Waller (R. 23-25). He asserted that he did not know where the tent occupied by Rowe and Waller was, nor that Winsatt lived there, nor did he remember being in their tent (R. 28). His last clear recollection was of going into the cafe in which the fight occurred (R. 25).

5. In the Specification of Charge I the accused is charged with the murder of Private First Class William L. Waller, the Specification alleging that the accused did, on or about 29 July 1945, "with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill" the deceased.

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 * * *." 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, * * *" (MCM, 1928, par. 148a). It is universally recognized that the most distinguishing 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 terms 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" (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

Similarly, the Manual for Courts-Martial defines malice aforethought as follows:

> "Malice aforethought. - * * * 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. * * *"(MCM, 1928, par. 148a).

The uncontradicted evidence shows that the accused, after having a fight with Rowe and Waller on the afternoon of 29 July 1945, returned to his tent from Chanyi, played some phonograph records, examined his injured nose, and asked his tent companion for a pistol. He thereafter left his own tent, entered the tent occupied by Rowe and Waller, and, as they slept, deliberately fired two shots into Waller and one into Rowe. Although the accused testified that he did not remember these fatal events, he did not act as a drunken man, but rather in his normal and usual manner. This evidence excludes any reasonable inference that the accused acted in self defense or in the heat of sudden passion and compels the conclusion that the accused, after brooding over his injuries, deliberately, with premeditation and malice aforethought, killed Private First Class William L. Waller by shooting him with a pistol. Every element of the crime charged is sustained by evidence beyond a reasonable doubt.

6. The Specification of Charge II alleges that the accused did, on 29 July 1945, "with intent to do him bodily harm, commit an assault upon Earl V. Rowe * * * by shooting him in the body with a dangerous weapon, to wit, a pistol."

The evidence, as set forth in the above paragraph, shows beyond a reasonable doubt that the accused, with an obvious intent to do bodily harm, shot Private Earl V. Rowe as alleged, with the result that he suffered a severe paralysis of the body. The evidence is legally sufficient, therefore, to sustain every element of the offense charged.

7. Upon arraignment the accused, through counsel, entered a

special plea of not guilty, asserting that the accused was "mentally deranged at the particular time" charged. The law member ruled,

> "* * * that the special plea as to the alleged mental derangement is really a matter of defense, and it will be up to the defense to prove it during the course of the trial, unless the defendant wishes to introduce medical testimony at this time relative to the mental condition of the accused, or the defense desires a continuance."

The defense counsel having inquired if he should change his special plea to a plea of not guilty, the law member replied, "Yes, otherwise it will be assumed." Thereupon a plea of not guilty was entered to all Specifications and Charges (R. 4). No evidence was offered either by the prosecution or the defense tending to overcome the presumption of the accused's sanity.

The ruling of the law member was clearly erroneous. Although it is true that the initial burden of overcoming the presumption of sanity rests with the defense, requiring the defense to present sufficient evidence to raise a reasonable doubt as to the accused's sanity, the ultimate burden of proving mental accountability rests with the prosecution. This rule has been correctly and authoritatively stated, as follows:

> "Every person brought to trial before a court-martial is presumed to be sane and mentally accountable for the offense charged against him. This presumption continues until sufficient evidence is presented, either by the defense or by the prosecution, which raises a reasonable doubt to the contrary. In that event the presumption of the accused's sanity is vitiated, and a legal burden is placed upon the prosecution to prove, beyond all reasonable doubt, that the accused was 'so far free from mental defect, disease, or derangement, as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right.'" (TB MED 201).

Although the defense counsel is under an initial duty to present evidence of an accused's mental deficiency, this burden, under the Manual for Courts-Martial, does not relieve the court from the duty of guarding the accused's right in this particular (MCM, 1928, par. 63; TB MED 201).

There appears, however, no compelling reason in the present case which required the court to make such an inquiry, for there is no evidence in the record to indicate that the accused was either permanently or temporarily insane on the occasion in question. The law member's ruling, therefore, decided only a purely abstract proposition of law and did not

affect the substantial rights of the accused or prejudice the defense in any way.

8. The sentence imposed by the court in the first instance was that the accused should be "hanged by the neck until dead." On the same day this sentence was rendered the court was reconvened at the direction of the convening authority and instructed that an appropriate sentence, in accord with directions of the War Department, would be that the accused "be shot to death with musketry." The court reconsidered its original sentence and sentenced the accused "to be shot to death with musketry." Since an execution by shooting is deemed, in military law, to be less ignominious than hanging, the proceedings in revision in no way injuriously affected the substantial rights of the accused. MCM, 1928, par. 103a.

9. The charge sheet shows that the accused is 24½ years of age and that he was inducted into the service on 15 September 1942.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. A sentence of death or imprisonment for life is mandatory upon a conviction of murder, in violation of Article of War 92.

Abner E. Lipscomb, Judge Advocate.

Albert Blaustein, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 294971 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private First Class Wilborn K. Stevens (34370799), 527th Ordnance Heavy Maintenance Tank Company.

2. The offense in question was committed at Chanyi, China, on 29 July 1945, and the sentence imposed by a general court-martial was confirmed by the Commanding General of the China Theater on 24 October. Thereafter, the record of trial was examined by the Board of Review of the Branch Office of The Judge Advocate General for that command and held legally sufficient to sustain the findings of guilty and the sentence. Subsequent thereto the Commanding General of the China Theater was divested of the powers heretofore conferred upon him to confirm sentences imposed as the result of trial by general court-martial, and the Branch Office of The Judge Advocate General for that theater was inactivated. The record was accordingly forwarded for action pursuant to Article of War 48.

3. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof.

4. The accused is approximately 24½ years of age and has been in the military service since 15 September 1942.

5. The record shows that at about 8:00 p.m., on 29 July 1945, the accused returned to his quarters from an afternoon spent at Chanyi and reported to a tentmate that he had had a fight downtown with Privates Waller and Rowe, and that one of them had bitten his nose. After playing a few phonograph records, he asked a tentmate for a pistol, and, shortly after the request was refused, he left the tent for the declared purpose of going to the dispensary to have his nose treated. At about 10:00 p.m. he entered the tent occupied by Privates Waller and Rowe and asked which were their beds. When they were pointed out to him he walked over to Waller's bed, said, "Waller, Waller, ol' boy," and lifting the mosquito bar with his left hand he pointed a .45 caliber pistol at the sleeping Waller and fired two shots into his body. The accused then pivoted to the right and fired once at Rowe. The accused was described as having a "natural" appearance and as walking normally and unexcitedly. Upon returning to his tent he stated, "I shot Rowe and Waller," adding that "they won't find the gun," explaining that he had thrown it away. As a result of the accused's violence Waller was killed and Rowe is reported to be completely and hopelessly paralyzed from the chest down.

The accused, who has been awarded the good conduct medal, was described by witnesses as a good soldier and as well liked in his company. A psychiatric report attached to the record states that the accused has a mental age of between six and seven years of age and an I.Q. of between forty-seven and fifty. This report concludes with the statement that "In spite of these tests, the undersigned officers feel that [the accused] has sufficient intellectual endowment to know the difference between right and wrong and to adhere to the right." Because the accused was thus classified as a low grade moron, the Board of Review and the Assistant Judge Advocate General of the China Branch Office who originally examined the record recommended that the death sentence imposed be commuted to life imprisonment.

In view of the above recommendations, the previous good record of the accused, and the evidence showing the accused's excessive use of intoxicating liquor on the afternoon preceding the offenses, I recommend that the sentence be confirmed, but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life, and that an appropriate United States Penitentiary be designated as the place of confinement.

6. Consideration has been given to letters addressed to the Under Secretary of War and to me by the Honorable Albert Gore, Member of Congress, dated 24 January 1946, in behalf of accused.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1 - Record of trial
2 - Dft. of ltr. for sig. Sec. of War
3 - Form of Executive action
4 - Two letters from Hon. Albert Gore

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life. As modified ordered executed. GCMO 66, 30 March 1946).

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

SPJGN-CM 296014

UNITED STATES v. Second Lieutenant ROBERT F. HOLDEN (0-787141), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Selman Field, Monroe, Louisiana, 21 November 1945. Dismissal and total forfeitures.

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

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

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

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

Specification: In that Second Lieutenant Robert F. Holden, Air Corps, did, at Ellensburg, Washington, on or about 19 October 1943, with intent to defraud, falsely indorse the name of Richard Holden to a certain United States postal money order in the following words and figures, to wit:

$	10472 Chicago, Kenwood Sta., Ill.		341075
*1	Office number		serial number
*2			
*5	United States Postal Money Order		
10	Identification Required	dollars	#
15	Sep 23 1943	22	cents
20	Postmaster at		POSTAL MONEY ORDER
25	Amarillo, Texas		

Pay amount stated above to order of payee named in attached coupon. Not good for more than largest amount indicated on left hand margin.

Any alteration or erasure renders the order void.

Paying Office
Stamp Here

Ernest J. Kruetgen,
Postmaster Postmaster
Received payment:

Chicago, Kenwood Sta., Ill.
10472 341075
office number serial number
Coupon for Paying Office
Holder must not detach
twenty-two—dollars # cents
write words for dollars
Pay to:
Pvt. Richard Holden
Remitter: (stamped)
Mrs. F. Holden (Chicago, Ill)
6101 Kimbark (Kenwood Sta.)
(M.O.B. Sep 23 1943)
C.O.D. _____ issuing office
parcel number stamp here

To transfer ownership the person in whose favor this order is drawn must sign on lower line, writing the endorsee's name on the top line. More than one indorsement is prohibited by law. Bank stamps are not regarded as indorsements.
TO: College Book Store
Pay to A/S J.W. Ekker, 89903234
A/S Richard Holden, 38541056 Payee
A/S Jack W. Ekker, 39903234

PAY TO C.W.C.E.
COLLEGE BOOK STORE

which said United States postal money order was a writing of a private nature, which might operate to the prejudice of another.

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

Specification 1: In that Second Lieutenant Robert F. Holden, Air Corps, did, on or about 2 October 1945, wrongfully and unlawfully drive an automobile on Catalpa Street, a public street in the city of Monroe, Louisiana, while under the influence of intoxicating liquor.

Specification 2: In that Second Lieutenant Robert F. Holden, Air Corps, was near West Monroe, Louisiana, on or about 3 October 1945, drunk and disorderly in uniform in a public place to wit: Highway No. 80 near "Dixie Inn".

The accused pleaded guilty to the Specification of Charge I and Charge I, guilty to Specification 1 of Charge II and Charge II, and not guilty to Specification 2 of Charge II. He was found guilty of all Charges and Specifications and sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that, on 23 September 1943, at Kenwood Station, Chicago, Illinois, Mrs. Fred Holden purchased United States Postal Money Order number 341075, which directed the postmaster at Amarillo, Texas, to pay the sum of $22.00 to the order of Private Richard Holden (Pros. Exs. 1, 1A, 1B). Mrs. Holden placed the money order in an envelope and mailed it to her son, the named payee, at Amarillo Air Field, Amarillo, Texas. The letter was never received by the addressee but, instead, was delivered to the accused who was then taking "a special course as a prerequisite to cadet training" at the Central Washington College of Education, Ellensburg, Washington. Realizing that it had reached him by mistake, the accused, an enlisted man at the time, took the money order to his Commanding Officer, who stated that, because the true payee was not in the school, "nothing could be done about it" and "dismissed" the accused with the remark that "it was [his] problem" (Pros. Exs. 1, 2, 5). When, four days later, no one had called for the money order, the accused decided to cash it because he "didn't know what else to do with it and it seemed like throwing away money to destroy the money order." Accordingly, in the name of the payee and supplying his own serial number, the accused indorsed the instrument to one J. W. Ekker in payment of an existing debt (R. 24, 25; Pros. Exs. 1, 3-5). Ekker cashed the money order at the College Book Store, Ellensberg, Washington, which, because of the forgery, sustained the loss until ultimately repaid by the accused (R. 26).

At about 1500 hours on 1 October 1945, the accused drove from Selman Field, Louisiana, stopped at the "Dixie Inn," consumed about twenty-two bottles of beer, and, although realizing that he was "very drunk * * * and in no condition to be driving a car," proceeded to the nearby town of Monroe to keep an engagement with his "girl friend." She saw at once that he was intoxicated and insisted on driving the car. They had something to eat at the Poland Sandwich Shop on South Grand Street and then went to "the cab stand behind the Frances Hotel." There they sat in the accused's car and consumed "a fifth of whiskey." When "civilian friends" appeared and expressed a desire to join the couple, the accused volunteered to obtain "some cokes for chasers." He drove away and, as he proceeded along Catalpa Street, his car was seen to "skid," to "weave" from one side of the street to the other, and to describe a "U" turn in the center of the thoroughfare. Three city police officers were nearby and signalled the accused to stop

the vehicle. They found him cooperative but very much intoxicated (R. 14-21; Pros. Ex. 5).

On the night of 3 October 1945, Sheriff Coverdale of Ouachita Parish, Louisiana, was called to the "Dixie Tourist Court," near the city of Monroe, because of a disturbance in one of the tourist cabins. The sheriff took one Dorothy Ingram into custody and, as she was entering the police car, the accused approached from the "Dixie Inn" and inquired of the sheriff, his deputy, and the woman, whether they were as drunk as he. When the accused began to curse and rejected the admonition of the sheriff "to mind his own business," he, too, was taken into custody. Both the sheriff and the deputy sheriff considered the accused "highly intoxicated" and, because of his "vile language" and interference in their performance of duty, to be guilty of disorderly conduct (R. 7-12). In his version of the events, which was contained in a pre-trial statement introduced by the prosecution, the accused stated that, on 3 October 1945, he left Selman Field at about 1700 hours. He stopped first at the "Coronado Club," consumed four bottles of beer, drove to "Ann's Cafe" for dinner, and, at about 1830 hours, went to the "Dixie Inn." During his stay there of about "1½ hours" he consumed "eight shots of whiskey." When a lady was heard screaming on the outside of the building, he hurried out and found "a young lady with two small children" sitting in Sheriff Coverdale's car. When the accused inquired as to the nature of the trouble, the sheriff said, "None of your business. You either shut up, or I'll take you in for disturbing the peace." The accused, however, persisted in his inquiry and was then taken into custody. He remained in the local jail until his girl friend arrived the next afternoon and supplied $100.00 as bail money (Pros. Ex. 5).

4. First Lieutenant William E. Sawrie, appearing as a defense witness, stated that during the two weeks period when assigned to the Sales Commissary Office, the accused had shown himself to be conscientious and of good character (R. 29). First Lieutenant Robert A. Scardino had known the accused for approximately five months, had made several social calls with him, and found that he had always conducted himself as an officer and a gentleman (R. 30). The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to remain silent (R. 31).

5. The Specification of Charge I alleges that the accused did, "on or about 19 October 1943, with intent to defraud, falsely indorse the name of Richard Holden to a certain United States postal money order * * * which * * * was a writing of a private nature, which might operate to the prejudice of another." This offense is set forth as a violation of Article of War 93.

After defining forgery as "the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose

a legal liability on another or charge his legal liability to his prejudice," the Manual for Courts-Martial (par. 149j) states that "some of the instruments that are subjects of forgery are * * * orders for delivery of money or goods."

The accused, by his plea of guilty and his full statement as to facts surrounding the incident, freely acknowledged that he indorsed the name of another to a money order in which he, the accused, had not been named as payee, and that he passed the instrument so indorsed to a third party for value. Such conduct clearly constituted a forgery. That he allegedly called his possession of the money order to the attention of his Commanding Officer and that he waited several days for the true payee to call for the money order cannot morally or legally justify his action in representing himself as the payee and converting the proceeds to his own purposes. His admission that the money order was not intended for him clearly reveals his culpability. The findings of guilty of the Specification of Charge I are sustained beyond any question of doubt.

6. Specification 1 of Charge II alleges that the accused "did, on or about 2 October 1945, wrongfully and unlawfully drive an automobile on Catalpa Street, a public street in the city of Monroe, Louisiana, while under the influence of intoxicating liquor." Specification 2 of Charge II alleges that the accused was, "near West Monroe, Louisiana, on or about 5 October 1945, drunk and disorderly in uniform in a public plact to wit: Highway No. 80 near 'Dixie Inn.'" Both Specifications are laid under Article of War 96.

The accused interposed a plea of guilty to the offense alleged in Specification 1 but undertook to establish his innocence to the charge of drunkenness and disorderly conduct. It is manifest from the record that on both occasions in question he was highly inebriated. In spite of his admitted knowledge that, on the afternoon of 2 October 1945, he was "very drunk * * * and in no condition" to drive, the accused continued to drink and, later in the evening, operated his automobile in such a reckless manner that he attracted the attention of several police officers who deemed it necessary to take him into custody. Such offensive and menacing conduct clearly brought disrepute and discredit to the military service and violated Article of War 96.

On the afternoon following this incident the accused consumed several bottles of beer and that evening drank "eight shots of whiskey." It is no surprise that he appeared "highly intoxicated" to the sheriff and deputy sheriff. The evidence is ample to sustain the finding of drunkenness and, in view of the offensive language of accused uttered in a public place in the presence of several persons, is also sufficient to sustain the finding of disorderly conduct.

7. It is observed that the offense of forgery, described in Specification 1, Charge I, occurred on 19 October 1943 and was, therefore, barred by the Statute of Limitations as set forth in Article of War 39. The record fails, however, to show that the accused was advised of his right to avail himself of this defense, but shows that he pleaded guilty thereto. In a number of opinions the Board of Review has stated that there is no requirement that the record affirmatively reveal that the accused has been advised of his rights in this matter, and that it may be presumed that the accused's military counsel has performed his duty to advise the accused in this particular. 5 BR 157, 251, Fouts; 18 BR 235, 236, Santo; Dig. Op. JAG 1912-40, 396 (1); III Bull. JAG, Feb. 1944, pp. 56-58. Although we do not approve of these precedents, they constitute binding authority which we feel constrained to follow.

8. The records of the War Department show that the accused is approximately 21 years of age. He completed the eleventh grade in high school, and from March 1942 to July 1943 he was employed as a welder. He entered the service on 17 July 1943, and was commissioned a second lieutenant on 30 September 1944.

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

Abner E. Lipscomb, Judge Advocate.

T. Alex Gamon, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 296014 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War 28 February 1946

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert F. Holden (O-787141), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, falsely indorsing a money order, in the amount of $22.00, with intent to defraud, in violation of Article of War 93; and of wrongfully and unlawfully driving an automobile on a public street while under the influence of intoxicating liquor, in violation of Article of War 96. He was sentenced to be dismissed the service, and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The record shows that more than two years prior to the present trial and while the accused was an enlisted man, he received a letter addressed to the payee of the money order described above and that he fraudulently indorsed the money order as alleged and cashed it. Subsequently he refunded the money thus wrongfully procured. Although this offense was barred by the Statute of Limitations, the accused pleaded guilty thereto. The record also shows that on 2 October 1945 the accused was arrested while driving an automobile in a drunken condition, and that on 3 October 1945 he was drunk and disorderly in uniform in a public eating place. Since the sentence imposed was undoubtedly based largely upon the offense of forgery which was barred by the Statute of Limitations and since the lesser offenses involving drunkenness would not ordinarily result in a sentence of dismissal, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $50 of his pay per month for three months, and that the sentence as thus commuted be ordered executed.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(Sentence confirmed but commuted to a reprimand and forfeiture of $50 pay per month for three months. As commuted ordered executed. GCMO 46, 6 Mar 1946.

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

SPJGH - CM 296061

UNITED STATES v. Second Lieutenant KENNETH H. KEECH (0-705702), Air Corps.	)	ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Lincoln Army Air Field, Lincoln, Nebraska, 23, 26 and 27 November 1945. Dismissal and total forfeitures.

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

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

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

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

Specification 1: In that Second Lieutenant Kenneth H. Keech, Air Corps, Squadron A-1, 3541st Army Air Forces Base Unit, then Air Corps Unassigned, attached Section K, 273d Army Air Forces Base Unit (SB), did, at or near the City of Merriam, Kansas, on or about 26 July 1944, wrongfully, unlawfully and with culpable negligence cause the death of Second Lieutenant James B. Davis by flying a B-24 type military aircraft, in which the said Second Lieutenant Davis was serving as a member of the crew, at such a low altitude as to bring the aircraft into contact with a tree or other obstruction to flight thus causing said aircraft to crash.

Specification 2: In that Second Lieutenant Kenneth H. Keech, * * *, did, at or near the City of Merriam, Kansas, on or about 26 July 1944, wrongfully, unlawfully and with culpable negligence cause the death of Corporal E. G. Vellone by flying a B-24 type military aircraft, in which the said Corporal E. G. Vellone was serving as a member of the crew, at such a low altitude as to bring the aircraft into contact with a

tree or other obstruction to flight thus causing said aircraft to crash.

Specification 3: In that Second Lieutenant Kenneth H. Keech, * * *, did, at or near the City of Merriam, Kansas, on or about 26 July 1944, wrongfully, unlawfully and with culpable negligence cause the death of Corporal Calvin H. Somers by flying a B-24 type military aircraft, in which the said Corporal Calvin H. Somers was serving as a member of the crew, at such a low altitude as to bring the aircraft into contact with a tree or other obstruction to flight thus causing said aircraft to crash.

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

Specification: In that Second Lieutenant Kenneth H. Keech, * * *, did, on or about 26 July 1944, wrongfully violate paragraph 16a (1) (a), Army Air Forces Regulation Number 60-16, by flying a B-24 type military aircraft of which he was pilot over the City of Merriam, Kansas, at an altitude of less than one thousand (1000) feet above buildings and other obstructions to flight of said city, while not in take-off or landing.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due and confinement at hard labor for seven years. The reviewing authority approved only so much of the sentence as provided for dismissal and forfeiture of all pay and allowances due or to become due and forwarded the record of trial for action under Article of War 48.

3. All of accused's offenses occurred on 26 July 1944. Charges were originally preferred in October 1944 and referred for trial by the Commanding General, Second Air Force, but, due to accused's hospitalization for the serious injuries he received in the airplane crash, trial was indefinitely postponed. Thereafter accused was transferred to the present general court-martial jurisdiction and because of the lapse of time the charges were redrafted, reinvestigated and again referred for trial. Practically all of the prosecution's pertinent evidence was offered by way of depositions and stipulations, the depositions having been taken for use before the general court-martial appointed by the Commanding General of the Second Air Force.

The depositions and stipulations introduced in evidence by the prosecution established that on 26 July 1944, Army Aircraft No. 44-10605, a

B-24 type of airplane commonly called a Liberator bomber, was dispatched on a local compass calibration mission from Lincoln Army Air Field, Lincoln, Nebraska. Had the compass been in working order the plane and crew would have departed promptly for overseas. Accused, reputed to be an able and conservative pilot, was in command of this plane and he was accompanied by Second Lieutenant Guy Lewis McMacken, co-pilot; Second Lieutenant James B. Davis, navigator; Sergeant Harold E. Edwards, engineer; Corporal Calvin H. Somers, armorer gunner, and Corporal E. G. Vellone, tail gunner (R. 6, 7, 8; Pros. Exs. 2, 3, 4). Accused had just spent six days in the hospital and except for the fact he seemed more quiet than usual, he appeared all right to Lieutenant McMacken. Once in the air it was discovered that the compass was not functioning properly but rather than return promptly to the air field, inasmuch as it was their first flight of the week and they had flown but a little over three hours that month, accused suggested that they continue on to Kansas City. Accused flew the plane to Kansas City, pointed out to Lieutenant McMacken where his father was employed and where he formerly worked and then continued to Shawnee, Kansas, where he circled the plane over his home three times, descending lower on each pass. Thereafter, accused flew on to Merriam, Kansas, where his wife's parents lived and made a "couple runs" over their home. Accused then flew back to Shawnee for a "couple more runs" and then returned to Merriam for "one last run" at his inlaws' home. These "runs" over Merriam were made at an altitude of around 100 feet above housetops, possibly "as low as 50 feet." All of these runs were being made over a residential area. On this last run one wing of the plane struck a tree, the plane then struck a house and crashed to the ground. At the time of the crash the motors of the craft were functioning properly (Pros. Exs. 3, 4).

Various residents of the town of Merriam saw this airplane flying in the vicinity for from twenty minutes to a half an hour and observed it make three or four low flights over residential areas during that time. It came in at not over 100 feet altitude and then descended to such level that its passage "fanned" the tops of two trees about 35 or 40 feet high, passed about 10 feet over the roof of one house and in its last pass it struck a tree and a house chimney and then crashed (Pros. Exs. 5-11, 17, 18).

As a result of the injuries they sustained in this crash, Lieutenant James B. Davis, Corporal E. G. Vellone and Corporal Calvin H. Somers all expired within a few minutes thereafter (Pros. Exs. 1, 12-15, incl.).

4. The defense introduced evidence by way of deposition to show that on 20 July 1944, Captain William D. Knapp, Flight Surgeon, examined accused and found that he was suffering from acute follicular tonsillitis. Accused was sent to the Regional Hospital at Lincoln Army Air Field, where Captain Paul Lindenberg, Medical Corps, examined him and sprayed his throat with sulfadiazine. Accused was then hospitalized until 25 July 1944. From

21 July to 25 July 1944, inclusive, accused received one-eighth of a gram of sulfadiazine four times daily. This was only a small dose of the drug. Accused was not observed at the hospital to exhibit any intolerance or sensitivity toward the drug. On 26 July 1944, following accused's release from the hospital, Captain Knapp cleared him for flying duty after ascertaining his condition from the hospital authorities and their records but without personally examining him (Def. Exs. A, C, D, E, F).

Major Orien B. Patch, Medical Corps, testified that although he would expect no untoward physiological reaction in a normal individual from such amounts of sulfadiazine as accused received, nevertheless if a person had an idiosyncrasy or sensitivity to the drug the amount accused had taken could cause dizziness, double vision, disturbed depth of perception, impaired sensory perceptions and other insidious disturbances (R. 23-25,28). The amount of the drug taken has no bearing upon a person's reaction thereto. The reaction of a person allergic to the drug might become apparent at any time within 4 hours or 10 days after administration thereof (R. 27, 28). According to Major Patch it was customary procedure to have flight surgeons examine sulfa drug patients after discharge from the hospital to determine when the effect, if any, from the drug would cease (R. 27). Major Patch saw accused on 25 July 1944 and approved his release from the hospital inasmuch as his temperature was normal and he gave no indication that he suffered any disturbance from the drug. In his opinion accused was not hypersensitive to sulfadiazine and the amount administered to him would not have caused any physiological reaction. However, he admitted it was possible for accused to have subsequently suffered such a reaction (R. 28, 32, 34, 35). The average therapeutic dose of sulfadiazine is one gram every four hours while accused received only one-eighth of a gram four times daily for four or five days (R. 22, 31).

Dr. George W. Covey, Chief of Staff at the Lincoln General Hospital, Lincoln, Nebraska, testified that a person sensitive to sulfadiazine, might have various reactions after taking the drug, including skin rash, degeneration of the liver, disturbances of the central nervous system and even actual temporary insanity. It also may disturb one's sense of judgment as to distance and as to the size and shape of objects. Such reactions do not depend upon the amount of the drug administered, some individuals having disturbed reactions after taking but a half gram while others have only so reacted after prolonged administration of it. Furthermore, such a reaction might occur within fifteen minutes or fourteen days after taking the drug (R. 67, 68). A few minutes exposure to sunshine often accentuates reaction to the drug. An individual affected by the drug might or might not realize his condition since its effect is comparable to that produced by slight intoxication and might well induce an individual to feel more competent than actually he was (R. 70). However, the number of individuals sensitive to sulfadiazine is small (R. 69).

After his rights had been fully explained, accused elected to give a sworn testimony in his own behalf. He testified that he was 22 years old when the accident occurred, that he entered upon active duty as an air cadet in March 1943 and received his commission on 7 January 1944 (R. 46, 47). He had never taken any sulfa drugs until his hospitalization from 20 July 1944 through 25 July 1944, during which time he took sulfadiazine tablets four times daily and had his throat sprayed five times. After release from the hospital the Flight Surgeon cleared him for flight duty by telephone without making any examination (R. 48-50). The day that he took off on this compass calibration mission was hot and sunny (R. 50). Once in the air he began to feel a "nervous tension or slight uneasiness" and he permitted the airplane to fly itself for a while (R. 51). He remembered circling over the town of Merriam in the vicinity of his father-in-law's home and feeling somewhat "confused" (R. 52). He admitted that he knew that Army Air Force Regulations fixed 500 feet as the minimum altitude of flight over all obstacles except that over inhabited areas the minimum altitude was 1000 feet. He did not remember flying under the prescribed altitude nor had he any recollection of the crash (R. 53).

On cross-examination accused admitted his familiarity with Army Air Forces Regulations fixing 1000 feet as the minimum flight altitude over inhabited areas (R. 57). Although he discovered his compass was not functioning properly, he continued on to Kansas City to accumulate flying time and also to see his home again before going overseas (R. 58, 60). He remembered pointing out to his co-pilot where he and his father worked in Kansas City and also flying to, and circling at least once, the town of Merriam. His plane functioned properly as he flew by visual reference to the ground and the horizon (R. 61-63).

5. In rebuttal for the prosecution Lieutenant Colonel Charles F. Sweigert, Medical Corps, testified that the average therapeutic or curative dose of sulfadiazine for ordinary infection is about six grams per day (R. 72). Administration of one-half gram of the drug daily is a small dose, being one-half of the recognized prophylactic or preventive dose of one gram daily. According to then existing directives Army personnel were permitted to continue on flying status while on prophylactic doses of this drug (R. 72). In Colonel Sweigert's opinion it was conceivable that toxic reaction could occur from such amounts of the drug as accused had taken but he believed the possibility of such an occurrence to be extremely slight (R. 74, 80). A sensitivity to the drug might become manifest within a few hours or it might be a matter of days (R. 72).

6. Accused is charged with wrongfully operating military aircraft over buildings at an altitude of less than 1000 feet, in violation of paragraph 16a (1) (a), Army Air Forces Regulations No. 60-16, and also with three distinct offenses of involuntary manslaughter. Involuntary manslaughter is homicide unintentionally caused in the commission of an

unlawful act not amounting to a felony, or caused by culpable negligence in performing a lawful act (MCM, 1928, par. 149a).

The evidence here demonstrates not only that accused flew a B-24 type of Army aircraft repeatedly over a residential area at altitudes well under the minimum of 1000 feet fixed by Army Air Forces Regulations but also that he flew it so low as to strike a tree and a house, which in turn caused the plane to crash to the ground, killing three of the crew members. Clearly he was guilty of gross negligence in so operating this aircraft. The killing of each of the three crew members as a direct result of such conduct constituted the offense of manslaughter (CM 233196, Bell, 19 BR 365). Each of the deaths constituted a separate offense and each was properly alleged in a separate specification (Bell case, supra).

The defense sought to establish that accused was suffering from toxic or psychotic reactions as a result of potions of sulfadiazine that had been administered to him by medical authorities for about five days immediately preceding the day of this fatal flight. There is medical testimony in the record to establish the possibility of such reactions. However, there is no substantial evidence to induce the belief that accused in fact suffered any such reaction. He was able to operate the aircraft, to converse intelligently with his co-pilot, to point out locale with which he was familiar and, most important of all, to intend to make low runs or passes over his father-in-law's house and to execute that intention. In view of such evidence, it cannot be said the court was unwarranted in concluding that accused was mentally responsible for his acts.

The depositions of two of the members of accused's crew, which were admitted in evidence and contained substantial evidence establishing accused's guilt of the offenses charges, were taken on 3 and 11 April 1945, respectively. The original Charges and Specifications preferred against accused were referred for trial on 23 August 1944 by the Commanding General of the Second Air Force. However, accused was not tried under that reference because of his prolonged hospitalization from injuries suffered in the crash. Subsequently accused came under the jurisdiction of other general court-martial authority and the Charges and Specifications were reinvestigated, were redrafted without change and were referred for trial on 24 October 1945 by the Commanding General of the Army Air Forces Eastern Technical Training Command, thereafter designated Army Air Forces Technical Training Command. Thus, the depositions were taken before reference to trial of the specific Charges and Specifications on which accused was tried but after the identical offenses had been originally charged against accused and referred for trial by other general court-martial authority.

It has been held that depositions taken prior to reference of a case for trial constitute no more than affidavits and are incompetent evidence unless accused expressly consents to their admission knowing he has valid

objection thereto (CM 162743, Johnson; CM 170175, Besford; CM 202457, Mitchell and Hatfield). In reaching this conclusion it was held that a valid deposition must be taken in connection with a pending action, i.e., after reference of the case for trial. Furthermore, it was considered highly significant in the cited cases that it did not affirmatively appear that accused had notice of the time the depositions were to be taken or that he was represented thereat, or accorded the opportunity to submit cross-interrogatories. Clearly statements taken under such circumstances constituted nothing more than affidavits.

However, in the present case the depositions were taken after the identical offenses for which accused was eventually tried had in fact been referred to trial by competent authority. Thus, these depositions were taken in connection with a pending action. Furthermore, it is apparent that accused received notice of the taking of these depositions and was represented at the time inasmuch as cross-interragatories asked of the deponents appear in each deposition. In net effect, the situation here is similar to that involved in using, at a subsequent trial of the same person on the same issues, a deposition taken for use at the earlier trial. Such use of depositions is permitted (MCM, 1928, par. 117b). Accordingly, in our opinion these depositions were properly admitted in evidence.

7. On 15 January 1945 John C. Mullen of Omaha, Nebraska, attorney at law, appeared before the Board of Review in behalf of accused, his client, and was accorded a full hearing. Mr. Joseph Skubitz, secretary of Senator Clyde M. Reed of Kansas, also was present. Congressman Erret P. Scrivner of Kansas, although interested in this matter, notified the Board he was unable to appear at the hearing. At the conclusion of the hearing, Mr. Mullen filed a brief with the Board which has been fully considered thereby.

8. Accused is 23 years of age and is married. Following graduation from high school accused worked as a draftsman's helper from April 1941 to October 1942 and thereafter until March 1943 he was employed as an oil tester by a refining company. In March 1943 he entered upon active duty as an air cadet and was commissioned a second lieutenant on 7 January 1944 upon graduation from Army Air Forces Pilot School, Frederick Army Air Field, Frederick, Oklahoma.

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

Thomas N. Jaffey, Judge Advocate

Joseph J. Stern, Judge Advocate

Robert C. Trenethan, Judge Advocate

SPJGH - CM 296061 1st Ind

Hq ASF, JAGO, Washington 25, D. C. [illegible] 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Kenneth C. Keech (O-705702), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of three separate offenses of manslaughter, in violation of Article of War 93, and guilty of operating Army aircraft below the requisite altitude, in violation of Article of War 96. He was sentenced to dismissal, total forfeitures and confinement at hard labor for seven years. The reviewing authority approved only so much of the sentence as provided for dismissal and total forfeitures and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion. On 26 July 1944, accused, the pilot of a B-24 type of bomber aircraft, and his crew engaged in a scheduled flight from Lincoln Army Air Field, Lincoln, Nebraska, immediately preparatory to transfer overseas. Accused flew the aircraft to the town of Merriam, Kansas, where his father-in-law resided and there proceeded to make three or four low runs over his father-in-law's house. On these runs the aircraft descended to an altitude of between fifty and one hundred feet, well below the altitude of one thousand feet fixed by Army Air Forces Regulations as the minimum flight altitude over inhabited areas. On his last run he flew the aircraft so low that one of its wings struck a tree, the aircraft then struck the roof of a house and crashed to the ground, killing three members of the crew. As a result of the crash, accused suffered various injuries, including loss of an arm amputated at the shoulder, which hospitalized him for the better part of a year.

The defense sought to establish that accused was suffering from toxic or psychotic reactions as a result of potions of sulfadiazine that had been administered to him by medical authorities for about five days immediately preceding the day of this fatal flight. There is medical testimony in the record to establish the possibility of such reactions. However, there is no substantial evidence to induce the belief that accused in fact suffered any such reaction. He was able to operate the aircraft, to converse intelligently with his co-pilot, to point out locale with which he was familiar and, most important of all, to intend to make low runs or passes over his father-in-law's house and to execute that intention. In

view of such evidence, it cannot be said the court was unwarranted in concluding that accused was mentally responsible for his acts.

On 15 January 1945 Mr. John C. Mullen of Omaha, Nebraska, attorney at law, appeared before the Board of Review on behalf of accused and was accorded a full hearing. Mr. Joseph Skubitz, secretary of Senator Clyde M. Reed of Kansas, also was present. Congressman Erret P. Scrivner of Kansas, although interested in this matter, notified the Board he was unable to appear at the hearing. At the conclusion of the hearing, Mr. Mullen filed a brief which has been fully considered by the Board.

Accused was willfully and wantonly negligent in piloting this aircraft at such an extremely low level over a residential area, his conduct manifestly exposing persons and property on the ground and in the air to the injury and destruction that resulted. Transmitted with the record of trial is a Memorandum for The Judge Advocate General, dated 4 January 1946, from General H. H. Arnold, Commanding General, Army Air Forces, in which General Arnold expresses the opinion that accused's offense "fully warrants his dismissal from the service" and, further, that accused was "very fortunate" in that the reviewing authority "saw fit to eliminate all confinement from the sentence." I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Form of action
3. Memo fr Gen Arnold
4 Jan 46

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. As modified ordered executed. GCMO 47, 6 March 1946).

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

SPJGK - CM 296066

6 FEB 1946

UNITED STATES	)	FOURTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Walla Walla Army Air Field, Washington, 15 November 1945. Dismissal and total forfeitures.
	)	
Second Lieutenant JOSEPH C. O'DELL (O-711242), Air Corps.	)	

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

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

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

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

Specification: In that Second Lieutenant Joseph C. O'Dell, Jr., Squadron T, 423rd Army Air Forces Base Unit, did, without proper leave, absent himself from his organization and station at Walla Walla Army Air Field, Washington, from about 6 September 1945 to about 16 September 1945.

CHARGE II: Violation of the 95th Article of War. (Finding of guilty disapproved by reviewing authority).

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

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

Specification 1: In that Second Lieutenant Joseph C. O'Dell, Jr., Squadron T, 423rd Army Air Forces Base Unit, did, at Reno, Nevada, on or about 8 September 1945, wrongfully take and use without the consent of the owner, a certain airplane, to wit: one Fairchild M 62, NC50469, the property of J. O. Hutton, of a value of more than $50.00.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: In that Second Lieutenant Joseph C. O'Dell, Jr., Squadron T, 423rd Army Air Forces Base Unit, did, at Reno, Nevada, on or about 8 September 1945, wrongfully violate Part 60.700 of Civil Air Regulations by acrobatically flying a civilian aircraft over a congested area, to-wit: Hubbard Field.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 2 and 3 of Charge III but was found guilty of all other Specifications and guilty of all Charges. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the finding of guilty of the Specification of Charge II and Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution relating to the Charges and Specifications of which the accused now stands convicted, is briefly summarized as follows:

a. Charge I and its Specification.

A duly authenticated extract copy of the morning report of Squadron T-3, 423rd Army Air Forces Base Unit, Walla Walla Army Air Field, Washington, containing entries showing accused as absent without leave from 6 September to 16 September 1945 was introduced and admitted into evidence without objection (R. 6, Pros. Ex. 1).

b. Charge III, Specifications 1 and 4.

At 1000 hours on 8 September 1945, Mr. Junius O. Hutton, owner of an airplane, designated as Fairchild M-62, NC 50469, "tied down" the airplane at Hubbard Field, Reno, Nevada. When he left the plane, "The ignition was turned off. The controls were placed on. The propeller covers were placed on. Wing tips were tied down at tie down stakes." He gave no one permission to use the plane on 8 September 1945. When he examined the plane on 9 September 1945 he found "The ship was parked crooked and only one wing tip was tied. Everything was in order but for one thing, he forgot to lock the controls. I always lock the controls after I use my plane so I know someone else must have been in it" (R. 8, Pros. Ex. 3).

Mr. Roy Masterman was the owner of a plane designated as NC 56120 "stored" at Hubbard Field, Reno, Nevada. On 8 September 1945 the accused tried to start Mr. Masterman's plane but two Army officers who were friends of the latter and knew his plane "drove" him away. On the same date, as Mr. Masterman was "about to drive from Hubbard Field to the City of Reno," he saw plane NC 50469 -

"*** apparently headed right for us and just high enough to cross the telephone wires. He then made a right turn and flew right down the runway at about 20 to 30 feet off the ground. He then pulled up

and dived down again between the Administration Building and the Hangar at an altitude lower than the buildings. Then he pulled up over the east side of the airport and then he attempted a slow roll. He then pulled out of the slow roll and went into a loop. Coming out of the loop he nearly hit a C-46 which was passing by. He came out of the loop and made another pass down the field. He then went up to the east side of the field and came back and made a landing against the Tee" (R. 8, Pros. Ex. 4).

Mr. Masterman asked accused whose plane he was flying and the latter stated he was flying, with permission, the plane of a friend. Accused further stated his name was L. C. Travis and that he was stationed at Reno Army Air Base. Mr. Masterman testified there was a "pronounced smell of liquor" on accused's "person" and that he was "under the influence of intoxicating liquor" (Pros. Ex. 4).

At about 1830 hours on 8 September 1945, Mr. Frederic W. Guermann observed accused enter a "PT 19" plane designated as NC 50469 and start its engine. Accused was alone in the plane as "it taxied to the center of the runway." Mr. Guermann described the maneuvers of the plane after the take-off, as follows:

"He just cleared the fence and as he cleared the fence he got up between 10 to 20 feet and then went up to 400 feet. He made a sharp turn to the right and came right back over the Hangar. He made a wing-over over the tie down strip next to the big Hangar. The big Hangar is west of the intersection of the field which intersection is approximately in the center of the field. After the wing-over he turned to the left and went catty-corner northeast of the intersection and climbed to between 1200 and 1500 feet. Then he did two sloppy lazy eights. Then he went to 2000 feet. He was then headed south and he dived the plane and gained air speed after which he executed a loop at the top of which he just missed a C46, at least it appeared that way from the ground. He then made a few more maneuvers in the air. Then he came down in a southwesterly direction at a very low altitude at about 60 feet, then he circled the Hangar with the right wing down and then he executed a steep bank with the left wing down between the two Hangars at approximately 25 feet. At the time from the ground it was clear that he was waving his left hand in the air. He then came back and buzzed the Hangar again at approximately 50 feet." (R. 8, Pros.Ex. 5)

When the plane landed Mr. Guermann "talked to the man" who gave his name as "L. C. Travis, T4, Reno Army Air Base". On 9 September 1945, the next day, accused approached Mr. Guermann, apologized, and said "if he had done anything wrong he would be glad to pay for it" (R. 8, Pros. Ex. 5).

Pursuant to a complaint "concerning a violation of CAA Regulations," Mr. Robert Kaufman, Inspector for Civil Aeronautics Administration, on 9 September 1945 questioned accused, who, when first asked whether he was "the man who did the buzz job at Hubbard Field on Saturday, 8 September 1945" at first "refused to admit it and then admitted that he was the man" (R. 9, Pros. Ex. 6). The prosecution did not offer, but asked the court to take judicial notice of the "Civil Air Regulations governing this case" (R. 6).

4. The accused, after having been fully advised of his rights, elected to make a sworn statement as to Charge II and the Specification thereof, but elected to remain silent as to all other Charges and Specifications.

5. The Specification of Charge I alleges that accused absented himself without proper leave from his station from about 6 September 1945 to about 16 September 1945.

The extract copy of the morning report introduced into evidence by the prosecution without objection constituted prima facie evidence of accused's guilt of absence without leave for the period alleged (par. 117, MCM, 1928). Although it appears on the face of the extract copy of the morning report that the entry showing the initial unauthorized absence of accused was entered on the original morning report on 17 September 1945, delay in making the entry in the morning report does not render an extract copy thereof inadmissible (CM 269103, Zoller, 44 BR 387). There is no evidence in the record to impugn the commanding officer's knowledge of the accused's absence without leave, and the usual presumption of regularity is applicable to the morning report (idem).

6. The evidence compels a finding of guilty of the wrongful taking and use of an airplane without the consent of the owner as alleged in Specification 1, Charge III. It was established by uncontradicted testimony that on 8 September 1945 the accused entered an airplane owned by Mr. J. C. Hutton, started the engine thereof and flew the plane over Hubbard Field. Mr. Hutton gave no one permission to use his plane on 8 September 1945.

7. Specification 4 of Charge III alleges that accused did at Reno, Nevada, on or about 8 September 1945, wrongfully violate Part 60.700 of Civil Air Regulations by acrobatically flying a civilian aircraft over a congested area, to wit: Hubbard Field.

Effective 1 August 1945, prior to the date of the misconduct alleged in the Specification, Part 60, of the Civil Air Regulations which includes Part 60.700, was amended. Under the regulations as amended there is no Part 60.700, but the conduct described in the Specification and formerly prohibited by Part 60.700 is now prohibited by Part 60.104. The erroneous citation thus presents the question of the validity of a Specification which alleges the wrongful violation of a Civil Air Regulation and which describes

the conduct constituting the violation, which regulation however was no longer in existence on the date the offense was alleged to have been committed, owing to a previous amendment of the Civil Air Regulations.

In CM 202250, Ramos , 6 BR 17, the Specification therein alleged that accused

> "*** did at Fort Mills, P.I., on or about March 23, 1934, willfully, unlawfully and feloniously commit an act of lasciciousness upon the person of one Rosa Degesa by then and there forcing her upon a mat and placing his penis against her buttocks and remaining in that position for some moments, this being in violation of Article 439 of the Penal Code of the Philippine Islands."

On the date mentioned in the Specification, Article 439, Philippine Penal Code, was no longer in force but had been superseded on 1 January 1932 by Article 336, Revised Penal Code. It was further shown that there were no material differences between the two Articles. The Board of Review, in holding the erroneous citation was not a fatal error stated:

> "The Board of Review considers the erroneous citation not to be a fatal error when it is borne in mind that the article cited had been superseded by another of substantially the same provisions; and that the specification should be read as though Article 336, above quoted, now in force, had been mentioned."

Following the principle enunciated in the above cited case this Board of Review is of the opinion that the Specification should be read as though Part 60.104 of the Civil Air Regulations now in force had been mentioned. Though the Specification is defective in the form in which it was drawn, the Board is convinced that it fully apprised the accused of the nature and elements of the Charge against him. He was fully aware that he was charged with violation of the Civil Air Regulations and of the misconduct constituting the violation. He raised no objection to the defect in the Specification prior to or during the trial. Had he done so the requirements of good pleading would dictate that the Specification should be amended or withdrawn. The Manual for Courts-Martial, 1928, paragraph 87b, page 74, states:

> "*** No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect or that his substantial rights were in fact otherwise injuriously affected thereby."

The Board of Review is of the opinion the erroneous citation does not constitute fatal error.

The evidence clearly establishes that on 8 September 1945 the

accused performed acrobatics with a civilian plane over Hubbard Field. After the take-off, in which he "just" cleared the fence, he flew the plane down the runway about 20 to 30 feet above the ground, pulled up and dived between the administration building and the hangar at an altitude lower than the building, performed two "sloppy lazy eights" at an altitude of between 1200 and 1500 feet, "appeared" at one time almost to collide with a "C-46 which was passing by",attempted a slow roll and went into a loop, buzzed the hangar and later made a landing against the "Tee." Accused was observed waving his left hand in the air as he was flying the plane.

Although the evidence clearly establishes that the accused performed acrobatics in a civilian plane over Hubbard Field, there is not a scintilla of evidence that Hubbard Field was a congested area. Part 60.700 of the Civil Air Regulations prior to amendment provided, in so far as pertinent to the Specification as drawn, that,

> "No person shall acrobatically fly an aircraft (a) At any height whatsoever over a congested area of any city, town, or settlement ***". (Underscoring supplied.)

Part 60.104 of the Civil Air Regulations in force and effect on 8 September 1945, in pertinent part provides:

> "An aircraft shall not be aerobatically flown (a) *** (b) Over the congested areas of cities, towns, settlements ***" (Underscoring supplied).

An examination of these Regulations clearly indicate that in order for the performance of acrobatics or aerobatics to be a violation thereof, it is essential that the acrobatics or aerobatics be performed over a congested area. The total absence of any evidence from which to infer that Hubbard Field was a congested area requires a finding of not guilty of the offense as alleged.

In view of the finding of not guilty of a wrongful violation of the Civil Air Regulations nothing remains in the Specification from which can be carved a lesser included offense. It is not wrongful per se to perform acrobatics over an airfield and no allegation is made in the Specification that he performed acrobatics other than in wrongful violation of the Civil Air Regulations. Therefore the findings of guilty of Specification 4, of Charge III, must be disapproved.

8. War Department records disclose that this officer is 26 years of age and married, and the record of trial indicates he is the father of one child. He graduated from high school and attended North Texas State Teachers College for one year, but did not graduate. In civil life he was employed for approximately one year as a "Service Salesman" for the Standard Stations Incorporated and for approximately 6 months as a "helper" and "Expediter" for the Consolidated Steel Corporation, both of Los Angeles,

California. He served in the Regular Army as an enlisted man from 22 June 1938 until 7 December 1938, on which latter date he was given a Certificate of Disability for Discharge for "Flat Feet," a physical disability which was subsequently corrected. He again entered the service on 7 October 1942, became an aviation cadet on 1 April 1943, and after completion of the required training was, on 8 February 1944, appointed and commissioned a temporary second lieutenant in the Army of the United States. On 14 October 1944 he was reprimanded and restricted to the limits of his post for one week under the provisions of Article of War 104 for four minor infractions of rules and regulations. On 21 September 1945 accused tendered through channels a resignation for the good of the service in lieu of trial by court-martial. On 4 January 1946 the Secretary of War directed that this resignation not be accepted.

9. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally insufficient to support the findings of guilty of Specification 4, Charge III, but legally sufficient to support the findings of guilty of all other Specifications and of all Charges, approved by the reviewing authority, and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of either the 61st Article of War or the 96th Article of War.

Thomas W. Moore, Judge Advocate

William S. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 296066 1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Joseph C. O'Dell (0-711242), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave for a period of ten days, in violation of Article of War 61 (Specification, Charge I); of wrongfully and dishonorably failing to support his wife and child, in violation of Article of War 95 (Specification, Charge II); and of wrongfully taking and using an airplane without the consent of the owner (Specification 1, Charge III), and of wrongfully violating Part 60.700 of the Civil Air Regulations by acrobatically flying a civilian aircraft over a congested area (Specification 4, Charge III), both in violation of the 96th Article of War. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the finding of guilty of wrongfully and dishonorably failing to support his wife and child (Specification, Charge II), approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 4 of Charge III, but legally sufficient to support the findings of guilty of all other Specifications and all Charges approved by the reviewing authority, and the sentence, and to warrant confirmation of the sentence.

The accused officer absented himself without proper leave from his station from 6 September to 16 September 1945. On 8 September 1945 the accused entered an airplane owned by Mr. J. C. Hutton, started the engine thereof and flew the plane over Hubbard Field, Reno, Nevada. Mr. Hutton gave no one permission to use his plane on 8 September 1945.

Absence without leave by an officer is a serious military offense and this, coupled with the unauthorized use of an airplane owned by a civilian, clearly demonstrates unworthiness of a commission. On 14 October 1944 accused was reprimanded and restricted to the limits of his post for one week under the provisions of Article of War 104 for four minor infractions of rules and regulations. On 21 September 1945 he tendered, through channels, a resignation for the good of the service in lieu of trial by court-martial. On 4 January 1946 the Secretary of War directed that this resignation not be accepted. I recommend that the sentence be confirmed,

but that the forfeitures be remitted, and that the sentence as thus modified be ordered executed.

4. Consideration has been given to a memorandum from General H. H. Arnold, formerly Commanding General, Army Air Forces, to The Judge Advocate General recommending that the sentence be confirmed and ordered executed.

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

3 Incls
1. Record of trial
2. Form of action
3. Ltr. fr Gen Arnold

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. GCMO 51, 6 March 1946).

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

SPJGN-CM 296074

UNITED STATES v. Second Lieutenant ALFRED L. CHENNAULT (0-794637), Air Corps.	ARMY AIR FORCES PERSONNEL DISTRIBUTION COMMAND Trial by G.C.M., convened at Army Air Forces Overseas Replacement Depot, Greensboro, North Carolina, 14 November 1945. Dismissal, total forfeitures, and confinement for two (2) years.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Alfred L. Chennault, Air Corps Unassigned, Attached Squadron H, 1060th AAF Base Unit, did, at Kansas City, Missouri, on or about 22 June 1945, with intent to defraud, wrongfully and unlawfully make and utter to the Traders Gate City National Bank, Kansas City, Missouri, a certain check, in words and figures as follows, to wit:

Kansas City June 22 1945

VALLEY NATIONAL BANK, TUCSON, ARIZONA

Pay to Traders Gate City National Bank, Kansas City, Mo.
or order $50.00

Fifty and no/100 - - - - - - - - - - - - - - - Dollars

Ft. Geo. G. Meade /s/ Alfred L. Chennault
Md. 0-794637

and by means thereof, did, fraudulently obtain from the said Traders Gate City National Bank, $50.00 in cash, he, the said Alfred L. Chennault, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Tucson, Arizona, for the payment of said check.

Specification 2: Similar to Specification 1 except that check was made and uttered to the First National Bank, Kansas City, Missouri.

Specification 3: Similar to Specification 1 except that check was made and uttered on 27 August 1945, to the Commerce Union Bank, Nashville, Tennessee, and was in the sum of $100.

Specification 4: In that Second Lieutenant Alfred L. Chennault, Air Corps Unassigned, Attached Squadron H, 1060th AAF Base Unit, did, at Reno, Nevada, on or about 25 June 1945, with intent to defraud, wrongfully and unlawfully make and utter to the First National Bank of Nevada, Reno, Nevada, a certain check, in words and figures as follows, to wit:

No. 7-8 San Antonio, Texas June 25, 1945

NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

Pay to the Order of Cash $25.00

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

Ft. Meade /s/ Alfred L. Chennault
Md. 0-794637

and by means thereof, did, fraudulently obtain from the said First National Bank of Nevada, $25.00 in cash, he, the said Alfred L. Chennault, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of said check.

Specifications 5 to 19: Similar to Specification 4 but differing as to dates and payees as follows:

He also had a checking account in the National Bank of Fort Sam Houston, San Antonio, Texas. The sole deposits were monthly allotments of $50, which continued from sometime prior to May 1945 to October 1945 (Pros. Ex. 14). Between 25 June 1945 and 10 August 1945 he wrote sixteen checks on this account, each in the sum of $25. Thirteen were issued in Reno, Nevada, three to the First National Bank and ten to the El Cortez Hotel, and the proceeds, according to him, were lost in gambling (R. 16-17; Pros. Exs. 1, 7-10, 14). After leaving Reno he was in need of funds to complete a transfer to Fort Meade, Maryland, and, en route, cashed checks at the Walker Bank and Trust Company in Salt Lake City, Utah, and at the Bolling Field Post Exchange in Washington, D. C. Later he spent a 30 day leave period in Utah and, having lost his funds gambling, cashed another check at the First Security Bank in Ogden, Utah (R. 17-18; Pros. Exs. 1, 11-13, 14).

His account in the National Bank of Fort Sam Houston was under $25 on all dates on which the foregoing checks were issued except 10 July 1945 and 10 August 1945 when the regular $50 allotment was credited. However, other outstanding checks immediately exhausted the allotment deposits, and the checks described were dishonored upon presentation (R. 14; Pros. Exs. 1, 2). The accused admitted that at the time he wrote these checks he was aware that the funds in this account were insufficient to pay them (Pros. Ex. 14).

Accused voluntarily gave a pre-trial statement in which he recounted his execution of the worthless paper and also gave some of his personal history. A native of Texas, 28 years of age and married, he asserted he was a college graduate. His civilian employment was with the American and Branniff Airlines in the capacity of agent. Prior to his induction into the Army on 17 May 1942 he was with the Canadian Air Forces. In October 1944 he went overseas as a pilot of a B-24 and flew eighteen combat sorties. He returned to this country 9 July 1945 (Pros. Ex. 14).

4. Evidence for the defense: Accused, after explanation of his rights as a witness, elected to remain silent (R. 19). A copy of his Form 66-2 was introduced in evidence in his behalf (R. 19).

5. The nineteen Specifications of the Charge allege that between 22 June 1945 and 27 August 1945 accused made and uttered to various banks and business establishments, with intent to defraud, nineteen checks totalling $600, and fraudulently obtained that amount in cash, knowing he did not have and not intending to have sufficient funds, in the banks on which drawn, for payment.

It is undisputed that accused made and uttered the checks and obtained the face amounts in cash, and that the checks were dis-

Spec.	Date	Payee
5	27 June 1945	First National Bank of Nevada, Reno, Nevada
6	4 July 1945	El Cortez Hotel, Reno, Nevada
7	5 July 1945	id.
8	6 July 1945	id.
9	7 July 1945	id.
10	8 July 1945	id.
11	9 July 1945	id.
12	10 July 1945	id.
13	10 July 1945	First National Bank of Nevada, Reno, Nevada
14	11 July 1945	El Cortez Hotel, Reno, Nevada
15	12 July 1945	id.
16	15 July 1945	id.
17	18 July 1945	Walker Bank & Trust Co. Salt Lake City, Utah
18	20 July 1945	Bolling Field Exchange, Bolling Field, D.C.
19	10 August 1945	First Security Bank of Utah, Ogden Branch, Ogden, Utah.

Specification 20: (Motion to strike sustained; R. 14, 18).

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

3. Evidence for the prosecution: It was stipulated that accused made and uttered all of the checks described in the Specifications and received the face amounts in cash. The instruments were dishonored upon presentation for payment (R. 14; Pros. Ex. 1).

On 22 June 1945, accused, while passing through Kansas City, Missouri, cashed a $50 check at the Traders Gate City National Bank and another for the same amount at the First National Bank. His asserted purpose was "to defray traveling expenses." The instruments were drawn on the Valley National Bank of Tucson, Arizona (R. 15, 18; Pros. Exs. 4, 5, 14). The accused had an account in this bank but the only deposits were derived from an allotment which he discontinued in May 1945. The last payment was credited to his account on 7 June 1945 and by 22 June 1945 the balance was only $24 (R. 14, 15, 18; Pros. Exs. 3, 4). He later contended that at the time he wrote these checks he did not know whether there were sufficient funds in the bank to pay them (Pros. Ex. 14). Notwithstanding the diminishing condition of this account he wrote a third check against it in the sum of $100 on 27 August 1945, and cashed it at the Commerce Union Bank in Nashville, Tennessee (R. 15; Pros. Ex. 6).

honored upon presentation. His account in the Valley National Bank of Tucson, Arizona, upon which he drew the $50 checks described in Specifications 1 and 2 and the $100 check described in Specification 3, contained only $24 and, consequently, his intent to defraud may be inferred. His self-asserted lack of knowledge of the status of his account is no defense because it was his duty to ascertain and inform himself on this score.

In writing the sixteen $25 checks described in Specifications 4 to 19, which he drew upon his account in the National Bank of Fort Sam Houston, San Antonio, Texas, he admittedly acted with knowledge that he did not have sufficient funds to honor his drafts. Although, on two dates on which he wrote checks, there was over $25 in the account, it was promptly exhausted by payment of other checks outstanding when the checks in question were given. It does not avail the accused that he had the money in the bank at the date he wrote the checks. It was his duty to see that the money remained in the bank and was available for payment upon timely presentation. The Specifications are proven beyond any reasonable doubt.

6. War Department records show that the accused is about 29 years of age having been born 2 November 1916. He had two years at the Junior College in Paris, Texas, his birthplace, and subsequently attended Southern Methodist University for one and a half years. After leaving college in 1938, he worked as a clerk in a stationery business, as a tooling clerk for an aircraft manufacturer, and as a passenger agent for a commercial airline. He enlisted in the Royal Canadian Air Force on 7 June 1941 and, after serving as an aviation cadet, transferred to the United States Army Air Forces on 15 May 1942. Upon completion of his training he received a commission as a second lieutenant in the Air Corps Reserve on 13 December 1942, entering upon active duty on that date. He served overseas with the 767th Bombardment Squadron and was awarded the Air Medal and an Oak Leaf Cluster for "meritorious achievement in aerial flight while participating in sustained operational activities against the enemy." On 25 July 1944 he received a reprimand and forfeiture under Article of War 104 for absence without leave for three days. Further action under Article of War 104 was taken against him on 17 August 1944 and again on 6 September 1944 by reason of his issuance of worthless checks. His 201 File contains considerable correspondence between the War Department and his creditors concerning his issuance of such checks and nonpayment of debts.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the

record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Robert J. Flamm, Judge Advocate.

Samuel L. Morgan, Judge Advocate.

SPJGN-CM 296074 1st Ind
Hq ASF, JAGO, Washington, D.C. JAN 3
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Alfred L. Chennault (0-794637), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of making and uttering, with intent to defraud, between 22 June 1945 and 27 August 1945, nineteen worthless checks totalling $600, knowing that he did not have and not intending that he should have sufficient funds for payment in the banks on which drawn, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct, for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

Although he had only $24 in the Valley National Bank of Tucson, Arizona, accused wrote two checks, each for $50, and cashed them at Kansas City banks on 22 June 1945. Two months later he drew a $100 check on the account. He also had a checking account in the National Bank of Fort Sam Houston at San Antonio, Texas, against which he issued a large number of checks. His deposits in this bank were sufficient to cover only a few of these drafts and, between 25 June and 10 August 1945, sixteen checks, each for $25, were dishonored. Most of these checks were uttered to hotels and banks in Reno, Nevada, and the proceeds, according to accused, lost in gambling. He admitted knowing that his balance in the San Antonio bank was insufficient to pay them. The record does not disclose that accused has ever redeemed any of these checks.

This is not the only time accused has been in difficulty over his checks. In August 1944 and again in September 1944 he received punishment under Article of War 104 for like offenses. His 201 File contains a number of letters from his creditors complaining of his issuance of worthless checks as well as non-payment of debts. The staff judge advocate in his review in the present case refers to an additional $700 in worthless checks on which no charges were preferred. Although it is apparent that accused deserves severe disciplinary measures, I believe the confinement imposed is somewhat

excessive, particularly in view of his creditable war record: he has flown 18 combat missions as the pilot of a B-24 bomber and received the Air Medal with Oak Leaf Cluster. I recommend that the sentence be confirmed but that the confinement be reduced to one year and that the forfeitures be remitted, that the sentence as thus modified be ordered executed, and that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence confirmed , forfeitures remitted and confinement reduced to one year. As modified ordered executed. GCMO 41, 6 March 1946).

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

(79)

21 JAN 1946

SPJGH - CM 296107

FORT LEWIS, WASHINGTON
NINTH SERVICE COMMAND
ARMY SERVICE FORCES

UNITED STATES)
)
v.)
)
Captain JOHN SAVINI)
(0-394474), Infantry.)

Trial by G. C. M., convened at Fort Lewis, Washington, 27 November 1945. Dismissal.

OPINION of the BOARD OF REVIEW
TAPPY, BECK, STERN and TREVETHAN, Judge Advocates.

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

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

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

Specification: In that Captain John Savini, Infantry, Detachment of Patients, Madigan Hospital Center, Madigan General Hospital, Fort Lewis, Wash., did, at The Dalles, Oregon, between on or about 30 May 1945 to on or about 16 of Sept 1945, while lawfully married to Mrs. Ellis Josephine Straub Savini, wrongfully, dishonorably and unlawfully live and cohabit with a woman, to wit, Joyce Eloise Potter, not his lawful wife.

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

Specification 1: In that Captain John Savini, Infantry, ***, did, at Fort Lewis, Washington, on or about 30 April 1945, present for approval and payment a claim against the United States by causing to be presented to Major Angus S. Clist, Finance Officer at Fort Lewis, Washington, an officer of the United States duly authorized to approve and pay such claims, in the amount of $132.00 for rental allowance and subsistence allowance which claim was false in that he, said Captain Savini, stated in said claim that Joyce

P. Savini was his lawful wife and which said statement was then known by the said Captain Savini to be false.

Specification 2: Identical in form with Specification 1 except that the date of the offense is 31 May 1945 and the amount of the false claim is $133.

Specification 3: Identical in form with Specification 1 except that the date of the offense is 31 August 1945 and the amount of the false claim is $133.

The accused 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, recommended that its execution be suspended and forwarded the record of trial for action under Article of War 48.

3. Evidence introduced by the prosecution to support the Charge of unlawful cohabitation may be summarized as follows:

It was stipulated between the prosecution, defense and the accused that Mrs. Ellis Josephine Straub Savini was alive on 16 September 1945 and that if she were present she would testify that she resides in San Jose, California, that she was married to John Savini on 11 February 1942 at Tacoma, Pierce County, Washington, and that said marriage had not been dissolved (R. 6, 7). A certified copy of a marriage certificate, received in evidence without objection, shows the marriage of the above-named persons in accordance with the stipulated testimony of Mrs. Ellis Straub Savini (R. 7; Pros. Ex. 1). There was also received without objection a certified copy of a marriage certificate showing the marriage of John Savini and Joyce Eloise Potter on 9 April 1942, at Seattle, Washington (R. 10; Pros. Ex. 2). Mrs. Ellen Potter of The Dalles, Oregon, testified that she was present at the marriage ceremony of her daughter, Joyce Eloise Potter, and the accused on 9 April 1942, at Seattle, Washington, and that they resided at her home during the months of June and July 1945, living together as husband and wife. They occupied the same room at night and Mrs. Potter introduced accused to friends as her "son-in-law". Subsequent to their departure in July the couple visited with Mrs. Potter in August and September 1945 and on these occasions they deported themselves in similar manner by cohabiting as husband and wife (R. 7-9).

The prosecution's evidence in support of the false claim offenses (Charge II, Specifications 1, 2 and 3) was as follows:

It was stipulated between the prosecution, the defense and the accused that the signature of the payee appearing on each of three photostatic copies of pay and allowance vouchers for the months of April, May and August 1945 was the signature of the accused and said vouchers were received in evidence without objection (R. 10; Pros. Exs. 3, 4, 5). It was further stipulated that the accused caused the above-mentioned pay and allowance vouchers to be presented on 30 April 1945, 31 May 1945 and 31 August 1945, respectively, to Major Angus S. Clist, Finance Officer, Fort Lewis, Washington, an officer of the United States duly authorized to approve and pay such claims. On each voucher, under the heading "Dependents", Joyce P. Savini, 404 W. 3d St., The Dalles, Oregon, is named as accused's lawful wife. The one for the month of April shows $42 as the amount claimed for subsistence, while those for May and August each show a claim for $43.40 for that item; and all three show a claim of $90 for rental allowance for the respective periods involved (R. 10, 11).

4. Accused, having been advised as to his rights as a witness, elected to testify under oath. He testified that following intimate relations with Lieutenant Ellis Straub during December 1941 and January 1942, she informed him that she had become pregnant. Although accused was then engaged to Miss Joyce Potter he married Lieutenant Straub to give her unborn child a name, with the understanding that his wife would permit him to obtain a divorce. After the marriage Mrs. Savini changed her mind and would not permit accused to divorce her. Obtaining legal advice, accused was informed that he had no grounds for divorce. He did not live with his wife at any time after the marriage. On 9 April 1942 he married Miss Potter because his Division was alerted for overseas movement and he felt he was entitled to some happiness with the girl he loved before his departure, being of the opinion that he might not return. Accused testified that Miss Potter was aware of his marriage to Lieutenant Straub at the time of her (Miss Potter's) "marriage" to him. The alert status of his organization was revoked, his battalion was transferred to Camp Hood, Texas, and accused did not go overseas until April 1944. He attempted to communicate with "Lieutenant Straub" with a view to divorce but was not successful, although he contributed to her support from the date of the marriage until June 1944, payment being made through her brother-in-law who lived in San Francisco. She received from accused the sum of $100 per month during the first year following the marriage, part by direct payment and the balance by allotment. Thereafter, the first allotment was discontinued and a new one executed by accused under which his wife received $50 per month through her brother-in-law as allottee. In June 1944 all payments were stopped and nothing further has been paid accused's wife because through error in the Office of Dependency Benefits she had been overpaid to the extent of almost $2000. Reimbursement for the overpayment was being sought from accused. Recently he was returned to the United States from a general hospital in France and is presently a patient at Madigan General Hospital awaiting action of a

retiring board as a result of wounds received in combat (R. 11-14). Accused admitted that he lived with Joyce Eloise Potter between 30 May 1945 and 16 September 1945 (the period of the alleged unlawful cohabitation - Charge I, Specification). At the time of his marriage to Lieutenant Straub he was 24 years of age and she was about 29 or 30. Subsequent to the marriage he was informed that she had given birth to a child. Divorce proceedings to dissolve this marriage are now pending (R. 14-18).

It was stipulated that accused entered on active duty 10 October 1940 and that his rating for performance of duty on all assignments was either excellent or superior; also that he participated in campaigns in Germany, Northern France, Normandy and the Rhineland. He is authorized to wear the Silver Star, the Bronze Star Medal, three Bronze Service Stars and the Purple Heart. General Orders announcing the award of the Silver Star to accused were read to the court. In the past year he has undergone four abdominal operations and has received treatment for a leg wound.

Without objection, four letters purporting to have been written in November 1945 by four high ranking Army officers under whom accused had served were read into the record. Said letters make reference to his excellent character and attest to his outstanding ability and accomplishments as a soldier (R. 19-22).

5. The uncontradicted evidence shows that the accused married Ellis Josephine Straub; that he thereafter contracted a bigamous marriage with Joyce Eloise Potter on 9 April 1942, and that they unlawfully cohabited as husband and wife between 30 May and 16 September 1945. Such conduct on the part of accused is clearly wrongful and dishonorable within the meaning of the 95th Article of War (CM 252626, Scanlon, 34 BR 105).

As concerns the offenses of presenting false claims for rental and subsistence allowance (Charge II, Specifications 1, 2 and 3), the evidence shows that accused presented for approval to the proper finance officer his pay vouchers (War Department Form No. 336) for the months of April, May and August 1945; that each voucher contained the statement under "Dependents" that he had a lawful wife, Joyce P. Savini; and that the several vouchers claimed subsistence and rental allowances as alleged in the applicable Specifications.

The statement that Joyce P. Savini was accused's wife was clearly false and was made by accused with knowledge of its falsity. It does not, however, follow therefrom that the claims were likewise false.

The test in determining accused's guilt of presenting a false claim is whether accused was rightfully entitled to the money he claimed. If in fact "dependency" did exist according to law and accused was entitled to receive the allowances claimed, irrespective of any other offenses of which he may be found guilty, he is not guilty of presenting false claims as charged (CM 242395, Adams, 27 BR 161). As a basis for payment to officers of subsistence and rental allowances, the term "dependent" includes "at all times and in all places a lawful wife" (37 U.S.C. 8; 37 U.S.C. Sup. III, 104). In Rawlings v. United States (93 Ct. Cl. 231), after quoting this statute, it was stated:

> "This language of the statute seems to say that a lawful wife or an unmarried child shall be a statutory dependent, with no questions asked as to the fact of dependency, just as plainly as it says that a mother shall be regarded as a dependent only if in fact she is chiefly supported by the officer. There is nothing in the statute which indicates that this apparent meaning was not the legislative meaning."

The evidence shows that on the date the vouchers were presented accused had a lawful wife living. Accordingly, under the rule of law announced in the Rawlings case, supra, the accused was lawfully entitled to the allowances claimed because in fact he did have a statutory dependent. Thus the claims presented were not false or fraudulent, although they may have contained a false statement.

The making of a false statement in connection with a claim for allowances is undoubtedly deceitful and recognized as an offense under military law. The accused made the false statement as to his marital status with full knowledge of its falsity. Had the Specifications been drawn to allege a violation of the fourth paragraph of the 94th Article of War - the one dealing with false statements in connection with claims against the Government - the case would present no problem, for the offenses committed by accused come squarely within the provisions of that paragraph.

The Specifications allege that accused presented false claims for approval and payment, and also allege in each instance that accused "stated in said claim that Joyce P. Savini was his lawful wife and which statement was then known by the said Captain Savini to be false." Thus each Specification alleges the making of a false statement in connection with the presentation of each claim. The Boards of Review have consistently held that where a specification alleges a felonious assault but

the proof establishes nothing more than assault and battery, and the language in the specification descriptive of the assault also alleges a battery, findings of guilty of the offense of assault and battery will be sustained. Similarly, when a specification alleges the making of a false statement in addition to the presentation of a false claim and the proof establishes nothing more than the making of a false statement, then so much of the findings of guilty as involves the making of a false statement must be sustained. Furthermore

> "No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby." (MCM, 1928, par. 87b, p. 74)

Here the facts alleged in the Specifications constitute the offense of making a false statement as well as presenting a false claim and the accused was fairly apprised thereof. Consequently, to sustain so much of the court's findings of guilty as involves the making of false statements does not injuriously affect any of accused's substantial rights. Accordingly, the record of trial is legally sufficient to sustain so much of the findings of guilty of Specifications 1, 2 and 3 of Charge II as involves the making of false statements, in violation of Article of War 94.

6. War Department records show that the accused is 28 years of age and married. He graduated from North Carolina State College in 1940, at which time he was appointed a second lieutenant of Infantry in the Officers' Reserve Corps, Army of the United States. He was called to active duty on 10 October 1940, promoted to first lieutenant on 24 February 1942 and to captain on 31 August 1942. He served in the European Theater of Operations and received the Silver Star for gallantry in action on 19 November 1944, and the Bronze Star Medal for meritorious service during the period 29 July 1944 to 2 November 1944. He was wounded in action on 13 January 1945 and was thereafter returned to the United States, being admitted to Madigan General Hospital, Washington, on 23 April 1945 for appendicitis, acute. The review of the staff judge advocate states that two children were born of the bigamous marriage, one in December 1942, the other in June 1944. It further states that there is one child, the issue of the legal marriage. Attached to the record of trial is a letter signed by the trial judge advocate, the assistant trial judge advocate

and the defense counsel recommending clemency in the form of commutation of the sentence based upon the accused's brilliant war record, the severe wounds incurred in battle and the high esteem in which he is held by his superior officers. The reviewing authority recommended that the execution of the sentence be suspended.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial except as above noted. 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 its Specification, legally sufficient to support only so much of the findings of guilty of Charge II and Specifications 1, 2 and 3 thereof as involves findings of guilty of wrongfully making false statements as alleged in presenting the several claims for allowances, in violation of Article of War 94, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 94 and manddatory upon conviction of a violation of Article of War 95.

Thomas N. Tappy, Judge Advocate.

Wm T Beebe Jr., Judge Advocate.

Joseph J. Herz, Judge Advocate.

Robert E. Trueblood, Judge Advocate.

SPJGH - CM 296107 1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain John Savini, (0-394474), Infantry.

2. Upon trial by general court-martial this officer was found guilty of unlawful cohabitation with a woman not his wife (Charge I and its Specification), in violation of Article of War 95, and of presenting for payment to the proper finance officer three false claims during the months of April, May and August for subsistence and quarters allowance (Charge II, Specifications 1, 2 and 3), in violation of Article of War 94. He was sentenced to be dismissed the service. The personnel of the prosecution and defense recommended that the sentence be commuted in view of the accused's outstanding war record hereafter discussed. The reviewing authority approved the sentence, recommended that its execution be suspended and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support only so much of the findings of guilty of Charge II and Specifications 1, 2 and 3 thereof as involves findings of guilty of wrongfully making false statements as alleged, in presenting the several claims for allowances, in violation of Article of War 94, and legally sufficient to support the sentence.

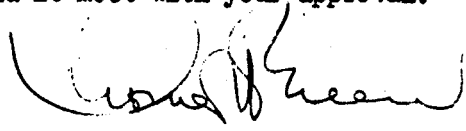
The record of trial discloses that the accused married Lieutenant Ellis Straub, an Army nurse, in February 1942 to give her unborn child a name. He did not live with her but contributed $100 per month to her support for one year following the marriage and $50 per month thereafter until June of 1944. After the marriage, accused endeavored to induce his wife to consent to a divorce but she refused and thereafter, in April 1942, Miss Joyce Potter "married" him, with full knowledge of accused's existing marriage. Accused was engaged to Miss Potter at the time of his marriage to Lieutenant Straub. Following the bigamous marriage, accused and Miss Potter unlawfully cohabited from 30 May 1945 until 16 September 1945. Accused went overseas in 1944 and distinguished himself in the European Theater, winning the Silver Star and the Bronze Star Medal. He was also wounded in action.

He presented his pay and allowance vouchers to the proper finance officer during the months of April, May and August 1945 and therein designated "Joyce P. Savini" as his lawful wife. While the statements were false in

that Ellis Straub Savini and not Joyce P. Savini was his lawful wife, the claims were not false because accused was entitled to the allowances claimed since he in fact had a lawful wife. Two children have been born of the bigamous marriage and one of the legal marriage. Divorce proceedings are now pending for dissolution of the latter.

In view of the serious nature of his offense of unlawful cohabitation, particularly the circumstances in connection therewith, and notwithstanding accused's previous unblemished military and civilian record and the several testimonials from high ranking officers under whom he served attesting to his sterling character and outstanding bravery on the field of battle, I recommend that the sentence be confirmed and carried into execution.

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



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

THOMAS H. GREEN
Major General
The Judge Advocate General

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dings dis approved in part. Sentence confirmed and ordered executed. GCMO 55, 6 March 1946).

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

SPJGK - CM 296113

18 FEB 1946

UNITED STATES v. First Lieutenant JACK H. GILMORE (O-1647459), Signal Corps.	BASE SECTION INDIA BURMA THEATER Trial by G.C.M., convened at Headquarters, Base Section, IBT, APO 465, 13 and 14 November 1945. Dismissal, total forfeitures and confinement for one (1) year.

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

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

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

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

Specification 1: In that First Lieutenant Jack H. Gilmore, Signal Corps, Office of Strategic Services, Service Unit, Detachment 505, did, in conjunction with Captain Robert D. Ellis, Air Corps, and Private First Class Frederick J. Sherman, at Behala, India, on or about 12 August 1945, without the consent of the owner, wrongfully and willfully take and carry away from the person of Ram Sevak Singh, Police Sentry, one musket rifle, 410 bore, value of about twenty-nine rupees lawful monies of the Government of India, the property of Ram Sevak Singh.

Specification 2: In that First Lieutenant Jack H. Gilmore, * * *, did, in conjunction with Captain Robert D. Ellis, Air Corps, and Private First Class Frederick J. Sherman, at Calcutta, India, on or about 12 August 1945, without the consent of the owner, wrongfully and willfully take and

carry away from the person of Fouzder Singh, Constable of Police, one Police Service belt with buckle, value about two rupees and thirteen annas, lawful monies of the Government of India, the property of Fouzder Singh.

Specification 3: In that First Lieutenant Jack H. Gilmore, * * *, did, in conjunction with Captain Robert D. Ellis, Air Corps, and Private First Class Frederick J. Sherman, at Behala, India, on or about 12 August 1945, commit an assault upon Jogendra Narain De, Assistant Sub-Inspector of Police by pointing at him and pressing against him, the said Jogendra Narain De, a dangerous weapon, to wit, a .45 caliber Thompson sub-machine gun, under threat of death.

Specification 4: In that First Lieutenant Jack H. Gilmore, * * *, was, in conjunction with Captain Robert D. Ellis, Air Corps, and Private First Class Frederick J. Sherman, at Calcutta, India, on or about 12 August 1945, grossly disorderly in uniform, in a public place, to wit, Alipore Police Station, by creating a disturbance under threats with firearms in the presence of others in search of a civilian prisoner; interfering with the orderly business of the civilian police and by forcibly disconnecting police telephone communications.

Specification 5: (Finding of not guilty).

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

Specification: In that First Lieutenant Jack H. Gilmore, * * *, was, in conjunction with Captain Robert D. Ellis, Air Corps, and Private First Class Frederick J. Sherman, at Behala, India, on or about 12 August 1945, grossly disorderly in uniform, in a public place, to wit, Behala Police Station, by creating a disturbance under threats with firearms in the presence of others, interfering with the orderly business of the civilian police, in search of a civilian prisoner and by discharging fire-arms in and about a public compound of the Bengal Police.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 1 and 2 of Charge I, and of Charge I, and of Specification 5 of Charge II. He was found guilty of the other Charges and Specifications, except the words "and pressing against him" in Specification 3 of Charge II, of which excepted words he was found not guilty. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

About 2145 hours 12 August 1945 accused, accompanied by Captain Robert D. Ellis and an American soldier, entered the Behala Police Station, in a suburb of Calcutta, India (R. 8,48). Accused was armed with a Thompson Sub-Machine gun and a .45 caliber pistol, and the soldier with a Thompson Sub-Machine gun (R. 9). Accused pointed his "tommy gun" at one Jogendra Narain De, "Assistant Sub-Inspector" on duty at the police station, and said, according to De's testimony, "'Where is Davis Driver? Bring him here!" (R. 9). De told accused, "I don't know who Davis Driver is. Sit down and I will see what I can do"(R. 9). De further testified, "But he didn't listen *** he kept on threatening and saying, 'Produce Davis Driver', and he got me by the shoulders and took me in to the other room" (R. 9), where one Constable Hossain was. Accused stood on a verandah at the door of the room and, while Captain Ellis and the soldier were "searching the lockup" for Davis, accused fired "two shots" with the "tommy gun" (R. 10,12,13). "After some time" accused "took his pistol and pointed it at" De, and said, "You will die, you will die, you will die" (R. 10, 14), and "came a little closer then and tipped my ear" with the "tommy gun" (R. 10,14,18). De was frightened (R. 17,18). Accused and Captain Ellis then took De "upstairs and searched the place and found four constables *** started pushing the constables about and sent them downstairs *** pushed them right out of the compound towards the road" (R. 11,12).

Drugapada Ghatak, "Inspector of Police, Intelligence Branch," testified that he was in the room with De when accused and his companions, dressed in "American Uniforms," entered the police station (R. 18,25). He corroborated De's testimony concerning the occurrences downstairs, and stated that accused "dragged me to the second room * * * by my arm," and pressed his arm on my neck and pushed me to the corner of the room" (R. 19, 20). Ghatak was not armed (R. 22). He further testified that "The captain and another one they assaulted Hossain. *** with his arm they pushed his neck and with the tommy gun they hit different parts of the body," and that accused was present during this assault (R. 19). "Hossain on being assaulted asked for my instructions what he should do. I asked him to satisfy them, by showing the lockup and the constables' barracks and other places, that Davis Driver was not there" (R. 19). Ghatak saw accused fire "two or three" shots with his "tommy gun," and also heard "about ten or fifteen shots outside *** in the compound" (R. 20,21).

Ram Sevak Singh was "doing sentry duty" at the police station, armed with a "410 bore police rifle" (R. 26). He testified that he saw accused's party enter the station. "I had orders to stop anyone coming in and called to them to stop. They didn't listen to me. They took no notice of me. They went in to the verandah of the police station", followed by Singh. When they started their disturbance he asked them what was happening, whereupon they came toward him and "pointed two tommy guns and a revolver at me" (R. 28). Accused, who was pointing the revolver

at Singh, "grabbed" Singh's "gun and threatened to shoot me" (R. 28). Singh became "frightened and thought the soldiers were drunk and might shoot me, so I let my rifle go" (R. 28). Accused put Singh's rifle in accused's motor car (R. 28).

Ranjit Roy, "Sub-Inspector of Police," testified that at about 2200 hours 12 August he was in the office of the Alipore Police Station, Calcutta "more than two miles" from Behala Police Station (R. 43), "talking to a public gentleman about the case of a theft," when accused, Captain Ellis and an "Indian Boy" entered the room (R. 36). "They came and asked me, 'Where is Davis Driver?'" (R. 37). Roy asked them to be seated, and consulted the "lockup register." He told them "no such man was arrested at this police station on that date," and had two "accused persons" brought in, neither of which was Davis (R. 37). Accused "stated, 'You know we have fifty officers out with tommy guns, and must find our boy'" (R. 37). "The Indian Boy said that Davis had been arrested near Behala Police Station." While the boy was talking, "one soldier came in to the office with a tommy gun in his hand" (R. 37). "He took his stand for a second or two near the door and then came at my back *** I told the Captain, 'Let me ring up Behala Police Station and see if any such man was arrested there or not,' and asked my A.S.I., Bhattacharjee, to ring up Behala Police Station. Bhattacharjee reported no such man was arrested at Behala Police Station. I explained this to the officers and by that time I found the soldier who was at my back pointed the tommy gun towards me *** I felt the touch of the muzzle of the tommy gun at my right neck *** I told the Captain, 'What is this? I am helping you and I am willing to help you' *** The Captain kept silent" (R. 38). Roy did not know whether the gun was loaded (R. 43). During this conversation Bhattacharjee "put his hand on the telephone." The soldier slapped his hand, made him remove it from the telephone, "went near the wall plug connection of the telephone and took out the plug and wanted to tear the plug from the wire. Then the soldier went inside the OC's quarters and brought out the OC's servant into the room at the point of that gun" (R. 39). Accused took the soldier's gun from him, went outside, and "returned with two tommy guns in his two hands," preceded by "some other constables." Both guns were "pointed out *** straight towards the office" (R. 39). The "officer in charge," one Z. Rasul, entered the office, and Roy "introduced" him to the American officers (R. 39). Accused "pointed one gun towards the OC and the other gun towards the office, either at me or Bhattacharjee," and said to the soldier, "'Wrap the wire with the table leg and tear the plug' *** the soldier came from where the plug connection was and he wrapped the wire with the chair and table leg and by putting his foot on the table tore up the plug from the wire *** then they left the place in a jeep" (R. 40). Roy was "put in fear by the actions of these three American soldiers" (R. 40).

Fouzder Singh, a "Constable of Police," was walking "down from Kiddepore Road to Munchigunj Road," Calcutta, shortly after 2200 hours, 12 August. He was in uniform, and wearing a police belt and buckle (R. 44, 45). He testified that when he reached Munchigunj Road a car "stopped a

few feet up and a sahib got out and came up behind and grabbed my belt *** I turned around and saw the soldier's face" (R. 44, 46). The soldier was the accused (R. 45). "He dragged me by the belt on the main road. I grabbed my belt and another sahib came up and pointed" a Thompson Sub-Machine Gun at Singh, who became "frightened and let my hands off my belt" (R. 44,45). Accused "took the belt and buckle" and "got into the vehicle" (R. 45).

On 14 August 1945 accused voluntarily made and signed a sworn statement after having been advised of his rights under the 24th Article of War (R. 48). In this statement, which was admitted in evidence without objection (Pros. Ex. 5), accused said that during the afternoon of 12 August he "had five drinks of gin and fruit juice and knew what I was doing and saying." About 1930 hours he was informed by an Indian bearer, Henry, that another Indian, David, who was employed at the camp of which accused was commanding officer, was in jail. Accused determined to "bail David out of jail," and drove to Behala Police Station together with Captain Ellis, one "Pvt. Fred C. Scherman" and Henry, about 2100 hours. Accused wore "a white T shirt, khaki uniform shorts, mosquito boots and a khaki garrison cap." Private Scherman stayed outside and the others went into the station. Captain Ellis was "carrying a pistol in a holster," and accused had a Thompson Sub-Machine gun loaded with twenty rounds. Captain Ellis told an Indian in the police station that he "had come to post bail for David. This Indian volunteered to let us look at the prisoners to see if David was a prisoner." Accused, Captain Ellis and Henry then "went out on the porch," where accused heard "at least six or eight shots from a gun and it sounded as though it came from a sub-machine gun being fired at the other end of the porch. I looked in the direction of the firing and saw Scherman with a sub-machine gun. Scherman was pointing the gun upwards. I called and asked, 'What's the matter' Scherman replied 'everything is all right' and I heard Ellis say that he was O.K. I stepped down to the steps and raised my weapon upwards at about a 90 (degree) angle resting the butt on my hips and released the safety. I saw that my weapon was set for automatic firing and I fired 2 or 3 bursts of approximately 3 or 4 rounds each. I did not aim my weapon at any person or building." He fired "in a spasm of exuberance. I was faced with a situation which was ridiculous beyond my imagination. It was practically an uncontrollable impulse. The scene in and about the Behala Police Station seemed like a circus. *** After I ceased firing the police sentry on duty at the gate came over to me. He was carrying a rifle in shoulder arms position. I asked him for his weapon and I then reached over and took his gun from him off his shoulder. The sentry offered no resistance to my taking his weapon. I had my weapon under my left arm and tried to remove the rifle bolt with my right hand. I was unable to remove it and asked the sentry to remove it but he was too scared to do anything." Accused took the rifle from the sentry "because I was afraid he would shoot me." Accused and his party then drove to "a Calcutta Police Station which I believe is the Alipore" police station, where they "talked with a little Indian who was seated there. Ellis asked him if he had a boy by the name of David

confined in the police station. The police official checked his records and told us that no one named David was confined in the Alipore P.S. I had my sub-machine gun with me and had left the rifle in the jeep. *** Before leaving the police office I told Scherman to disconnect the phone." They went to David's home, where they found him, and were taking him to their car when "I looked up and saw a Calcutta Police constable standing about 30 feet away from the jeep. I walked up behind him, put my arms around his waist and released his belt. I pulled his trousers down to his shoes and took his belt. I returned to the jeep and we all got in and drove back to camp," where accused threw the police rifle and belt into a tank. Accused "was sober, but my reflexes and emotions were undoubtedly influenced by the drinks taken previously in the day." He did not "at any time" while he was "in or about the Behala or Alipore Police Stations point" his "weapon at any person and threaten to shoot him." He was not "at any time intimidated by any of the Indian Police or by civilians." He considered his search for David to be "official business." The next morning accused cleaned the rifle and gave it to Captain Ellis to return to Behala Police Station.

It was stipulated between the prosecution, defense and accused that on or about 12 August 1945 at Calcutta the market value of "one musket rifle, 410 bore" was about 29 rupees, and the market value of "one used police service belt with buckle" was about 2 rupees, 13 annas (Pros. Exs. 7,8).

4. Evidence for the defense.

Constable Hossain testified that "nobody hit me hard" (R. 55). Captain Ellis did not hit him "with fists and butts of guns" (R. 55), "but I was caught hold of and fell down and things like that happened to me" (R. 56). The soldier "got me from the back" and "the Captain was in front of me" when they went to look for David (R. 57). The officer in charge, one Mookerjee, did not tell Hossain to say he was beaten and handled, when Hossain made and signed a statement 12 August (R. 55,56).

Bruce Glen, an employee of the Office of Strategic Services, testified he was an interpreter at an investigation of the case conducted 4 September, at which Ghatak stated there was no "threatening *** in the first office," and Hossain stated that "he had not been threatened and beaten, but had been told the statement had to be made and the OC questioned him about what had happened and told him 'You were beaten and threatened.' This was taken down by the OC. He was asked if his statement was read to him and he replied in the negative" (R. 60,61).

After having his rights explained to him, accused elected to take the witness stand in his own behalf (R. 65). He testified that he was 42 years of age and in civilian life had been a "criminal investigator" for twenty years (R. 65). He "enlisted in November of 1942 and took basic and advanced training in Colorado and California. I went to Officers'

Candidate School at Fort Monmouth and was commissioned in June of 1943 in the Signal Corps. I was in the Signal Corps until November of 1943 and since that time have been attached to OSS. During that period I spent the first six months in training and at school. After that I did a short period of duty in Alaska and the Aleutians for the OSS. I returned to the States and was sent to the Far East in February of this year" (R. 65,66). On 12 August 1945 he was commanding officer of "Area Z," an Office of Strategic Services Camp near Calcutta, where secret activities were conducted. His "main responsibility was security against everybody in the world and to keep everyone from knowing what was going on in the area and who the people there were" (R. 66). Accused knew "the war was over or about over," and permitted personnel at the camp to "get two cases of gin and mixed it with fruit juice and let them have some fun" (R. 67,69). Accused had "five or six drinks with various persons. I was never drunk." David was used as an informer. When accused learned that the police "had taken David away," he became "worried about David. I had reason to be. I knew that outsiders wanted information. Hendry and David owed me no loyalty and there was no reason why, if put under pressure, they wouldn't talk" (R. 71). David "had a pass. I knew that the first thing an Indian does when apprehended is to pull out a bunch of recommendations to show who he is *** Ghatak knew me before he saw me at the police station and he was exactly the type of person I didn't want to get hold of David" (R. 71). Accused "felt the release of David was in line of duty as Security Officer of Area Z" (R. 82). Accused was authorized to carry weapons "when on duty" (Def. Ex. C), and did so the night in question because it was "just the ordinary thing to do. I carried arms about the area at night; always a tommy-gun. During the day I carried side arms. Every time I left the area after the first of June I carried arms. I gave it no thought. I see now that it was damned bad judgment going where I went, but I never gave it a second thought" (R. 73). "In civilian life it was the same way. We worked in the police stations day and night with arms. Even at home I had a tommy gun of my own and preferred to use it. I know it's strange to understand why, but it was just as much of a habit as a pistol would be to anyone else" (R. 90). He did not have a pistol when he entered Behala Police Station (R. 85), did not threaten or assault anyone at either station (R. 74,82), and stated that "to the best of my recollection I have never had two tommy guns at the same time in my life" (R. 87). "Everything was on a friendly basis" at Behala Police Station (R. 74), but the people there were "confused" (R. 87). At Alipore Police Station, "the OC *** was very hostile and excited *** Roy was all aflutter when the OC came in," but appeared to be "friendly and cooperative *** to the nth degree" (R. 77). Accused fired the Thompson Sub-Machine gun "out in the open up in the air" in "three or four bursts. I used all the rounds in the weapon, maybe eighteen or maybe a full clip" (R. 75). His purpose in firing was to make "some show of authority, probably with the idea of straightening things out. There were people all over and nobody could straighten anything out; even Hendry couldn't. I understand now that they were frightened because they saw that Hendry had a cut and blood on his head and thought that one of their constables or

drivers had beaten him up and we were looking for that constable, when all we wanted was the boy. Everybody went nuts all over the place and so I fired to straighten them out" (R. 75). He ordered Private Scherman to disconnect the telephone because the police at Alipore Police Station "were trying to call someone in the police department. By then I realized the boy wasn't there. I further realized that should other people come in on it we would have to make explanation. My idea was that our business there was finished, let's get out and go on. Roy kept insisting that someone should be called. I had no business with the MP's. I would have made every effort to keep from meeting them under the circumstances. I didn't tell him to wrap the wires around the table leg; I merely told him to disconnect the phone *** it had a plug. It was a very simple connection like an electric light plug and all he had to do was pull it out" (R. 78). Accused took Fouzder Singh's belt because "I had been worried. I found David, I was relieved. It would have been a tough situation if I hadn't. It was V-J Day. It was a silly, foolish, asinine thing to do. It wasn't sensible and it wasn't malicious. I didn't intend to hurt the guy" (R. 78), but "after I got it I intended to keep the buckle as a souvenir" (R. 88). Accused put the police rifle and belt in the tank to conceal them from the Military Police (R. 79). He did not wish to explain his possession of them to the Military Police: "My instructions were that I was to protect information about the things we were doing at Area Z against MP's or any outside agency" (R. 79).

5. Accused admitted taking the rifle from Ram Sevak Singh. Accused had no authority to take this rifle, especially from a police sentry engaged in the performance of duty. In the absence of any showing that the sentry had threatened unlawfully to use his rifle the taking thereof by accused was wrongful. The evidence proves this offense was committed as alleged in Specification 1 of Charge II. Accused admitted taking the belt and buckle from Fouzder Singh as alleged in Specification 2 of Charge II and offered no justification whatever therefor. There is sufficient evidence to prove the assault upon Jogendra Narain De as alleged in Specification 3 of Charge II, in spite of the denial thereof by accused. These three acts were conduct of a nature to bring discredit upon the military service in violation of Article of War 96.

Although accused had a right by the use of lawful means to attempt to secure the release of David from police custody, the use of arms, intimidation of police officials and forcible disconnection of the telephone line at Alipore Police Station were not such lawful means, were sufficiently alleged in Specification 4 of Charge II, adequately proved by the evidence, and constituted disorderly conduct in violation of Article of War 96.

The assaults upon and threats to Indian Police at Behala Police Station, officials of a friendly foreign state, made by accused and his companions and emphasized by the wild discharge of firearms, constituted a conspicuous disorder, and were breaches of the peace and violent conduct of a disgraceful character in public degrading to the service, for which accused was

responsible. His part in them as alleged in the Specification of Charge III was clearly proved and was, under all the circumstances, conduct unbecoming to an officer and a gentleman in violation of Article of War 95 (Winthrop, 1920 reprint, p. 718, note 49; see CM 220643, Knight, 13 B.R. 32).

Accused's assaults upon De and the constables and his immediate emulation of Private Scherman's act in discharging the sub-machine gun, at Behala Police Station, his assault at Alipore Police Station with two sub-machine guns upon police officials, his order to Private Scherman to disconnect the telephone line, and his failure to prevent Private Scherman from separating the plug from the wire are circumstances which definitely establish that accused assented to all the disorders committed by Captain Ellis and Private Scherman and cooperated with them in the attempt to accomplish their common purpose. He lent to these disorders his approval, and was thereby aiding and abetting them. Accused was therefore a principal in all the acts at both stations (18 U.S.C. 550, 35 Stat. 1152; Winthrop, 1920 reprint, page 108; CM 266724, McDonald, 43 B.R. 296-8; CM ETO 1453, Fowler, 4 B.R. (ETO) 347,348).

6. A special hearing was held by the Board of Review 1 February 1946, at which arguments on behalf of accused were presented by Honorable Edwin C. Johnson, United States Senator from Colorado, Captain Robert D. Ellis, who had served at the trial as individual defense counsel, Mr. Morrison Shafroth, and Mr. F. S. Warren. At a second hearing held by the Board 4 February, Captain Ellis, Mr. Shafroth and Mr. James R. Withrow, accused's commanding officer at the time these offenses occurred, appeared on his behalf. Oral arguments by Mr. Shafroth and Mr. Withrow were supplemented subsequently by written briefs.

7. War Department records disclose that this officer is 42 years of age, is married, and has no children. He is a high school graduate and four years after graduation attended for one year a school designated as "L.H.T.S." From 1931 to 1933 he was the owner of a radio and recording business and from 1933 to 1943 was self-employed as a criminal investigator. He entered the service as a volunteer officer candidate 17 November 1942, and upon completion of the required course of instruction at the Officer Candidate School, Eastern Signal Corps Schools, Fort Monmouth, New Jersey, was commissioned second lieutenant, Army of the United States, 10 June 1943 and was ordered to active duty the same date. He was assigned to Office of Strategic Services 29 October 1943 and promoted to first lieutenant 21 March 1944. He was ordered to Anchorage, Alaska, 24 June 1944 on temporary duty for approximately sixty days, and ordered overseas, permanent change of station, 8 February 1945.

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

of War 95 and is authorized upon conviction of a violation of Article of War 96.

Kenneth Magee, Judge Advocate

William P. Kuhn, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 296113 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 6 March 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Jack H. Gilmore (O-1647459), Signal Corps.

2. Upon trial by general court-martial this officer was found guilty of the following offenses committed at Calcutta, India: assault upon a police official, wrongful taking of a rifle from a police sentry, wrongful taking of a belt and buckle from another police sentry and disorderly conduct in a police station, in violation of Article of War 96 (Specifications 1,2,3 and 4 of Charge II), and grossly disorderly conduct in another police station in violation of Article of War 95 (Specification of Charge III). No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The accused was commanding officer of an Office of Strategic Services camp near Calcutta, India, where he had five or six drinks of gin and fruit juice during the afternoon of 12 August 1945, celebrating what he believed to be the end of the war. About 1930 hours he was told that a native boy, who was employed by him as a servant and informer, had been arrested by the Indian police. While he did not make any such contention in his pre-trial statements, he testified that he feared that pressure would be put on this native to disclose secret information to unauthorized persons. The accused therefore set out with another American officer and an American soldier to secure his release. The accused's party, armed with two Thompson sub-machine guns and a .45 caliber pistol, went to an Indian police station in the suburbs of Calcutta where they threatened several native officials with their weapons and, although told by these officials that their boy was not there, compelled them to assist in an unsuccessful search for the informer through the station buildings. During the search the accused and the soldier fired several bursts in the air with their sub-machine guns in the station compound. A native sentry approached with a rifle on his shoulder and the accused relieved him

of his rifle. (The rifle was cleaned by the accused the next day and returned.) The accused and his companions then proceeded to another Indian police station, threatened native officials there with their weapons, and again forced a futile search for the informer after the officials told them he was not there. Before leaving this station the accused ordered the soldier to disconnect the telephone, which he did by pulling a plug from a socket and tearing the plug from the telephone wire. The party then went to the informer's home, where they found him. As they were taking him to their car, the accused saw a native sentry nearby, went up to him and removed his belt and buckle, which the accused later decided to keep for a souvenir.

This officer is 42 years old, entered the service as a volunteer officer candidate 17 November 1942, and was duly commissioned second lieutenant 10 June 1943. He was ordered to India 8 February 1945. According to information contained in written statements filed with the Board of Review and forwarded herewith by two of his superior officers in the OSS, Mr. James R. Withrow, formerly a Lieutenant Commander in the United States Navy, and Mr. Herbert S. Little, formerly a Lieutenant Colonel, Army of the United States, accused, after his return to the United States from a special assignment in the Aleutians, which he had performed in a superior manner for OSS, volunteered for a hazardous, secret OSS mission far behind enemy lines in the China-Burma-India Theater, which would have involved great danger to himself. When this undertaking was eventually vetoed by the British authorities, the accused was placed in charge of the important installation where he was stationed at the time of the incidents involved in the present case. These statements emphasize the need for the maintenance of absolute secrecy, the necessity for immediate action should such secrecy be threatened, and their belief in the existence of a certain degree of antagonism toward the OSS by British authorities. Under ordinary circumstances accused's bizarre and violent conduct, his lack of restraint and good judgment, his failure to conform to standards expected of an officer and a gentleman in dealing with officials of a friendly foreign state are sufficient to justify his dismissal. However, the statements by his commanding officers, summarized above, show that this officer is a daring individual who has rendered superior service and add weight to his testimony that he considered drastic action necessary. While the accused's unorthodox methods were grossly improper and should be emphatically condemned, in view of his conclusion, even though improper and mistaken, that his mission had to be accomplished without regard to method, and his probable exhilaration from liquor and news of the imminent end of the war, his acts do not appear to have been accompanied by criminal intent. Under the foregoing circumstances it is recommended that the sentence be confirmed but commuted to dismissal, a reprimand and forfeiture of $100 pay per month for three months and that the sentence as thus modified be ordered executed but that execution of that portion thereof adjudging dismissal be suspended during good behavior.

4. Consideration has been given to requests for clemency from Honorable Edwin C. Johnson, United States Senator from Colorado, and Mr. Morrison

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NAVY DEPARTMENT

Shafroth, attorney-at-law, Denver, Colorado, a friend of the accused. Senator Johnson's letters and a copy of Mr. Shafroth's letter are forwarded herewith. In addition, Senator Johnson, Mr. Shafroth, Captain Robert D. Ellis, who had served at the trial as individual defense counsel at the request of the accused, and Mr. F. S. Warren, formerly of Denver, Colorado, now of Washington, D.C., appeared before the Board at a special hearing on 1 February 1946 and pleaded for clemency on the ground that the accused is an impetuous individual who had considered his acts legal and necessary. At a second hearing before the Board 4 February, Mr. Shafroth, Captain Ellis and Mr. Withrow appeared on his behalf. Written statements by Captain Ellis, Mr. Withrow, Mr. Little and Mr. J. Simpson Dean, formerly a Lieutenant Colonel, Army of the United States, and another former commanding officer of the accused, and a brief by Mr. Shafroth, have also been considered and are forwarded herewith.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

10 Incls
1. Record of trial
2. Form of action
3. Ltrs fr Sen Johnson 23 Dec 1945and 6 Jan 1946
4. Cpy ltr fr Mr Morrison Shafroth
5. Statement by Capt.Ellis
6. Statement by Mr. Withrow
7. Statement by Mr. Little
8. Statement by Mr. Dean
9. Brief by Morrison Shafroth
10. Ltr fr Mayor of Denver,Colo.

(Sentence confirmed, but commuted to dismissal, a reprimand, and forfeitures of $100 pay per month for three months. Sentence modified but dismissal suspended. GCMO 124, 13 May 1946).

05768

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

SPJGN-CM 296303

UNITED STATES	FIRST SERVICE COMMAND ARMY SERVICE FORCES
v.	Trial by G.C.M., convened at Camp Edwards, Massachusetts, 13 November 1945. Dishonorable discharge (suspended), and confinement for seven (7) years. Rehabilitation Center, Fort Slocum, New York.
Private WILBERT F. BURDICK (32750470), East Coast Processing Center, Camp Edwards, Massachusetts.	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Wilbert F. Burdick, East Coast Processing Center, Camp Edwards, Massachusetts, did, at Camp Gordon, Georgia, on or about 29 June 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at Philadelphia, Pennsylvania, on or about 5 September 1945.

The accused pleaded not guilty to, and was found guilty of, the Charge and the Specification thereunder, excepting the words of the Specification "was apprehended at Philadelphia, Pennsylvania" and substituting therefor the words "returned to military control in a manner and at a

place not shown." 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 ten years. The reviewing authority approved the sentence but reduced the period of confinement to seven years, suspended the dishonorable discharge imposed, and designated the Rehabilitation Center, Fort Slocum, New York, as the place of confinement. The result of the trial was published in General Court-Martial Orders #1200, Headquarters First Service Command, Army Service Forces, Boston 15, Massachusetts, 16 November 1945. The record of trial was forwarded to the Judge Advocate General pursuant to Article of War 50½.

3. The only evidence in the record relative to the court's finding that the accused deserted the service at Camp Gordon, Georgia, on 29 June 1943, as alleged, consists of a photostatic copy of a morning report of Company C, 101st Engineer Combat Battalion, for the month of June 1943 containing an entry, as follows:

"KWC 29 Pvt. Burdick duty to AWOL 1930 CRP" (Pros. Ex. 1).

The defendant objected to the admission of this morning report "* * * on the first ground that it does not properly identify the accused in that it does not give his first name, middle initial and army serial number * * *." The law member ruled that the instrument might be admitted "subject to a motion to strike at the end of the case in the event that sufficient evidence is not produced to tie this up" (R. 6).

The prosecution then introduced an extract copy of a morning report of the Philadelphia Military Police Detachment, Pennsylvania District Third Service Command, which contained an entry relative to the accused, as follows:

"BURDICK, WILBERT F Pvt 32750470
9-5-45- AWOL to Conf- 1300
9-12-45- Conf to rel to gd- 0630" (R. 6; Pros. Ex. 2).

No other evidence was presented and the defendant made a motion for a finding of not guilty "on the ground that the prosecution had failed to make out a case of desertion or absence without leave against the accused" which was denied (R. 6).

The accused, by his plea of not guilty, admitted that he was the person named in the Specification and a member of the East Coast Processing Center of Camp Edwards, Massachusetts. His plea did not, however, admit that he was the unidentified Private Burdick who was a member of Company C, 101st Engineer Combat Battalion in June 1943. Although the Manual for Courts-Martial states that "Identity of names raises a presumption of identity of persons * * *" it appears that the cases in which such a presumption has been employed involved considerable

more description than a surname only (Wigmore on Evidence, 3rd Ed. Sec. 2529 and cases therein cited). When the presumption is used its "strength * * * will * * * depend upon how common the name is, and other circumstances" (MCM, 1928, par. 112a). In this particular instance we not only do not know how many Private Burdicks there may be in the Army, but we cannot narrow our inquiry as to identification to a Private Burdick of any one organization; for the Specification alleges that Private William F. Burdick belonged to one organization and the morning report declares "Pvt. Burdick" to be absent without leave from an entirely different organization. It necessarily follows, therefore, that the first of the above morning reports has not been satisfactorily and adequately shown to relate to the accused.

The second of the morning reports, the one from the Philadelphia Military Police Detachment at Philadelphia, does not clarify our problem. Although it states that the accused was, on 5 September 1945, taken from a status of absence without leave and placed in confinement, so much of this statement as pertains to the accused's being absent without leave is obviously based upon hearsay. The entry does not purport to deal with the accused as a member of the organization making the particular morning report, and obviously the data recorded was obtained from some outside source. The morning report is only sufficient, therefore, to show that the accused was placed in confinement on the day specified.

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

Abner E. Lefsrom, Judge Advocate.

Robert Lemmer, Judge Advocate.

On Leave, Judge Advocate.

SPJGN-CM 296303 1st Ind JAN 30 1946
Hq ASF, JAGO, Washington, D.C.
TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Wilbert F. Burdick (32750470), East Coast Processing Center, Camp Edwards, Massachusetts.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect these recommendations, should such action meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(Findings and sentence vacated. GCMO 63, 20 March 1946).

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

(107)

SPJGK - CM 296366

21 JAN 1946

UNITED STATES	SAN ANTONIO AIR TECHNICAL SERVICE COMMAND
v.	Trial by G.C.M., convened at Hobbs Army Air Field, Hobbs, New Mexico, 26 November 1945. Dismissal, total forfeitures and confinement for two (2) years.
Second Lieutenant ROBERT C. SHERMAN (O-2092595), Air Corps.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Robert C. Sherman, Air Corps, 3017th Army Air Forces Base Unit, did, at Lovington, New Mexico, on or about 12 May 1945, wilfully, knowingly, feloniously and unlawfully enter into a bigamous marriage with Ingrid U. A. Ostberg without having obtained a divorce from his lawful, living wife, Edith V. Banks Sherman.

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

3. For the prosecution.

It was stipulated that at the time the alleged bigamous marriage with Ingrid U. A. Ostberg was entered into accused was in the military service of the United States, and was still in such service at the time of the trial (Pros. Ex. 1).

Accused married Edith V. Banks in San Diego, California, 2 May 1939 (Pros. Ex. 4), and contracted a second marriage with Ingrid U. A.

Ostberg at Lovington, New Mexico, 12 May 1945 (Pros. Exs. 2 and 5).

After accused had been advised of his rights, he voluntarily made the following statement in the presence of First Lieutenant Thomas K. Campbell to First Lieutenant Luther D. Lynn, who was conducting a preliminary investigation concerning an "offense of bigamy" of which accused was suspected (Pros. Exs. 3 and 6):

"On 2 May 1939 I was married at San Diego, California, to Virginia Edith Banks, by the Presbyterian minister at his manse on Market Street, and my grandfather was a witness. In 1942 or 1943 my wife started a divorce proceeding and I changed my draft classification and came into the Army. Thereafter I went back and talked the matter over with my wife, and she stopped the divorce proceedings. Apparently she had stopped it before I went home. My wife lives at 334 40th Street, San Diego, Cal., which is a home her parents gave her, and I have regularly sent her $100.00 to $120.00 per month for her support and the support of our four year old daughter. The last time that I sent money to her was October 3, 1945, on which date I sent her $150.00. My wife is still living at the present time. I had a telephone conversation with her on or about September 20, 1945.

"On 12 May 1945 I married Ingrid U. A. Ostberg, at Lovington, New Mexico, at the parish house of one of the churches in Lovington. Flight Officer Pooley and Pfc. Doris Reuter were witnesses. I realized that I had not been divorced from Virginia Edith Banks Sherman, but I had not told Ingrid Ostberg that I was still married. Ingrid Ostberg was under the impression that I had been divorced."

For the defense.

After an explanation of his rights accused elected to make a sworn statement. He testified that in 1942 he separated from his wife, Edith V. Banks, whom he had married on 2 May 1939, and that after the separation had continued for about eleven months they agreed upon a divorce which his wife desired (R. 8,9,10). Accused paid the fees of the attorney who represented his wife as well as the fees of his own attorney, whom he retained to protect his rights with regard to seeing his child, issue of his marriage with Edith V. Banks. He desired to enter the Army, but was not accepted until he proved to the satisfaction of his draft board that his wife had instituted divorce proceedings and that he could provide sufficient support for his child. The divorce papers were served on him prior to his entrance into the army, a property settlement was agreed upon, and accused appeared at the courtroom with his attorney on the date set in the notice. Neither accused's wife nor her attorney appeared, but accused's attorney assured him that everything would be all right (R. 10). Accused did not see his wife any time thereafter in 1942, but she came to

see him in Kansas City in June or July 1943, after he had been inducted into the Army. Accused testified that he "didn't have much to do with her back there, and she didn't mention divorce" (R. 10). In 1943, when accused was transferred to Santa Ana, California, as an aviation cadet, he went to see his daughter, who resided with his wife. The latter advised him that "she had cancelled the divorce" and he replied that he "would rather she wouldn't do that " (R. 12). He made no investigation to ascertain the truth of her statement, and although he obtained three-day passes from time to time while in training at Santa Ana and visited his wife and child, divorce was never mentioned between them thereafter, and they did not live together as husband and wife.

On cross-examination accused testified that since he became a commissioned officer in December 1944 he had been drawing "rations and quarters" allowances as a married man and that in order to do so he had been told that he had "to show" both his wife and his child (R. 14,16,17); but that while he regularly forwarded from $100 to $125 per month to his wife, the allowance so made was intended for the support of his child only (R. 13). He admitted that he had known since some time in 1943 that his wife claimed that there had been no divorce, but stated that he did not believe her (R. 14). He conducted no investigation to ascertain whether or not the divorce had actually been granted, other than to write to his attorney on three occasions (R. 14,18). He received one reply from his attorney who advised him "that everything was being taken care of, there was nothing to worry about, just sit back and wait" (R. 18). He had never instituted any divorce proceedings against his wife, but since his second marriage he had been served with papers in a new divorce proceeding that she had brought against him (R. 16,17). Accused knew his second wife for about two months before he married her, and within a month and a half after meeting her seriously contemplated marrying her. However, he made no further effort to ascertain whether or not he was divorced, as he "only had her [his first wife's] word" that she had abandoned the divorce and "she had lied to [him] numerous times before" (R. 19,20).

4. That accused contracted a bigamous marriage as alleged is clearly established. His first marriage having been proved by the production of a properly certified copy of the marriage certificate there was a presumption that this marriage had continued (CM 228971, Tatum, 17 B.R. 1; par. 112a, MCM, 1928). In addition accused admitted in his voluntary confession that his first wife was still alive and that he realized at the time he contracted the second marriage that he had not been divorced from her. The second marriage was likewise legally established by competent proof and admitted by accused in his confession. Had there been any deficiency in the proof as to the marriages, these would have been supplied by accused's testimony as a witness in his own behalf. Accused relied solely on his contention that he acted in good faith in the belief that, despite his first wife's statement to him that she had abandoned the divorce proceedings, the divorce had been granted to her. The facts as developed in accused's statements as a witness in his own behalf and the voluntary declarations made

by him are destructive of his protestations of his alleged good faith. While it has heretofore been held (CM 260611, Wilkinson, 39 B.R. 327-330) that an honest mistaken belief that a spouse of a prior marriage has obtained a divorce constitutes a legal defense to a prosecution for bigamy before a court-martial where reasonable diligence has been exercised to ascertain the truth, it is the well settled rule that where the accused has not been diligent and relies merely on his assumption that a divorce has been granted, without seeking to determine his true marital status, such a defense is of no avail (CM 276297, Lewis, 48 B.R. 281). In the present instance the Board is convinced that the accused acted in bad faith, but that even if he believed that his wife had procured a divorce from him he did not exercise the degree of diligence required under the circumstances. The finding of guilty is, therefore, fully supported by the evidence.

5. War Department records show that accused is 29 years and 5 months of age, married, and has one dependent other than his wife. According to his testimony he has one child. He graduated from high school and in civilian life worked as a truck and tractor driver, liquor clerk, deck hand on ferries and excursion boats, and cable splicer. He was inducted into the Army on 7 April 1943, and upon completion of the prescribed courses for pilots was commissioned Second Lieutenant, Air Corps, on 23 December 1944. The records do not show any overseas service.

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

Thomas M. Mayo, Judge Advocate.

William B. Tudes, Judge Advocate.

Earl W. Wingo, Judge Advocate.

SPJGK - CM 296366 1st Ind

Hq ASF, JAGO, Washington 25, D. C. JAN 31 1946

TO: The Secretary of War.

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert C. Sherman (O-2092595), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of bigamy in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct, for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

Accused was married to Miss Edith V. Banks on 2 May 1939, and of this marriage was born one child. While accused testified that his wife had filed proceedings against him for a divorce in 1942 and that he had paid her attorney's fees as well as his own he admitted she did not appear in court in person or through attorney to procure a divorce, and in the latter part of 1943 advised accused that she had abandoned her suit. He drew allowances for quarters and subsistence as a married man, and War Department records disclose that on 23 December 1944, in executing his personnel qualification questionnaire, he stated that he was married and had one dependent other than his wife. On 12 May 1945, while his first wife was still living, and without a divorce having been obtained by either her or him, accused contracted a second marriage. In a voluntary written confession he acknowledged that at the time he contracted the second marriage he realized that he had not been divorced from his first wife. His sole defense was that he acted in good faith, but this contention is not supported by the record, nor does the record present any extenuating circumstances. From a report attached to the record of trial it appears that a medical examination of accused on 2 October 1945 did not reveal the presence of any psychiatric disease, but did show certain "personality characteristics" for which, according to his medical record, he had been placed under neuropsychiatric observation and study at Army Air Forces Regional Hospital at Pyote, Texas, 2 March 1945 to 8 April 1945, being discharged with the diagnosis of "Psychopathic personality, emotional instability." Both under the laws of New Mexico

where the second marriage was contracted and the District of Columbia Code the punishment for bigamy is confinement for not less than two years nor more than seven years.

I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted, that the sentence as thus modified be ordered executed, and that a disciplinary barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(Sentence confirmed but forfeitures remitted, as thus modified ordered executed. GCMO 61, 6 March 1946).

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

SPJGK - CM 296431

16 JAN 1946

UNITED STATES v. Private PRESTON ROBY (34225366), Squadron G (Aviation), 610th AAF Base Unit.	ARMY AIR FORCES PROVING GROUND COMMAND Eglin Field, Florida Trial by G.C.M., convened at Eglin Field, Florida, 13 December 1945. Dishonorable discharge (suspended) and confinement for twelve (12) months. Disciplinary Barracks.

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

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1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and 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 on a rehearing upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Preston Roby, Squadron G (Aviation), 610th Army Air Forces Base Unit, did, without proper leave, absent himself from his station at Eglin Field, Florida from about 10 October 1945 to about 7 November 1945.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two 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 twelve months. The reviewing authority approved the sentence and ordered its execution, but suspended execution of the dishonorable discharge until the soldier's release from confinement. He designated the Southeastern Branch, United States Disciplinary Barracks, Camp Gordon, Georgia, or elsewhere as the Secretary of War may direct, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 33, Headquarters Army Air Forces Proving Ground Command, Eglin Field, Florida, 14 December 1945.

3. The record of trial shows that the order appointing the court (paragraph 12, Special Orders No. 282, Headquarters Army Air Forces Proving Ground Command, 11 December 1945) did not designate a law member. The provision of Article of War 8 which requires the authority appointing a general court-martial to detail as one of the members thereof a law member "has been repeatedly held to be mandatory" (CM 221445, Merner, 13 B.R. 170). It is the opinion of the Board that this provision applies to the appointment of a general court-martial to which a case is referred for rehearing. The specific provision of Article of War 50½ that a "rehearing shall take place before a court composed of officers not members of the court which first heard the case" does not dispense with the general provision of Article of War 8 requiring the detail of a law member. The provisions of the Manual for Courts-Martial that in rehearings "The procedure in general is the same as in other trials," and that certain parts of the record of the former proceedings "may be examined by the law member" of the new court (paragraphs 84, 89, MCM 1928), clearly contemplate the detail of a law member.

It follows that the court in this case was not legally constituted and was without jurisdiction to try accused. The proceedings were null and void, ab initio.

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

Herman Mayo, Judge Advocate

William B. Kuda, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 296431 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAR 18 1946

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 Preston Roby (34225366), Squadron G (Aviation), 610th AAF Base Unit.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of the sentence so vacated be restored.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 34, 13 Feb 1946).

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

SPJGN-CM 296457

UNITED STATES	)	FOURTEENTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Chungking, China, 11, 12, 15,
Major HORACE J. LEAVITT	)	17, and 18 September 1945.
(0-921817), Corps of	)	Dismissal, total forfeitures
Engineers.	)	and confinement for nine (9)
	)	months.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Disapproved by reviewing authority).

Specification 2: In that Major Horace J. Leavitt, Corps of Engineers, Headquarters, United States Forces, China Theater, then Captain, Headquarters, United States Forces, China Theater, did, at Chungking, China, on or about 2 April 1945, while acting in an official position as Station Engineer and Purchasing and Contracting Officer negotiating, awarding and supervising contracts as agent for the United States Government at Chungking, China, wrongfully accept a loan of the sum of about CN$3,000,000.00 from Chow Tsing She, of Kien Yeh Construction Company, Chungking, China, the said Chow Tsing She and said company being then and there actively

engaged in bidding on and performing of contracts for the government of the United States awarded and supervised by said Major Horace J. Leavitt.

Specification 7: (Finding of not guilty).

Specification 9: (Finding of not guilty).

Specification 11: In that Major Horace J. Leavitt, a married man, Corps of Engineers, Headquarters, United States Forces, China Theater, did, at Chungking, China, from on or about 11 December 1944 to on or about 15 July 1945, wrongfully live and cohabit with Lau Chan Soo Wah, a married woman not his wife.

At the commencement of the trial motions to strike Specifications 3, 4, 5, 6, 8, and 10 were sustained by the court. The accused then pleaded not guilty to the Charge and to Specifications 1, 2, 7, 9, and 11 thereunder and was found not guilty of Specifications 7 and 9, guilty of the Charge and Specifications 2 and 11, and guilty of Specification 1, except the word "to," substituting therefor the words "utilizing the services of." 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 nine months. The reviewing authority, the Commanding General, Fourteenth Air Force, China Theater, disapproved the finding of guilty of Specification 1, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, China Theater, confirmed the sentence and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that, while on duty as an Assistant Engineer Officer with the Engineer Section in Kunming, China, the accused, in November of 1943, met Mrs. Lau Chan Soo Wah, a Chinese lady who was employed as a secretary by another officer in the same installation. Although not divorced, she was separated from her husband. The accused was also married, but his wife and children were in the United States (R. 19, 23-24, 45, 47, 112-113). Deprived of the society of their lawful spouses, he and Mrs. Lau sought solace in one another's companionship. Beginning with 6 February 1944 he visited her on numerous occasions at the room which she shared with four other girls, took her to dinner frequently, and, in conveying her to and from dining places in town, was "naturally" alone with her in his jeep (R. 24-25, 45-47). In May or June of 1944 he wrote the following postcard and sent it to her:

"Dearest Evelyn:

Dropped in but you were out. If you will have CQ call me at G Barracks I will come right up. Don't care what time it is. I just can't bear not seeing you another minute.

With all my love,
/s/ Horace

P.S. Will be in my office until about 10:00 p.m. Rap on window.

HJL" (R. 44-45; Pros. Ex. 1).

In December of 1944 the accused was transferred to the Headquarters Detachment at Chungking, China, and designated Station Engineer. Accompanying him on the plane which conveyed him to his new post was Mrs. Lau, who had also been assigned there as his secretary and stenographer. Their close friendship continued to flourish in the environment to which it was transplanted. Both during the first two weeks after her arrival when she lived at a hotel known as Victory House and during the succeeding six months when she was quartered in a house in Jau Tze Len they saw each other daily, had meals together, and played Mah Jhong with a few Chinese friends (R. 19, 27-29).

Without being relieved of any of his duties as Station Engineer, the accused, on 20 February 1945, was also appointed Purchasing and Contracting Officer of Headquarters, United States Forces, China Theater. In this latter capacity he was charged with the administration of funds provided by the Chinese Government to cover the cost of procuring adequate housing facilities for the use of United States Forces in Chungking. His was the "responsibility of contracting with Chinese firms for the construction and renovation of buildings and other structures * * *, supervision of the construction thereof and contracting for furniture, fixtures and other equipment" (R. 19-20).

About 10 June 1945 Mrs. Lau moved into a newly erected house located at 52 Shu Tien Wan. The building itself, the plumbing, the electrical work, and much of the furniture had been supplied for her special use without charge by Tse Kong Construction Company, Kien Sheh Construction Company, and Jay Ease and Company. All three of these firms had previously been awarded contracts through the accused and were apparently desirous of obtaining more (R. 28, 31-35, 42, 51, 56-58, 65-67, 71, 73-77, 79, 81-92).

To Mrs. Lau's most recently acquired domicile came many visitors, including the accused who was "there everyday almost." He conveyed her to the office each morning in his jeep, drove her back to her home at noon, shared lunch with her, returned her to the office for the afternoon

session, brought her home again in the evening, had dinner with her, and remained in her company until between 10:00 and 11:00 p.m. when he would leave to go to his own quarters (R. 29-30, 39, 42-43; 50; 104-105, 107-109). Although she employed a servant in her home and paid for the food that was served, accused contributed "a lot of canned goods" (R. 29). She had in her home a "Val-pack" and a canvas traveling bag belonging to the accused which he had loaned to her for her use when she moved from Kunming to Chungking (R. 30). Upon two occasions accused had taken a bath at her house because there was no water in his own quarters and had left his underclothes for her "Ama" to launder. He also had two blankets at the house (R. 30). He never had breakfast at her home (R. 42). "Very seldom" were he and Mrs. Lau alone together at night. Usually they would go to a movie or play Mah Jhong with several other persons in her house (R. 43, 107). At no time did he ever "stay all night," and, while under surveillance for a period of almost a month, he was never seen kissing or embracing her (R. 30, 107-109).

A warrant to search Mrs. Lau's home was issued by the Chinese authorities on 21 July 1945 (R. 99-100; Pros. Ex. 4). Accompanied by Lieutenant Colonel Robert W. Crowther and First Lieutenant James D. Scanlon of the American Forces, Major Fred Chau of the Chinese Army presented the document to her Ama and gained entrance. Neither the accused nor Mrs. Lau was present, but an examination of the premises revealed a considerable amount of "GI stuff," including a jacket, a raincoat, and canned goods. Under her bed a rubber contraceptive was found (R. 100-101, 103, 106-110). Ownership of all of these items, other than the contraceptive, was admitted by the accused in a receipt signed by him on 30 July 1945 (R. 104, 107; Pros. Ex. 5).

At the trial herein reviewed the following interrogation of Mrs. Lau occurred:

"Q. Mrs. Lau, while you were in Kunming, did you ever have sexual intercourse with Major Leavitt? On or about June 1, 1944?
A. Do I have to answer that?

President (Law Member): No, you don't have to answer and we can't force you to answer.

A. Then I'll not answer it.

* * *

President (Law Member): Do you Mrs. Lau continue to refuse to answer the question of the Trial Judge Advocate?
A. Yes.

President (Law Member): Very well. You will put your question

whether she made an inconsistent statement and then show the proper foundation.

Questions by Prosecution:

Q. Mrs. Lau, I will ask you whether or not about the middle of July 1945 until about the 1st of September 1945 you testified before an official Chinese military investigation here in Chungking?
A. I have no knowledge whether it was an official Chinese investigation or not. I was not told anything.

Q. Did you testify before Chinese?
A. I did.

Q. On how many occasions?
A. Four.

Q. You recall each of those occasions?
A. I do.

Q. At the conclusion do you remember reading and signing the record after reading it over?
A. I do.

Q. Did you sign?
A. Yes.

Q. I will ask you Mrs. Lau if you did not during the course of one of those investigations by the Chinese which I just referred to have this question asked you. 'When did you begin sexual intercourse with him, in Chungking or Kunming?' To which you answered, 'In Kunming.' Was that questioned asked you?
A. It was.

Q. And did you give that answer?
A. I did.

Q. I will ask you further if this question was asked you. 'In what place?'
A. Yes.

Q. To that question you answered. 'In the dormitory.'
A. I did.

Q. I will ask you Mrs. Lau if whether or not during the course of that same investigation you were next asked

this question. 'How often did you have sexual intercourse with Captain Leavitt?'

A. It was.

Q. Did you answer that question in these words? 'It is not certain maybe once a week.'

A. I did.

Defense: Object on the grounds that this statement was obtained under duress.

* * *

Q. I'll ask you Mrs. Lau as to whether or not you ever had sexual intercourse with Major Leavitt, between December 11, 1944, and July 19, 1945, while in Chungking?

A. I won't answer that. Do I have to General?

President (Law Member): We do not force you to answer, however, you cannot claim privilege.

A. No, I won't answer that." (R. 25-26, 30-31, 37-38).

Long before the search of Mrs. Lau's home the accused had on 1 or 2 April 1945 accepted an invitation to lunch at the home of Chow Tsing She, the general manager of the Jay Ease Construction Company known in Chinese as the Kien Yeh Construction Company (R. 36, 71-72, 81). At about 2:00 p.m., after the food had been served and consumed, a poker game was begun in which the accused and several Chinese participated. When the gambling ended at approximately 11:00 p.m., the accused was a loser in the sum of CN$4,000,000. Producing a check book, he stated that he would have to execute a post-dated instrument because at the time he had insufficient funds on deposit to meet the obligation. What then occurred has been described by Mr. Chow as follows:

"Q. Now will you tell the court just what happened then when that game closed. Just how the accounts were settled up that night?

A. When we finish, Major Leavitt took his check book and he asked me he say no cash on hand, and I will give you a post dated check. Because I am the host, I have to be responsible for between my friends, only one and he lost so that I say that never mind I pay the money first and you pay me, you don't give me post-dated check. And he say 'I will pay you tomorrow,' and I say, 'Never mind a few days, don't hurry,' and he put his check book back" (R. 72, 75).

One of the other players described the transaction as follows:

"Q. Did Major Leavitt at that time pay that four million CN to the winner?
A. Not at that time.

Q. Who paid, if anyone, at that time?
A. Because our manager owned the chips, so the manager paid.

Q. And who was that manager?
A. Chow Tsing She.

* * *

Q. Who won in that poker game on April 1, 1945?
A. Mr. Wang and Mr. Lu, and myself" (R. 81-82).

Mrs. Lau, a guest who was present but who did not play in the game, gave the following testimony concerning the incident:

"Q. Do you know whether or not Major Leavitt paid four million CN at that time?
A. At that time he did not pay because I think it customary for the host to write all the checks for each that lost, just to avoid a conflict. I don't know what the idea was. I am not a poker player myself. But he pulled out a check book and he asked everybody how much they lost and he wrote a check for every amount, then they distributed them amongst themselves.

Q. Then who actually paid off the four million CN lost?
A. At that time Mr. Chow was the only one that paid off the losses" (R. 37).

Suiting his action to his words, Mr. Chow satisfied the entire debt in full (R. 36-37, 71-73, 81-82). Two weeks later the accused paid his gambling losses to Mr. Chow with five thousand United States dollars, the equivalent of CN$4,000,000 (R. 76-77, 82). Not long after, on 9 May 1945, he awarded a contract for the construction of a four story office building to Mr. Chow's company (R. 78).

4. The accused, after being apprized of his rights as a witness, elected to take the stand but to limit his testimony to Specifications 1, 2, and 7. Several other witnesses were presented by the defense. Major Henry A. McPhillips, to whom direct supervision of the Engineer Department at Chungking had been delegated on approximately 1 February 1945, had had daily opportunity to observe the accused's services and characterized them as excellent. Since the accused's reassignment preparatory to trial, his "section has not functioned nearly as well with two or three times as much men and with not nearly as much work to be done" (R. 124-125).

A complete investigation of all construction activities in Chungking "from an engineering standpoint" had been undertaken by Lieutenant Colonel Allen T. Dotson in June of 1945 and completed the following month. In his opinion the accused,

> "* * * has done a commendable service. In fact I know of only two or three other engineer officers in the China Theater who have done the volume of construction in an expeditious a manner that he has done the work here. It's been a tremendous job and he has worked as much as eighteen hours a day to get it done. During this period I know he had very little personnel to help him. It was almost a one man job up until approximately March of this year.
>
> * * *
>
> "I would say that he did an outstanding job here.
>
> * * *
>
> "* * * This construction here in the Chu Ching compound should be the most expensive construction in China. But on the basis of comparison with construction in other areas it isn't the most expensive, based on square foot of construction costs analysis. Cost per square foot of construction at this compound specifically this office building, is less than the cost per square foot of a similar one story brick construction elsewhere in China" (R. 129, 132, 134).

Mr. Y. S. Lu, who had participated in the poker game on 1 April 1945 and had been one of the major winners, had offered to return all of his chips to the accused because "he lose too much." The accused declined to avail himself of this generous act and insisted upon making full payment with Mr. Chow's assistance. According to Mr. Lu,

> "Next day I gave the check back to Major Leavitt. He didn't want it. I said, 'You have to accept it. The next time we can have the balanced if I lose money [sic].' After two or three days I returned the check to Major Leavitt again. He insisted to me to keep it, so I cashed the money" (R. 137).

Mr. Lu had obtained contracts through the accused aggregating CN $30,000,000 (R. 137).

Captain George H. Muller was the accused's roommate at government quarters provided for them in "295 House." The accused always slept there "except for the period he was in Kunming, or the time he was Officer of the Day." "The water was off frequently," and a supply of it had to be carried in manually for bathing purposes (R. 150-151).

With respect to Specification 2 the accused testified in great detail as follows:

> "Well we started playing after dinner about 2:00 and played until 11:00, and when the game was over Mr. Chow had been acting as the banker, in other words he had the paper there where everybody had their names on it and he gave us some chips to start with. And every time he gave you more he charged it against your name. So they were all taking in chips, seeing what they lost and what they won. I couldn't understand what they were saying, although I knew whoever handled the bank always accepted the loss and always paid the winners. When they got all through I asked him how much I was in it and he showed me my name and the amount that he had given me. It was four million CN. I had a few chips that I remember, but the difference what I had and what was charged against me was four million CN. So I told him that I would give a post dated check, that I didn't have four million in the bank, but that I would get it. But he said, 'Never mind'. So I just thought since I didn't have that much CN in the bank and would have to give him a post dated check, I could either give him a post dated check or give him the gold. I had to buy the CN anyway. So I told him that I would give him the money in the morning. That was on a Monday morning. Monday he didn't come to the office, in fact he only came in the compound more than once or twice a month. But I rarely saw him two or three times a month. His brother handled all the work in the compound, and he also had another engineer who spoke English. So one Sunday morning I was in the office all by myself working. Civilian personnel do not work on Sundays. Chow came in the office, so I told him that I wanted to give him the money for his brother. I gave him five thousand dollars in United States currency. I think it was all but just a few of it was one hundred dollar bills, four or five fifty dollar bills, and I told him to give it to his brother, and would like to have a receipt for it because it was a considerable amount of money. So the following day his brother came back to the office and he had a receipt with him and the money. He wanted me to take the money. He said I was the guest at his house and he only intended to have a small sociable game, and he was very sorry I lost. And I simply told him that if I won I'd expect to get the money and I lost and I expected to pay. That was all to that transaction" (R. 153-154).

At the time he did not know that the winners were contractors (R. 162).

Mr. Chow had, at first, been reluctant to accept payment because the accused "was a guest." The accused, however, had insisted upon satisfying his "honest debt" within two weeks. The sum was withdrawn from a reserve of some ten or eleven thousand dollars which he had accumulated by dealing in government drafts. Although the normal rate of interest was then nine or ten per cent, he paid none to Mr. Chow for the use of the money advanced (R. 154, 159, 170-171).

The contract for the construction of a four story office building had thereafter been let to Mr. Chow's company on 9 May 1945. Five other contractors had submitted lower bids, but one had omitted all reference to the timber required and the others "were too small to do the job. They didn't have the organization and men to do the job" (R. 159-161, 176-178). Some question as to the propriety of the award having arisen, a full investigation was made and the letting of the contract to Mr. Chow's company was not only approved but directed by superior authority, both American and Chinese (R. 168-169).

5. Specification 2 of the Charge alleges that the accused did, "on or about 2 April 1945, while acting in an official position as Station Engineer and Purchasing and Contracting Officer * * *, wrongfully accept a loan * * * from Chow Tsing She, of Kien Yeh Construction Company * * *." This was set forth as a violation of Article of War 96.

Having lost some CN$4,000,000 in a poker game with several Chinese contractors with whom he did business, and not having a balance in his account to cover this sum, the accused offered to pay the winners with a post-dated check. Either because of a Chinese custom or personal friendship, Mr. Chow Tsing She, the host, who was one of the contractors, undertook to accommodate the accused by paying the gambling obligations incurred in full. Although the favor was not solicited by the accused, he freely accepted it. The result was a novation by which the accused became indebted to Mr. Chow only instead of to several creditors. Repayment was made by the accused within two weeks.

Since the relationship between Mr. Chow and the accused was, to all intents and purposes, that of lender and borrower, the sole question presented is whether the transaction was in fact wrongful. The acceptance by an officer of a substantial loan or gift from a person or firm with whom it is his duty as an agent of the Government to carry on negotiations has frequently been held to constitute a violation of Article of War 96, the reason being that no man can serve two masters. CM 203355, 7 BR 77; CM 213993, 10 BR 310; CM 244291, 28 BR 245, CM 204639, 8 BR 25; CM 234644, 21 BR 97; CM 278249, Waldman. This rule has been succinctly embodied in Army Regulations 600-10. CM 234644, 21 BR 97; CM 250309, 32 BR 331; CM 273791, 47 BR 29.

Although the principle so often enunciated is most desirable

and should be strictly adhered to and enforced, we do not believe that it is applicable to this case. The accused, it is true, was accommodated, but the benefit accruing to him cannot reasonably be held to be substantial. While the novation effected did result in the substitution of one creditor for several, the accused's net financial position remained unchanged. He still owed $5000. Although he did take two weeks to satisfy his debt, he was under no obligation to make immediate payment and the delay was apparently not of his choosing. Considering the magnitude of the loss, the period involved was extremely short. The argument that the accused "used" the money for two weeks without payment of interest ignores the circumstances that the transaction was of a gambling rather than of a commercial nature, a distinction which undoubtedly, in the event of default, would have induced the winners, as gentlemen, to refund to Mr. Chow the sum advanced by him. Since no material risk was incurred on what, despite the novation, was basically a gambling debt, the imposition of interest would have been to add insult to injury and was unjustified by law or mores. There is absolutely nothing in the record to show that the accommodation described influenced the accused in any way in his award of government contracts. Specification 2 has not been sustained.

6. Specification 11 of the Charge alleges that the accused did, "from on or about 11 December 1944 to on or about 15 July 1945, wrongfully live and cohabit with Lau Chan Soo Wah, a married woman not his wife." This offense was also laid under Article of War 96.

"Unlawful cohabitation," as the term is commonly understood, may be established by proof that the accused engaged in habitual sexual intercourse with one woman over an extended period of time, or that he lived with her "in such a way as to hold out the appearance of being husband and wife." Bouvier Law Dictionary, Rawles 3rd revision, vol. 2, p. 1868; XII BR 119, I Bull. JAG, Jan-June 1942, p. 23, sec. 454 (4a). These alternatives are not mutually exclusive, but one or the other is essential to the offense. In the present case neither has been satisfactorily demonstrated by competent evidence.

All that the prosecution has succeeded in showing by admissible evidence is that the accused and Mrs. Lau were close friends; that almost every day he was continuously near her or in her presence from about 8:00 a.m. to 11:00 p.m.; that he habitually had lunch and dinner with her, kept certain items of clothing, equipment, and food in her home, and twice took a bath there; and that at one time, long before the period covered by the Specification, he had expressed his love for her. None of these facts add up to even one act of sexual intercourse or constitute a holding out of the relationship of husband and wife. All were perfectly consistent with innocent conduct, and none of them requires the conclusion contended for by the prosecution.

The weakness of much of the testimony adduced is aptly illustrated by Mrs. Lau's comment with respect to the postcard, to wit, it "was written to me by [the accused] and it says, 'With all my love.' But it doesn't say whether I accept his love or not" (R. 50). Had there been evidence that the accused spent one entire night at her home, or that he was seen embracing or kissing her, or that he represented her to the world as his wife, it perhaps would have been proper and even necessary to conclude that an illicit relationship existed. In the absence of any of these elements we cannot say that the accused and Mrs. Lau ever had sexual relations with each other or lived in such a way as to create the appearance of being husband and wife.

The argument of the Theater Staff Judge Advocate in support of the finding of guilty relies in part upon "the fact that Mrs. Lau testified on the stand that she had admitted to certain Chinese officials having had sexual intercourse with the accused in Kunming, maybe once a week." This assertion reveals a misunderstanding of the nature and function of impeaching testimony.

Upon being questioned concerning her alleged sexual relations with the accused, Mrs. Lau refused to answer, with the result that she contributed nothing whatsoever on the subject to the record. Thereupon her former testimony was adduced not as primary evidence but merely to show that she had made previous statements inconsistent with her silence. While the rules of evidence permit the introduction of a pre-trial statement to impeach and contradict a witness' testimony, they do not permit such use of a statement in the total absence of any related testimony by the witness. The purpose of the pre-trial statement is to neutralize and to discredit the witness' present testimony. Here there is nothing to neutralize or discredit. To admit the former testimony would be to give it affirmative and independent rather than an impeaching or contradictory character and value.

Even if the rule were otherwise in cases involving absolute silence by the witness, the conclusion in this instance would still be the same; for, while Mrs. Lau's former testimony may have reflected upon her credibility, it did not itself become admissible proof of the issue before the court. The legal point involved is ably discussed in Wigmore on Evidence, paragraph 1018, as follows:

> "(a) Since, in the words of Chief Baron Gilbert (ante, Sec 1017), it is 'the repugnancy of his evidence' that discredits him, obviously the Prior Self-Contradiction is not used assertively; i.e. we are not asked to believe his prior statement as testimony, and we do not have to choose between the two (as we do choose in the case of ordinary Contradictions by other witnesses). We simply set the two against each other, perceive that both cannot be correct, and immediately conclude that he has erred in one or the other, - but without

determining which one. It is the repugnancy and inconsistence that demonstrates his error, and not the superior credibility of the prior statement. Thus, we do not necessarily accept his former statement as replacing his present one; the one merely neutralizes the other as a trustworthy one.

* * *

It is universally maintained by the Courts that Prior Self-Contradictions are not to be treated as having any substantive or independent testimonial value" (Underscoring supplied).

Since Mrs. Lau's former testimony was not competent primary evidence, its admission into the record constituted error. This being the case, the finding of guilty, insofar as it is predicated upon adultery, cannot properly be sustained in the absence of other evidence so persuasive as to compel a conviction. As was said in Dig. Op. JAG, 1912-30, sec. 1284 (quoted with approval in 10 BR 133, and 36 BR 29),

"It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony has been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of itself substantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded."

Since, as has already been indicated, Mrs. Lau's prior testimony in itself was of no evidentiary worth on the issue of adultery; since there was no other evidence adduced to show adultery, let alone such as to compel a finding of adultery; and since there was no adequate proof that the accused lived with her as husband and wife, Specification 11 must fall.

7. The accused is married and forty-three years of age. After completing three years of high school, he was employed by various firms as a construction foreman and superintendent and as a practical engineer. For a brief period between September, 1937, and May, 1938, he was an investigator for the Sheriff and District Attorney of

Weaverville, California. Apparently while working he attended St. Marys College for two years, majoring in commercial courses. He was commissioned as a First Lieutenant on 8 January 1943 and was promoted to Captain on 1 February 1944 and to Major on 12 May 1945.

8. The court was legally constituted. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty and the sentence.

Charles Lepluna, Judge Advocate.

Robert Glamin, Judge Advocate.

Samuel Morgan, Judge Advocate.

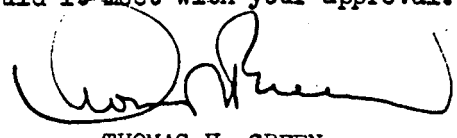
SPJGN-CM 296457 1st Ind
Hq ASF, JAGO, Washington, 25, D. C.
TO: The Secretary of War 21 March 1946

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Major Horace J. Leavitt (0-921817), Corps of Engineers.

2. As approved by the reviewing authority this officer was found guilty of wrongfully accepting a loan from a member of a construction company, which company was actively engaged in bidding on and performing of contracts for the United States Government awarded and supervised by accused, and of wrongfully living and cohabiting with a married woman not his wife, both in violation of Article of War 96. He was sentenced to dismissal, total forfeitures and confinement at hard labor for nine months. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

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

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



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Findings and sentence disapproved. GCMO 91, 1 May 1946).

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

SPJGN-CM 296460

UNITED STATES	PANAMA MOBILE FORCE & SECURITY COMMAND
v.	Trial by G.C.M., convened at Fort Clayton, Canal Zone, 21 and 26 November 1945. Dishonorable discharge (suspended) and confinement for one (1) year. Disciplinary Barracks.
Private REUBEN E. VENABLE (6967511), Company C, 150th Infantry.	

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

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

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

CHARGE I: Violation of the 86th Article of War.

Specification 1: In that, Private Reuben E. Venable, Company "C", 150th Infantry being on guard and posted as a sentinel, on motor patrol at Post Guardhouse, Fort Clayton, Canal Zone, on or about 1800 31 October 1945, did leave his post before he was regularly relieved.

Specification 2: (Finding of not guilty).

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

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

He pleaded not guilty to the Charges and Specifications and was found not guilty of Specification 2 of Charge I, but guilty of the Charges and remaining Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority disapproved the findings of guilty of Charge II and its Specification; approved the sentence but remitted two years of the period of confinement; suspended the dishonorable discharge imposed; 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 #48, Headquarters Panama Mobile Force and Security Command, dated 12 December 1945. The record of trial was forwarded to The Judge Advocate General pursuant to Article of War 50½.

3. The evidence for the prosecution in support of the only remaining finding of guilty shows that on 13 October 1945 the Transportation Sergeant of the First Battalion, 150th Infantry, stationed at Fort Clayton, Canal Zone, detailed the accused, who was a member of Company "C" of that battalion, as a driver for the motor patrol of the post to "pull duty" on the night of 31 October 1945 from "1800 to 2400" (R. 7-8; Pros. Ex. 1). The only instructions the Sergeant gave drivers was to pick up the vehicle at the post motor pool and report to the guardhouse at "1800 and 2400" (R. 8).

At 5:15 p.m. on 31 October 1945 the dispatcher at the Post Motor Pool issued a motor vehicle to the accused with a driver's trip ticket for the purpose of reporting to the Officer of the Day at the guardhouse (R. 41-42; Pros. Ex. 4). Between 6 and 6:30 o'clock, he drove Sergeant Bernard Hansen and a Private Gray into Panama City in a one-half ton truck. The accused was wearing his MP brassard and holster and equipment (R. 32-33, 35-36). About 7:40 p.m. that evening he was seen by the guard at Post 3, located at the lower gate entrance to the post, driving a "pick up" truck into the post (R. 14). The guard had previously seen the accused in the guardhouse and assumed that he was driving the guard truck because he had a member of the guard with him (R 15,18). Accused returned the vehicle to the Motor Pool at 8:10 p.m. and obtained another vehicle (R. 42-43; Pros. Ex. 5).

The guard at Post 3 was present at guard mount that night but did not hear accused's name called from the roll (R. 16). Usually two men were posted as guards on a motor patrol. Each was conveyed in a truck by one or more drivers. The total number of drivers that the guards used was not known (R. 17).

The commander of the guard, who was present at guard mount

that evening, testified that the accused was not present at guard mount and was not posted by him (R. 20). Since the accused's name was not on the guard roster, the commander gave him no orders (R. 22). Indeed, the drivers for the patrol received their orders "from the battalion" and not from the commander of the guard (R. 22). Each member of the motor patrol, including the driver, was required to sign the "sign-in," or "motor patrol," sheet when he went on duty and thereafter every two hours (R. 24, 26). The Officer of the Day did not post or even see the accused at guard mount, but it was customary at that post for a patrol driver to "pick up" his vehicle, bring it to the guard house at 1800, sign the motor patrol sheet, and thus be "posted." In the opinion of the Officer of the Day the driver of the motor patrol vehicle was a member of the guard. The accused's name did not appear on the official list of the guard for that night (R. 28; Def. Ex. A), and the drivers' names were never entered in that record (R. 31).

4. In defense it was shown that the accused's name was not contained in the guard roster which never contained the names of the drivers of the motor patrol (R. 44-45; Def. Ex. A). The accused having been advised concerning his rights as a witness elected to remain silent (R. 46).

5. The accused has been found guilty of leaving his post before he was regularly relieved after being "on guard and posted as a sentinel on motor patrol," in violation of Article of War 86. The elements of proof of the offense appear in MCM, 1928, par. 146c, p. 161:

> "Proof - (a) That the accused was posted as a sentinel, as alleged; and (b) that he left such post without being regularly relieved."

It appears from the evidence that at Fort Clayton a motor patrol was regularly maintained as part of the guard of that post. The vehicles used for that purpose were operated by drivers provided by the accused's organization. On the particular night in question the accused was assigned to act as driver for one of the patrols and did in fact procure the vehicle necessary for the purpose. At a time when he was supposed to be driving the guard he used the vehicle to take two enlisted men to Panama City. He is not charged here with a failure to carry out his orders in violation of Article of War 96 but with leaving his post while acting as a guard. There was no evidence that the accused was ever instructed concerning the duties of a guard, that he ever assumed such duties, or that he was ever posted as a sentinel. It was shown that he did not participate in guard mount; that he was never formally posted; and that he, as a driver, was never included in the formal roster which purported to contain the names of all of

the guards. All the record shows with reference to the accused's duties is that he was ordered to act as a driver for one of the guards on the motor patrol. In view of these circumstances he was not a sentinel within the meaning of Article of War 86.

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

Earle Stephens, Judge Advocate.

[illegible], Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 296460 1st Ind
Hq ASF, JAGO, Washington, D. C. FEB 20 1946
TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Reuben E. Venable (6967511), Company C, 150th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect these recommendations, should such action meet with your approval.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Findings and sentence vacated. GCMO 123, 13 May 1946).

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

SPJGK - CM 296462

25 JAN 1946

UNITED STATES	)	ARMY AIR FORCES CENTER
v.	)	Trial by G.C.M., convened at Orlando, Florida, 4 December 1945. Dismissal, total forfeitures and confinement for three (3) years.
Captain CLARENCE M. HICKS (0-855604), Air Corps.	)	

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

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

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

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

Specification 1: In that Captain Clarence M. Hicks, Air Corps, Squadron S (AAF School), 902nd Army Air Forces Base Unit (OAAB), did, at Orlando Army Air Base, Florida, on or about 2 November 1945, feloniously take, steal, and carry away about $125.00, lawful money of the United States, the property of First Lieutenant Richard R. Simmons.

Specification 2: In that Captain Clarence M. Hicks, * * *, did, at Orlando Army Air Base, Florida, on or about 2 November 1945, feloniously take, steal, and carry away about $20.00, lawful money of the United States, the property of Second Lieutenant Harold C. Dicks.

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

Specification 1: In that Captain Clarence M. Hicks, * * *, being indebted to Army Emergency Relief in the sum of $100.00 for a loan, which amount became due and payable on or about 1 April 1945, did, at Orlando Army Air Base, Florida, from about 1 April 1945 to about 14 November 1945, dishonorably fail and neglect to pay said debt.

Specification 2: In that Captain Clarence M. Hicks, * * *, being indebted to the Florida Bank and Trust Company, Winter Park, Florida, in the sum of $150.00 upon a promissory note, which

amount became due and payable on or about 4 October 1945, did, at Winter Park, Florida, from about 4 October 1945 to about 14 November 1945, dishonorably fail and neglect to pay said debt.

Specification 3: In that Captain Clarence M. Hicks, * * *, being indebted to the First National Bank at Orlando, Florida, in the sum of $150.00 upon a promissory note, which amount became due and payable on or about 3 October 1945, did, at Orlando, Florida, from about 3 October 1945 to about 14 November 1945, dishonorably fail and neglect to pay said debt.

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

Specification 1: In that Captain Clarence M. Hicks, * * *, did, at Orlando Army Air Base, Florida, from about 14 July 1944 to about 30 October 1944, wrongfully borrow about $285.00 from Technical Sergeant William Nechtman, Squadron S (AAF School), 902nd Army Air Forces Base Unit (OAAB).

Specification 2: In that Captain Clarence M. Hicks, * * *, did, at Orlando Army Air Base, Florida, on or about 24 September 1945, wrongfully borrow about $100.00 from Technical Sergeant Frank John Berulis, Squadron S (AAF School), 902nd Army Air Forces Base Unit (OAAB).

He pleaded guilty to all charges and specifications. When the prosecution closed its case in chief the accused, with the permission of the court, changed his plea of guilty of Specifications 1 and 2 of Charge I and Charge I to not guilty. He was found guilty of all charges and specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of ten years. The reviewing authority approved the sentence but remitted seven years of the period of confinement and forwarded the record of trial for action under Article of War 48.

3. For the prosecution.

As to Specifications 1 and 2, Charge I.

On 2 November 1945, at approximately 4:30 P.M., First Lieutenant Richard R. Simmons (now Captain) (R. 8) left his billfold containing about $125 in the top dresser drawer of Lieutenant Dicks at BOQ 2412, Orlando Army Air Base (R. 9-10). When he returned at about 5:30 P.M. all but $2 of the $125 contained in the billfold was missing. Lieutenant Simmons reported his loss to the Provost Marshal. At the time he neither knew the accused (R. 8) nor gave him permission to take this money nor owed him anything (R. 12). Restitution of the $125 has since been made (R. 12).

At about 4:30 in the afternoon of 2 November 1945 (R. 14) Second Lieutenant Harold C. Dicks left his wallet containing $25 in his top dresser drawer in BOQ 2412, Orlando Army Air Base (R. 15). When he returned at about 5:30 P.M. all that remained in the billfold was two $1 bills. He reported this loss to the office of the Provost Marshal (R. 16). At the time he neither knew the accused nor gave him permission to take any money from his wallet nor owed him any money. Restitution of the stolen money has since been made (R. 17).

On 2 November 1945 First Lieutenant Charles E. Lucas lived in BOQ 2412 (R. 18). Between 4:00 and 5:00 o'clock P.M. the accused came in the BOQ and asked whether he could use the telephone. He was directed to the telephone in the next room, which was the room occupied by Lieutenant Dicks (R. 19). The accused went through the door and pulled it closed (R. 20).

On 3 November 1945, Captain Lynn C. Vermillion, an investigator for the Provost Marshal's office (R. 50), talked to the accused in his office relative to some property stolen from BOQ 2412 (R. 51). Before doing so he read the 24th Article of War to accused advising him of his rights thereunder. Accused then freely and voluntarily made a statement in writing without threats or promise of reward (R. 52). This statement, identified as Prosecution's Exhibit No. 6, was written and signed by the accused in Captain Vermillion's presence and is as follows:

"I, Clarence M. Hicks, Captain, A.C. ASN O-855604, in the presence of Captain Lynn C. Vermillion, Assistant Provost Marshal, OAAB, make the following voluntary statement. I have been read by Captain Vermillion and understand the 24th Article of War.

"On 13 October 1945, I cashed a check for twenty dollars ($20.00) at the Colonial Pharmacy, 1113 East Mills St. and another check for twenty dollars ($20.00) at Ashmores Grocery, 836 North Fern Creek, Orlando. On 15 October, I cashed another check at the Colonial Pharmacy in the amount of ten dollars ($10.00) and on 20 October, two more checks in the amounts of $15 and $10, and a fifth check for $15.00 on 22 October 1945. Part of money obtained thereby was spent on the punch boards in the bar at Colonial Pharmacy. The rest of the money was used for regular household expenses.

"On 27 October 1945, I cashed checks in the following amounts at the following places:

Yowell-Drew Company	$25.00
Clarence Brown's	15.00
Louis' Ladies Shop	30.00

a total of $70.00, about two-thirds of which was spent on punch boards at Brown's News Stand, N. Orange Ave., and Jack Holloway's Bar. The balance was used for household expenses.

"On 29 October 1945, two more checks were cashed at Louis' Ladies Shop ($15.00) and Sears Roebuck's ($20.00). This money was used to

redeem another check issued some months previously and held by a local establishment, Rutland's Mens Store. This money was paid to Capt. Vermillion of the Provost Marshal's Office.

"On 30 October 1945, a check for $15.00 was cashed at Yowell-Drew Ivey Co. which money went into punch boards.

"On the night of 31 October 1945, I entered into a card game at the Officers' Club, OAAB, and lost in addition to the cash on my person, a sum of $150 for which I issued checks. A Capt. Hall received (to the best of my belief) two checks in the amount of $50 and $25. A Major Wilson received one check for $25 and Col. Guy E. Burnette received one check for $50. All checks heretofore mentioned were drawn on the Riggs National Bank, Washington, D.C. where I knew I had no account.

"Because of the financial difficulties I was now faced with and the prospect of having to return Mrs. Hicks and the two children to Washington on 3 November 1945 and further having no money to meet my commitments, I entered Building T-2412, Headquarters Area, OAAB, and took, to the best of my knowledge approximately $145.00 in cash from two wallets in a bureau drawer in one of the rooms. I entered this building at approximately 1600 hours and met two Officers in the room adjacent to the room which contained the money. I asked one of these Officers where the telephone was located. He replied that it was in the next room. I went in, closing the door behind me. I made two telephone calls, one to my office, and one to the School Supply Warehouse. Neither call was completed. While telephoning I noticed clothing laid out on the beds and presumed that the occupants of the room were out taking physical training. I left after placing the calls and went to T-2411. A short while later, I returned to T-2412, entered the room and took the money. I then left and went to the quarters of Lt. Col. Guy E. Burnette to whom I paid $50 of the money I had taken from the B.O.Q. for which he gave me a receipt. During the course of the evening, I took Mrs. Hicks out to dinner and to Phil Bergers returning home at about 0030 hours, 3 November 1945. About $15 was spent during the evening. I still had in my possession $78.12 of the money I had taken from the B.O.Q. At approximately 0130 hours, Capt. Vermillion came to my house and asked that I accompany him to the base. On the way out, while riding in the jeep up 1st Avenue from Cheney Highway to Nebraska Avenue, I dropped two twenty dollar bills onto the road at separate times. I did this because I had the fear of their being marked and I did not want them in my possession. At Capt. Vermillion's office, the balance ($37.00) of the original $145 was taken from my person.

"I have made the above statements without threats or promises."

The defense did not question the voluntary nature of this confession, but after it had been accepted in evidence objected "to those parts of the statement relating to offenses with which the accused is not charged, to wit,

the writing of various checks." After the presentation of arguments the law member ruled that the confession would not be accepted in evidence, but immediately directed that the court be closed. When the court was reopened the president announced that the confession would be accepted in evidence "in its entirety."

As to Specification 1, Charge II.

According to the records of the Orlando Section of the Army Emergency Relief accused borrowed $100 from that fund on 20 November 1944 (R. 21,22). The application for assistance was received in evidence as Prosecution's Exhibit 1 and showed the approval of a loan for that amount and the written acknowledgment by accused that he had received the $100 so loaned on that date. The need for assistance, set forth in the recommendation that the loan be made, was the pregnancy of accused's wife whose condition was such that specialized treatment in a Washington (D.C.) clinic had been recommended, according to the statement made to the representative of the Army Emergency Relief (R. 22,23, Pros. Ex. 1). The amount so advanced was not in the nature of a grant but was a loan (R. 27) which was to be repaid in monthly installments of $25 beginning 1 January 1945 (R. 24). Despite several efforts to effect collection no payment was made thereon until 23 November 1945 when it was paid in full (R. 25).

As to Specification 2, Charge II.

On 27 September 1945 accused "approached" Mr. Paul E. Davis, Cashier of the Florida Bank and Trust Company, Winter Park, Florida, "on the subject of a loan for a few days" until he could make arrangements to bring his family down from the North (R. 28,29). As a result the bank made accused a loan for $150, represented by his note payable seven days later, namely, 4 October 1945. Accused did not appear on the date the note was due, nor did Mr. Davis see him thereafter. Despite the fact that three notices were sent to accused, no part of the note was paid prior to 14 November 1945. Reimbursement was later made to the bank in full through the Red Cross (R. 30,31).

As to Specification 3, Charge II.

On 28 September 1945 accused made an application for a loan of $150 to the Emergency Loan Department, First National Bank at Orlando, Florida. The loan was duly made and in representation of it accused executed his note for $150 payable five days thereafter, namely, 3 October 1945 (R. 32,33). Two days before it became due a notice was sent to accused, but he failed to appear or pay the note. Additional notices were sent on 10 and 19 October without result, and vain efforts were made to reach accused by telephone. A letter was then sent to "Colonel Holden" and one to accused's mother, but up to 14 November no part of the note had been paid and no arrangements to take care of it made by accused (R. 34, 35). The note was eventually paid by accused's father (R. 34).

As to Specification 1, Charge III.

At the request of accused, William Nechtman, a technical sergeant in accused's section, made three loans, totaling $285, to accused, the first for $135 on 14 July 1944, the second for $60 on 12 September 1944, and the third for $90 about 17 October 1944 (R. 38-43, Pros. Exs. 2,3,4, and 5). At the time of each loan accused was a commissioned officer and the lender a noncommissioned officer in the Army of the United States (R. 45). Sergeant Nechtman did not take any steps to get the money back, but $100 was paid him by accused on 1 October 1945 and the balance was paid by "Mr. Cheney of the Red Cross" on 1 November 1945 (R. 46).

As to Specification 2, Charge III.

On 24 September 1945, accused, then a captain in the Army of the United States, sought to obtain a loan of $200 from Frank J. Berulis, a technical sergeant in the same unit as accused (R. 47-49). Sergeant Berulis advised him that he could lend him only $100 and turned over that amount to him in cash (R. 48). Accused repaid the loan about a month later (R. 49).

For the defense.

After a full explanation of his rights, accused elected to remain silent and offered no evidence in his behalf.

4. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all the charges and specifications. Accused pleaded guilty to three specifications laid under Article of War 95 charging him with dishonorable failure and neglect to pay debts incurred by him (Specifications 1, 2 and 3 of Charge II). The circumstances under which the loans were made, the consistent disregard by accused of his moral as well as legal obligation to repay loans that were clearly made to him to meet emergencies which he claimed existed, and his failure to respond to the repeated demands made upon him, establish a prima facie case of dishonorable conduct, which, considered in connection with his plea of guilty, fully justifies the findings of guilty (CM 228894, Peterson, 16 B.R. 365; CM 230736, Delbrook, 18 B.R. 29; CM 238996, Rondestvedt, 25 B.R. 23). Accused also pleaded guilty to two charges of borrowing money from enlisted men in violation of Article of War 96 (Specifications 1 and 2 of Charge III). That the loans were made as alleged was unequivocably established by the testimony of the two noncommissioned officers, one a member of accused's section and the other of accused's unit, from whom the money was borrowed. Such actions violate Article of War 96 (CM 117782, CM 130248, Dig Op JAG 1912-40, par. 454(19))

While there were immaterial variances between the allegations and the proof, accused's voluntary confession, offered after adequate proof of the corpus delicti, compels a finding of guilty of the two charges of larceny

(Specifications 1 and 2 of Charge I). The two offenses as a matter of fact were substantially one transaction and while in a technical legal sense multiplication of charges did not result in setting them forth in separate specifications, the trial judge advocate properly advised the court that they should be treated as a single offense in determining the sentence.

The sole legal problem that requires consideration is the admissibility of the confession, in view of the fact that it contains a disclosure by the accused of the commission of offenses, that is, the issuance of checks on a bank in which he knew he had no account, with which he is not charged. Fundamentally, reference by the prosecution to "former specific offenses or other acts of misconduct" by accused is prohibited (MCM, 1928, par. 112b, p. 112). This rule is subject to certain exceptions, including the following:

> "When criminal intent, motive, or guilty knowledge in respect of the act is an element in the offense charged, evidence of other acts of the accused, not too remote in point of time, manifesting that intent, motive, or knowledge, is not made inadmissible by reason of the fact that it may tend to establish the commission of another offense not charged. The court should not consider evidence so offered as bearing in any way upon the question of the accused's character."

A similar rule applies in civil courts with regard to the inclusion of other offenses in a confession as shown by the following excerpts:

> "Moreover, the entire confession is admissible where the part relating to other offenses tends directly to prove accused's guilt of the crime charged or the motive for its commission, or where such part serves to explain the remaining portion of the confession." (22 Corpus Juris Secundum, Sec. 820, p. 1441.)

> "Confession of different offense. A confession made by an accused of an offense different from that with which he is charged, and in no way connected with it, is not admissible on his trial for the offense charged. Thus, a statement by accused that when he found he was charged with murder, he felt so distressed that he went to stealing horses to pacify his mind, is not a confession of the crime of homicide. But where the different offense confessed is a part of the same scheme, or is so connected as not to be severed from the offense on trial, it is admissible." (Wharton's Criminal Evidence, 11th Ed., p. 992.)

> "There is a further complaint at the admission of a part of said confession on the ground that it referred to the making of other stills and other transactions. We do not so read the confession. While it proceeds at length to set out various steps in the purchase of material and in the construction of the stills, we think it all leads up to and refers ultimately to the transaction and stills connected with the particular offense here charged.

If it showed the making of other stills, same would be legitimate as connecting appellant with liquor making." (In Coomer v. State, 97 Tex. Crim. Rep. 100, 260 S.W. 568.)

"(c) In the third place, for the remaining case - an entire utterance, wholly heard - the precise rule of law is obscure. It is commonly said that the whole of the confession or admission must be taken together; but this obviously leaves unsettled whether it is meant that the prosecution must put it all in at first, or merely that the accused may call for or offer the remainder (post, sec. 2115), on cross-examination or otherwise, - two very different meanings in practical effect.

* * * *

"(e) Of course, the prosecution may desire here to invoke the rule (post, sec. 2115) allowing the whole to be put in. This is usually the case where the confession contains a mention of another crime committed by the accused. On the usual principles (ante, Secs. 194, 300-367), this additional crime would ordinarily not be provable for its own sake; yet under the present principle and that of Sec. 2115, post, the accused's allusion to it in his confession may and must be listened to if it is a part of the one entire statement confessing the crime charged at bar." (Wigmore on Evidence, 3rd Ed. Sec. 2100.)

While the question does not appear to have been passed upon directly in the Office of The Judge Advocate General, the Board of Review is of the opinion that the above-quoted principle adopted by the civil courts is in keeping with the rules laid down in the Manual for Courts-Martial and the logical inferences therefrom, is legally and equitably sound, and should be applied in the administration of military justice. Accused's confession details the steps which led up to the commission of the two thefts and explains the motive which actuated him, namely, his desire to extricate himself from the precarious and dangerous position in which he had been placed by his issuance of worthless checks and his inability to meet his commitments. The recital of the other offenses, therefore, tends directly to explain his actions in the ultimate consummation of the thefts and to establish his guilt. It is the opinion of the Board that in view of the provisions of the Manual for Courts-Martial, previously cited (par. 112b, supra) testimony by third persons of the issuance of these worthless checks by accused and his inability to meet them, offered not to establish accused's bad character but the motive for the subsequent thefts, would be admissible (see CM 246046, Benfield, 29 B.R. 371; CM 202366, Fox, 6 B.R. 150). It will be noted in this connection that the Manual (ibid) gives the following illustration of this exception to the general rule:

"On a charge of attempt to desert, the fact that the accused had recently assaulted and beaten another soldier and was under arrest awaiting trial for the offense would be admissible as

evidence of a probable motive to attempt to desert.

"On a charge of falsification of accounts of stores, the fact that the accused had embezzled some of the same stores, if offered as evidence of a motive for concealing the embezzlement by falsifying accounts, would be admissible; but evidence of a conviction of falsification before enlistment in a totally distinct transaction would be inadmissible, since such evidence bears solely upon his general moral character and not upon his present intent or motive." (Underscoring supplied.)

There seems to be no logical reason to exclude such facts from a confession by an accused. Moreover, the rule in effect generally in the civil courts that a confession must be taken as a whole applies as well to trial by courts-martial (MCM, 1928, par. 114a, p. 115). This provision is basically for the benefit of the accused, but when considered in connection with the other provision of the Manual that motive may under certain circumstances be established by proof of commission of another offense, it supports the conclusion reached by the Board of Review that where a confession, taken as a whole, sets forth events which led up to the commission of and explains the motive for the crime with which an accused is charged and to which he confesses, it may be admitted in evidence despite the fact that it contains as part of the events so detailed an admission by the accused of the commission of other offenses with which he is not charged. The Board of Review therefore holds that the confession was properly admitted.

5. Consideration has been given to oral argument requesting clemency, presented by Mr. Carey E. Quinn, civilian counsel for accused, at a special hearing before the Board of Review, and to a brief filed by him in behalf of accused.

6. War Department records show that accused is 26 years and 9 months of age and unmarried. Accused's confession and the review of the Staff Judge Advocate show that he is married and the father of two children. He graduated from high school and attended the University of Maryland for two years and Benjamin Franklin University for one year, specializing in business administration, but did not graduate from either institution. He was a member of the Reserve Officers Training Corps at the University of Maryland from September 1937 to June 1939. In civilian life he was employed as a general worker "in photo finishing" for Hicks Photofinish, Inc., from 1936 to 1939, and as manager of Photo Laboratory, Inc., from 1939 to 1942. He enlisted 24 February 1942, and upon completion of the Photography Course, AAFTS, was commissioned a second lieutenant, Air Corps Reserve, on 12 October 1942. He was promoted to first lieutenant 7 February 1944 and to captain 11 August 1945. His manner of performance of his duties from the date of his commission to 31 December 1944 was rated as "excellent" except for the period from 16 June 1943 to 17 July 1943, when his rating was "superior," and from 18 July 1943 to 16 August 1943 when it was "very satisfactory." From 1 January 1945 to 16 July 1945 there were two ratings of 5.4.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93 or 96, and is mandatory upon conviction of a violation of Article of War 95.

Lemuel Mayo, Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 296462 1st Ind [illegible] 1946

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Clarence M. Hicks (O-855604), Air Corps.

2. Upon trial by general court-martial this officer pleaded not guilty to and was found guilty of the larceny of approximately $145 from two fellow officers, in violation of Article of War 93 (Specifications 1 and 2 of Charge I); and pleaded guilty to and was found guilty of dishonorable failure and neglect to pay three obligations, one for $100 to Army Emergency Relief, another for $150 to the Florida Bank and Trust Company, Winter Park, Florida, and the third for $150 to First National Bank at Orlando, Florida, in violation of Article of War 95 (Specifications 1, 2 and 3 of Charge II), and wrongfully borrowing $285 and $100 from noncommissioned officers on separate occasions, in violation of Article of War 96 (Specifications 1 and 2 of Charge III). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined, at hard labor at such place as the reviewing authority might direct, for ten years. The reviewing authority approved the sentence but reduced the period of confinement to three years and forwarded the record of trial for action under Article of War 48.

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

Accused solicited and procured two substantial loans from noncommissioned officers assigned to the same unit in which he served. He procured an emergency loan of $100 from Army Emergency Relief through its Orlando Section, on 20 November 1944, payable in four monthly installments of $25 each, beginning 1 January 1945, a loan of $150 from the Florida Bank and Trust Company on 27 September 1945, payable seven days thereafter, and a loan for a similar amount on the following day from Florida Bank and Trust Company, payable five days thereafter. He paid no attention to repeated demands and no part of any of the three obligations was paid until after 14 November 1945. On 3 November 1945 accused stole approximately $145 from two wallets in the dresser drawer of an officer in his quarters at Orlando Army Air Base. In confessing these thefts accused explained that he had previously given several checks on a Washington bank in which he knew he had no account, including five totaling $150, given in payment of losses sustained by him in a card game at the Officers' Club to three fellow officers,

a captain, a major and a lieutenant-colonel, and stated that his financial difficulties, the necessity of having to return his wife and two children to Washington, and his lack of money with which to meet his commitments led to the commission of the larceny. Full restitution has been made of all sums borrowed and illegally taken.

Larceny by an officer is a serious offense. Dishonorable failure and neglect to pay a just debt has long been considered conduct unbecoming an officer and a gentleman, punishable by dismissal under Article of War 95, and the act of an officer in borrowing from an enlisted man, connected with his command, has been deemed detrimental to good order and military discipline, punishable under Article of War 96. However, in view of the previous excellent civilian and military record of the accused, his marital status and youth, and of my belief that his wrongdoings may be traced to his inability to refrain from gambling rather than to criminal instincts, I recommend that the sentence as approved by the reviewing authority be confirmed but that the period of confinement be reduced to two years, that the forfeitures be remitted, that the sentence as thus modified be ordered executed, and that a United States disciplinary barracks be designated as the place of confinement.

4. Consideration has been given to a plea for clemency presented by Mr. Carey E. Quinn, civilian counsel for accused, in a written brief filed with the Board of Review and in a personal appearance before the Board at a hearing at which the father and wife of accused made a similar plea. Consideration has also been given to a statement from the accused, and letters or copies of letters attesting to the high character and good record of accused (all attached to the brief filed by civilian counsel and forwarded herewith with the brief) from Mrs. Clarence M. Hicks, accused's wife, Mr. Walter W. Hicks, accused's father, Mrs. Lois M. Hicks, accused's mother, Dr. Alfred C. Norcross, his family physician, Mrs. Helen E. Simons, accused's mother-in-law, Captain Clement F. Stigdon, Jr., a fellow officer, and the following friends: Mr. Carl H. Reisinger, Insurance Agent, Washington, D.C., Mr. Harold Stoll, Radio Dealer, Washington, D.C., Honorable Roy O. Woodruff, Member of the House of Representatives from the State of Michigan, Brigadier General Raymond H. Fleming, New Orleans, Louisiana, Mr. Harry C. Weston, Washington, D.C., and Mr. Ralph R. Swope, Insurance Agent, Arlington, Virginia. Consideration has also been given to a letter to the Secretary of War from Mr. F. A. Winfrey, Vice Chairman, American Red Cross, which letter is likewise submitted for your consideration.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Form of action
3. Brief filed by counsel for accused w/incls.
4. Ltr. fr Mr. Winfrey

(Sentence as approved by reviewing authority confirmed, forfeitures remitted and confinement reduced to two years. As modified ordered executed . GCMO 45, 6 Mar 1946).

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

SPJGH - CM 296481

14 JAN 1946

UNITED STATES v. First Lieutenant JAMES T. BLACK (0-366373), Adjutant General's Department.	)	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Sam Houston, Texas, 23 October 1945. Dismissal, total forfeitures and confinement for six (6) years.

OPINION of the BOARD OF REVIEW
TAPPY, BECK, STERN and TREVETHAN, Judge Advocates.

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that James T. Black, First Lieutenant, Adjutant General's Department, Brooke Hospital Center, Fort Sam Houston, Texas, did, at Fort Sam Houston, Texas, on or about 31 October 1944, for the purpose of obtaining the payment of a claim against the United States, make and present to Colonel J. W. Dansby, Finance Officer at Fort Sam Houston, Texas, an Officer of the United States, duly authorized to approve, pay, and allow such claims, a certain writing for approval and payment, to wit, War Department Form 336, Revised Pay and Allowance Account, for the month of October, 1944, which said writing as he, the said First Lieutenant James T. Black, then knew contained a statement that the sum of $256.83 was due him, which statement was false and fraudulent, in that said statement omitted as a debit a Class E Allotment in the sum of $244.60, payable to the said First Lieutenant James T. Black's account at The First National Bank, Gadsden, Alabama, and was then known by the said First Lieutenant James T. Black to be false and fraudulent.

Specification 2: Same allegations as Specification 1 except claim covered the month of September 1944, was in the amount of $255.43 and was presented on or about 30 September 1944.

Specification 3: Same allegations as Specification 1 except claim covered the month of August 1944 and was presented on or about 31 August 1944.

Specification 4: Same allegations as Specification 1 except claim covered the month of July 1944 and was presented on or about 31 July 1944.

Specification 5: Same allegations as Specification 1 except claim covered the month of June 1944, was in the amount of $255.43 and was presented on or about 30 June 1944.

Specification 6: Same allegations as Specification 1 except claim covered the month of May 1944 and was presented on or about 31 May 1944.

Specification 7: Same allegations as Specification 1 except claim covered the month of April 1944, was in the amount of $255.43 and was presented on or about 30 April 1944.

Specification 8: Same allegations as Specification 1 except claim covered the month of March 1944 and was presented on or about 31 March 1944.

Specification 9: Same allegations as Specification 1 except claim covered the month of February 1944, was in the amount of $254.03 and was presented on or about 29 February 1944.

Specification 10: Same allegations as Specification 1 except claim covered the month of January 1944 and was presented on or about 31 January 1944.

Specification 11: Same allegations as Specification 1 except claim covered the month of December 1943 and and was presented on or about 31 December 1943.

Specification 12: Same allegations as Specification 1 except claim covered the month of November 1943, was in the amount of $255.43 and was presented on or about 30 November 1943.

Specification 13: Same allegations As Specification 1 except claim covered the month of October 1943 and was presented on or about 31 October 1943.

Specification 14: Same allegations as Specification 1 except claim for partial pay was for the month of September 1943, was in the amount of $60.43 and was presented on or about 30 September 1943 to Captain T. Micceri, Finance Officer.

Specification 15: (Finding of guilty disapproved by reviewing authority).

Specification 16: Same allegations as Specification 1 except claim for partial pay was for the month of August 1943, was in the amount of $25.43 and was presented on or about 31 August 1943 to Major W.K. Bond, Finance Officer.

Specification 17: (Finding of guilty disapproved by reviewing authority).

Specification 18: Same allegations as Specification 1 except claim covered the month of July 1943, was in the amount of $206.13 and was presented on or about 31 July 1943 to Captain T. Micceri, Finance Officer.

Specification 19: Same allegations as Specification 1 except claim covered the month of June 1943, was in the amount of $205.43 and was presented on or about 30 June 1943 to Captain T. Micceri, Finance Officer.

Specification 20: Same allegations as Specification 1 except claim covered the month of May 1943, was in the amount of $206.83 and was presented on or about 31 May 1943 to Colonel J. L. Tunstall, Finance Officer.

Specification 21: Same allegations as Specification 1 except claim covered the month of April 1943, was in the amount of $204.73 and was presented on or about 30 April 1943 to Colonel J. L. Tunstall, Finance Officer.

Specification 22: Same allegations as Specification 1 except claim covered the month of March 1943, was in the amount of $258.08, and was presented on or about 31 March 1943 to Colonel J. L. Tunstall, Finance Officer.

Specification 23: Same allegations as Specification 1 except claim covered the month of February 1943, was in the amount of $255.18 and was presented on or about 28 February 1943 to Colonel F. Richards, Finance Officer.

Specification 24: (Finding of guilty disapproved by reviewing authority).

Specification 25: Same allegations as Specification 1 except claim covered the month of January 1943, was in the amount of $228.60 and was presented on or about 31 January 1943 to Colonel F. Richards, Finance Officer.

Specification 26: Same allegations as Specification 1 except claim covered the month of December 1942, was in the amount of $235.80 and was presented on or about 31 December 1942 to Colonel F. Richards, Finance Officer.

Specification 27: Same allegations as Specification 1 except claim covered the month of November 1942, was in the amount of $244.60 and was presented on or about 30 November 1942 to Colonel F. Richards, Finance Officer.

Specification 28: Same allegations as Specification 1 except claim covered the month of October 1942, was in the amount of $245.80 and was presented on or about 31 October 1942 to Colonel F. Richards, Finance Officer.

Accused pleaded not guilty to and was found guilty of all Specifications and the Charge. Evidence of one previous conviction for disorderly conduct and for drunkenness, in violation of Article of War 96, was introduced. In the present case accused was sentenced to dismissal, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six years. The reviewing authority disapproved the findings of guilty of Specifications 15, 17 and 24 of the Charge, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced in evidence a photostat copy of an Authorization for Allotment of Pay, bearing the purported signature of

accused and authorizing a Class E allotment of $244.60 per month, commencing 1 October 1942 and continuing for an indefinite period, the allotment to be deposited in The First National Bank, Gadsden, Alabama, to the credit of James T. Black (R. 25; Pros. Ex. 2). There was also introduced in evidence a Notification of Discontinuance of Allotment, bearing the purported signature of accused and discontinuing the Class E allotment of $244.60 as of 30 November 1944(R. 25; Pros. Ex. 3). Photostat copies of thirteen Pay and Allowances Accounts covering the months of October 1943 to October 1944, inclusive, each bearing the purported signature of accused were also introduced (R. 27, 28; Pros. Ex. 4). Each of these accounts recited debits involving Class N and Class B allotments but did not reveal any Class E allotment in the amount of $244.60 as a charge against the pay and allowances claimed. The net balance of pay and allowances claimed thereon were as follows, viz:

Specification	Balance	Month covered by Voucher
13	$256.83	October 1943
12	255.43	November 1943
11	256.83	December 1943
10	256.83	January 1944
9	254.03	February 1944
8	256.83	March 1944
7	255.43	April 1944
6	256.83	May 1944
5	255.43	June 1944
4	256.83	July 1944
3	256.83	August 1944
2	255.43	September 1944
1	256.83	October 1944

On 2 April 1945 accused appeared before a Board of Officers appointed to examine into the matter of Pay and Allowance Accounts previously presented by him for payment. At that meeting accused stated that he understood his rights under Article of War 24 and was further advised that he need answer no questions which might be incriminating, that anything he might say could be used in evidence against him (R. 41, 43, 44, 46, 47). Thereafter accused admitted to this board that he had made an allotment of his pay effective 1 October 1942, had not made any deduction therefor on his pay voucher and realized that as a result he was receiving full pay and allowances in addition to the allotment (R. 35, 37, 38, 41, 42, 50, 51).

4. The defense introduced evidence to show that accused entered upon active military service on 25 August 1942, serving successively as platoon leader, mess officer and postal officer and receiving eight efficiency ratings of excellent, one of superior and two of very satisfactory (R. 56, 57, 60, 65).

After being fully advised of his rights accused elected to give sworn testimony in his own behalf and he testified as follows: He was married and had one child living. In civilian life he had been a postal clerk and held a commission in the Washington National Guard. As a commissioned officer he entered upon active military duty on 25 August 1942. Accused's daughter died in May 1943 while he was separated from his wife, and thereafter accused effected a reconciliation, taking his wife and son to live with him. Accused informed his wife he had accumulated some funds, having reference to the amounts he had received through his allotment (R. 66-68). After authorizing the allotment accused realized that he was receiving a "double amount of money" but never did "get around" to having the situation corrected. He professed his willingness to do all possible to make restitution (R. 68, 69).

On cross-examination accused admitted that his allotment was in the amount of $244.60 per month and that it remained in effect for 25 months, from October 1942 to October 1944, inclusive. It was deposited each month to his account in The First National Bank, Gadsden, Alabama (R. 70). Each month this allotment was in effect he signed a pay voucher on which the allotment did not appear as a debit although he knew such an entry should appear thereon (R. 71). The total amount he received under the allotment was $6115 (R. 72).

On examination by the court accused admitted that the thirteen photostats of pay vouchers introduced by the prosecution as Prosecution's Exhibit 4 were photostats of pay vouchers he had submitted to the finance officers named thereon for the period from October 1943 through October 1944. He also identified various other copies of pay vouchers as copies of vouchers he had submitted to the finance officers named thereon for payment purposes over the period from October 1942 to September 1943, inclusive, on none of which his Class E allotment was entered as a debit (R. 73, 74; Pros. Ex. 7). On these vouchers he claimed the following balances due him for the following months after deducting various debits against his account other than his Class E allotment:

Specification	Balance	Month covered by voucher
28	$245.80	October 1942
27	244.60	November 1942
26	235.80	December 1942
25	228.60	January 1943
23	255.18	February 1943
22	258.08	March 1943
21	204.73	April 1943
20	206.83	May 1943
19	205.43	June 1943
18	206.13	July 1943
16	25.43	August 1943
14	60.43	September 1943

Each time he presented his vouchers covering the months of October 1942 to October 1944, inclusive, for payment he knew he was also receiving the allotment he had authorized. He did not discontinue his allotment until the overpayments made to him were discovered by the authorities because, as he explained it, "I got in so deep that I was scared" (R. 75). The money improperly obtained he used for family purposes (R. 77).

5. The original charge sheet signed and sworn to by the accuser contained but one Charge and Specification. The Specification was thereafter redrafted and expanded to include twenty-eight Specifications, one for each separate pay and allowances account. The accuser did not sign or swear to the redrafted Specifications (R. 60-62). At the inception of the trial defense counsel entered a plea to the jurisdiction on the ground that the Charges and Specifications on which accused was about to be tried had not been signed or sworn to by an accuser. The court denied the plea and properly so.

The single Specification originally filed against accused was inartfully drawn but alleged in net effect that over the period from October 1942 to October 1944, inclusive, accused presented false and fraudulent monthly pay vouchers in that he failed to deduct therein a Class E allotment of $244.60 per month and thereby fraudulently received the total sum of $6115 from the United States Government, all in violation of Article of War 94. As redrafted by higher authority the twenty-eight Specifications substituted for this single blanket Specification alleged that for each particular month from October 1942 to October 1944, inclusive, accused made and presented a false and fraudulent statement in writing to obtain payment of a claim from the United States in that he failed to list his Class E allotment as a debit on his claims for pay and allowances and for partial payments, all in violation of Article of War 94.

It is provided that:

> "Obvious errors may be corrected and the charges may be redrafted over the signatures thereon, provided the redraft does not involve any substantial change or include any person, offense, or matter not fairly included in the charges as received." (MCM, 1928, par. 34).

The original single Specification alleges (a) that over the period involved accused presented false and fraudulent pay vouchers in that he failed to list his Class E allotment as a debit and (b) that thereby he obtained a particular sum of money. Each one of the redrafted Specifications alleges that for a particular month during the period involved accused made and presented a false and fraudulent statement in writing in his pay voucher because he failed to list his Class E allotment thereon.

So much of the original blanket Specification as alleges wherein the claims were false and fraudulent (i.e., the failure of accused to list his Class E allotment on his pay voucher)and that they were presented is made the basis of the offenses alleged in the twenty-eight redrafted Specifications. Clearly, the redrafted Specifications did not include "any matter not fairly included in the Charges as received." Indeed, if anything, the original blanket Specification contained more "matter" than appears in the redrafted Specifications. Furthermore, it has been held that the provisions of Article of War 70 requiring charges to be signed and sworn to and requiring an investigation thereof before reference for trial are procedural provisions only and not jurisdictional (CM 172002, Nickerson; CM 229477, Floyd, 17 BR 149). The provisions of the first three paragraphs of Article of War 70 are directory and not mandatory; they are solely to prevent an accused from being subjected to malicious or frivolous prosecution and the failure to observe any or all of these requirements does not deprive the courts-martial of jurisdiction or ipso facto necessarily prejudice any of accused's substantial rights (CM ETO 4570, Hawkins). The above-quoted portion of paragraph 34 of the Manual for Courts-Martial has been construed to permit the redrafting of charges and specifications so as to allege a different offense than that originally alleged if the transaction serving as the basis of the original offense also supports the redrafted charges and specifications (CM ETO 106, Orbon; Floyd case, supra; Hawkins case, supra: CM ETO 5155, Carroll and D'Elia). Thus records of trial have been sustained where, without resignature or reverification by the accuser, charges and specifications have been changed from absence without leave to desertion (Floyd case, supra) and from misbehavior before the enemy to short term desertion (Hawkins case; Carroll and D'Elia case; supra). Accordingly, no fatal error was here committed by redrafting the original specification, without renewal of the accuser's signature or oath, inasmuch as the very transaction serving as the basis for the original Specification served also as the basis for the redrafted ones.

An examination of the copies of pay vouchers, identified by accused as copies of vouchers submitted by him for payment, reveals that on all of them covering the months of October 1942 through October 1944, inclusive, accused claimed initial credit for the full pay and allowances due him and listed as debits various charges against him but on each and every voucher he failed to list as a debit his Class E allotment of $244.60 per month. It is quite apparent from evidence in the record that accused knew his Class E allotment should appear as a debit on each of these vouchers but that he knowingly and intentionally refrained from entering it. The court was amply justified in concluding that each of the pay vouchers set forth in the Specifications under which there were approved findings of guilty contained the particular false and fraudulent statements alleged. To make and present pay vouchers containing such false and fraudulent statements for the purpose of obtaining payment of claims asserted against the United States constituted offenses under the express provisions of Article of War 94. The evidence fully sustains the approved findings of guilty.

6. Accused is 35 years of age, married and has one child. War Department records indicate that he attended the University of Washington and the College of Puget Sound for a total of three years. Subsequently he was employed as a bookkeeper for two years and thereafter as a postal clerk by the United States Post Office Department. From 1935 to 1938 accused served as an enlisted man in the Washington National Guard. On 14 April 1938 he was commissioned a second lieutenant, Infantry, National Guard of the United States. On 10 August 1942 he was commissioned a second lieutenant, Army of the United States, and assigned to duty with Chemical Warfare Service. On 15 September 1943 accused was promoted to first lieutenant. War Department records further indicate that on 4 December 1944 accused was placed in arrest of quarters, that he continued in this status at least until 5 February 1945 and that on 23 April 1945 it was recommended that he be tried by general court-martial for the instant offenses.

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

Thomas N. Jaffy, Judge Advocate.

W. T. Bicek Jr., Judge Advocate.

Joseph J. Stern, Judge Advocate.

Robert C. Trowbridge, Judge Advocate.

SPJGH - CM 296481 1st Ind

JAN 22 1946

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant James T. Black (0-366373), Adjutant General's Department.

2. Upon trial by general court-martial this officer was found guilty under twenty-eight Specifications of making false statements in writing to obtain payment of claims against the United States, in that in twenty-eight separate pay and allowance accounts filed by him over the period from October 1942 to October 1944, inclusive, he made claim for monthly pay and allowances and for partial payments without listing thereon as a debit his Class E allotment in the monthly amount of $244.60, all in violation of Article of War 94. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six years. The reviewing authority disapproved the findings of guilty of three of the twenty-eight Specifications (Specifications 15, 17 and 24), approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. I concur in that opinion. For each of the twenty-five months from October 1942 to October 1944, inclusive, accused presented a monthly pay and allowance account to an appropriate Finance Officer of the Army on which he listed the full pay and allowances due him, plus certain debits due against him, but knowingly refrained from listing as a debit a Class E allotment for $244.60 per month which was being deposited to his bank account over the entire period. Accordingly, each month he received from the United States $244.60 more than he was entitled to, making a total of $6115 so received by him over the period of twenty-five months.

Accused's derelictions were discovered about a year before he was tried therefor and during a substantial portion of that time he was held in arrest of quarters. Accordingly, I recommend that the sentence be confirmed but that the period of confinement be reduced to four years and that a United States Penitentiary be designated as the place of confinement.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence confirmed but confinement reduced to four years. GCMO 39, 6 Mar 1946).

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

SPJGH - CM 296523

4 FEB 1946

UNITED STATES	)	ARMY AIR FORCES
	)	TECHNICAL TRAINING COMMAND
v.	)	ST. LOUIS, MISSOURI
	)	
Second Lieutenant RICHARD T. MOORE (O-839124), Air Corps.	)	Trial by G.C.M., convened at Sheppard Field, Texas, 21 November 1945. Dismissal

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Richard T. Moore, Air Corps, 78th Army Air Forces Base Unit (AACS Overseas Screening, Processing and Replacement Center), was, at Wichita Falls, Texas, on or about 1 November 1945, drunk and disorderly in uniform in a public place, to wit, at or near Sisk Cafe, 812-1/2 Scott Street, Wichita Falls, Texas.

The accused pleaded guilty to the Specification and not guilty to the Charge, but guilty of a violation of the 96th Article of War. He was found guilty of the Charge and Specification thereunder. Evidence was introduced of one previous conviction under the 96th Article of War for a violation of flying regulations, for which accused was sentenced to a restriction to the limits of his post for three months and to a forfeiture of $112.50 of his pay per month for 18 months. For the offense here involved he was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution's evidence shows that on 31 October 1945, Mr. Thomas C. Sisk owned and operated a cafe in Wichita Falls, Texas, known as the Sisk Cafe. At eleven o'clock in the evening of that date, and as

was customary, the cafe was closed for business. After all of the customers had left, Mr. Sisk proceeded to mop the front of the cafe and his cook (not named) scrubbed the kitchen. The front door of the cafe had been left open because of the warm weather. Between one and two o'clock the following morning, accused entered the Sisk Cafe by the open front door, accompanied by two enlisted men. Accused and the two enlisted men were informed that the cafe was closed for business and at the same time were requested to leave. Since the front door was open, accused could not understand why the cafe was closed for business and requested that he and his companions be served. His request was refused and an argument ensued between accused and Mr. Sisk during which accused cursed Mr. Sisk, and two or three times referred to him as a "gray-headed son-of-a-bitch." Accused's tone of voice was "not unusually loud" but sufficiently loud to attract the attention of the garbage and trash haulers in the front of the cafe. Based upon accused's actions and conduct, Mr. Sisk opined that accused had been drinking, but could not say that he was drunk. During the argument between Mr. Sisk and accused, a car occupied by two city police officers drove up to the cafe and observed accused and several other persons either inside the cafe (as one witness testified) or on the sidewalk in front of the cafe (as another witness testified), whereupon the two police officers requested accused and the two enlisted men to accompany them to the provost marshal's office. Accused asserted that the civil authorities had no jurisdiction over him and protested his removal to the provost marshal's office. He was asked two or three times to enter the police car and finally forced to do so. On arriving at the provost marshal's office, accused refused to enter and "threw both hands up on the side of the door and braced himself." One of the police officers "caught him around the waist and under the arms" and took him into the provost marshal's office and turned him over to the military police. One of the city policemen opined, based upon conversation with accused, that he, accused, was "in a state of intoxication."

4. After his rights as a witness had been explained to him by the court, the accused elected to remain silent. No evidence was offered by the defense.

5. The Specification, laid under the 95th Article of War, alleges that on or about 1 November 1945 accused was drunk and disorderly in uniform in a public place, to wit, at or near Sisk Cafe, 812½ Scott Street, Wichita Falls, Texas. It is undisputed that accused was present both inside the Sisk Cafe and on the sidewalk in front at the time alleged, and it is undisputed that he was in the uniform of a commissioned officer. The only question requiring consideration is whether, while there, he was drunk and disorderly to such an extent or degree as to amount to a violation of the 95th Article of War.

Neither of the prosecution's two principal witnesses, Mr. Thomas C. Sisk, proprietor of the cafe, and Mr. Herbert R. Leverett, a Wichita Falls police officer, testified in positive language as to the extent or degree

of accused's drunkenness. Indeed, Mr. Sisk could not swear that accused was drunk, but from his conduct and actions, believed he had been drinking. He also testified that accused's tone of voice was not unusually loud, but sufficiently loud to attract the attention of the city garbage and trash haulers in the front of the Cafe. It is not clear from the record whether the attention of these people was attracted, while accused was inside the Cafe or after he and his companions had moved to the sidewalk in front of it. From talking with accused, Mr. Leverett believed accused to be in a state of intoxication. Such evidence falls far short of proving that accused was "grossly drunk" or that he was "conspicuously disorderly" within the meaning of those terms as used in paragraph 151 of the Manual for Courts-Martial, 1928, describing conduct violative of Article of War 95. The Board is therefore of the opinion that the evidence establishes accused's guilt of the Specification, but only in violation of Article of War 96 (CM 249726, Hanson, 32 BR 169; CM 254054, Bunch, 35 BR 161, and CM 280174, Friel).

6. War Department records show that accused is 21 years of age and single. He is a high school graduate. After serving approximately 18 months as an enlisted man he was honorably discharged 22 December 1944, commissioned a second lieutenant, Army of the United States, and ordered to active duty with the Air Corps, the same date. Prior to entering the military service, he was employed as a machinist's helper at the United States Naval Torpedo station, Newport, Rhode Island.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as above noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves a violation of Article of War 96, legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas H. Tappy, Judge Advocate.

Joseph J. Stern, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

SPJGH - CM 296523 1st Ind

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

TO: The Secretary of War 28 February 1946

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Richard T. Moore (0-839124), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in uniform in a public place, in violation of Article of War 95. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves a violation of the 96th Article of War, legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion. The evidence shows that on 31 October 1945, Mr. Thomas C. Sisk owned and operated a cafe, in Wichita Falls, Texas, known as the Sisk Cafe. At eleven p.m. on that date, as was customary, Mr. Sisk closed the cafe for further business. The front door of the cafe was left open because of the warm weather. Between one and two a.m. the following morning, and while Mr. Sisk and his cook were still in there, accused entered the cafe by the open front door accompanied by two enlisted men. They demanded to be served and were refused. Whereupon an argument ensued between accused and Mr. Sisk during which accused cursed Mr. Sisk, and referred to him several times as a "gray-headed son of a bitch." Shortly thereafter two city policemen arrived on the scene and requested accused and his enlisted companions to accompany them to the provost marshal's office in Wichita. This accused refused to do and the policeman forced him into their car. Upon arrival at the provost marshal's office, accused refused to enter and again force was required to get him into the office. He was there delivered to military police. Although acacused was intoxicated, he was not loud or boisterous and very few persons observed his behavior. Accordingly, his conduct was violative of Article of War 96 and not Article of War 95. In March of 1945 accused was convicted under the 96th Article of War by a general court-martial for violating flying regulations and sentenced to be restricted to his post for three months and to forfeit $112.50 of his pay per month for eighteen months. I recommend that the sentence be confirmed but in view of the youth of accused and the minor character of the offense involved, I recommend that it be commuted to a reprimand and forfeiture of $50 of accused's pay per month for two months and that the sentence as thus commuted be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(Findings disapproved in part. Sentence confirmed, but commuted to a reprimand and forfeitures of $50 per month for two months. Sentence as commuted ordered executed. GCMO 48, 6 March 1946).

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

SPJGH - CM 296534

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Dale Mabry Field, Tallahassee, Florida, 7 and 8 November 1945. Simmons acquitted, Hinnant and Clay: Dishonorable discharge and confinement for life. Burns: Dishonorable discharge and confinement for forty (40) years. Hausey: Dishonorable discharge and confinement for thirty (30) years. Washington: Dishonorable discharge and confinement for fifteen (15) years. Penitentiary, Atlanta, Georgia.
Corporal JOSEPH A. HAUSEY (38308590), Technician Fifth Grade, MILTON R. SIMMONS (33796518), Privates First Class HENRY J. CLAY (39711823), GEORGE WASHINGTON (42036950), and Privates JAMES A. HINNANT (34662684), and LEROY BURNS (34324263), all of the 1869th Engineer Aviation Battalion.	)	

HOLDING by the BOARD OF REVIEW
TAPPY, STERN and TREVETHAN, Judge Advocates.

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

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

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

Specification 1: In that Technician Fifth Grade Milton Simmons, Company C, Corporal Joseph A. Hausey, Company B, Private First Class George Washington, Company B, Private LeRoy Burns, Company C, all of 1869th Engineer Aviation Battalion, acting jointly and in pursuance of a common intent, did, at Dale Mabry Field, Tallahassee, Florida, on or about 16 June 1945, with intent to commit a felony, viz: rape, commit an assault upon Ruby Scott by willfully and feloniously grabbing her by the arm, and bruising her arm and scratching her and feeling around her body and under her dress.

Specification 2: In that Corporal Joseph A. Hausey, Company B, Private First Class Henry J. Clay, Company B,

and Private LeRoy Burns, Company C, all of 1869th Engineer Aviation Battalion, acting jointly and in pursuance of a common intent, did, at Dale Mabry Field, Tallahassee, Florida, on or about 16 June 1945, with intent to commit a felony, viz: rape, commit an assault upon Corporal Anna Dackerman by striking her, throwing her on the ground, sitting on her knees and arms, holding her mouth, and pulling off her panties.

Specification 3: In that Technician Fifth Grade Milton Simmons, Company C, Corporal Joseph A. Hausey, Company B, Private First Class George Washington, Company B, Private First Class Henry J. Clay, Company B, Private LeRoy Burns, Company C, and Private James A. Hinnant, Company C, all of 1869th Engineer Aviation Battalion, acting jointly and in pursuance of a common intent, did, at Dale Mabry Field, Tallahassee, Florida, on or about 16 June 1945, with intent to commit a felony, viz: rape, commit an assault upon Julia Hannah by grabbing her by the arm, pulling her across the road and throwing her in a thicket.

Specification 4: In that Technician Fifth Grade Milton Simmons, Company C, Corporal Joseph A. Hausey, Company B, Private First Class George Washington, Company B, Private First Class Henry J. Clay, Company B, Private LeRoy Burns, Company C, and Private James A. Hinnant, Company C, all of 1869th Engineer Aviation Battalion, acting jointly and in pursuance of a common intent, did, at Dale Mabry Field, Tallahassee, Florida, on or about 16 June 1945, with intent to commit a felony, viz: rape, commit an assault upon Estelle Young by grabbing her by the arm and pulling her toward the parade ground.

Specification 5: In that Technician Fifth Grade Milton Simmons, Company C, Corporal Joseph A. Hausey, Company B, Private First Class George Washington, Company B, Private First Class Henry J. Clay, Company B, Private LeRoy Burns, Company C, and Private James A. Hinnant, Company C, all of 1869th Engineer Aviation Battalion, acting jointly and in pursuance of a common intent, did, at Dale Mabry Field, Tallahassee, Florida, on or about 16 June 1945, with intent to do him bodily harm, commit an assault upon First Sergeant William F. Fields, by hitting him over the shoulder with a club.

CHARGE II: Violation of the 92d Article of War.

Specification: In that Technician Fifth Grade Milton Simmons, Company C, Private First Class Henry J. Clay, Company B, and Private James A. Hinnant, Company C, all of 1869th Engineer Aviation Battalion, acting jointly and in pursuance of a common intent, did, at Dale Mabry Field, Tallahassee, Florida, on or about 16 June 1945, forcibly, feloniously and against her will have carnal knowledge of Leanora Lee.

CHARGE III: Violation of the 89th Article of War.

Specification: In that Technician Fifth Grade Milton Simmons, Company C, Corporal Joseph A. Hausey, Company B, Private First Class George Washington, Company B, Private First Class Henry J. Clay, Company B, Private LeRoy Burns, Company C, and Private James A, Hinnant, Company C, all of 1869th Engineer Aviation Battalion, being with the said 1869th Engineer Aviation Battalion in the garrison at Dale Mabry Field, Tallahassee, Florida, did, at Dale Mabry Field, Tallahasse, Florida, on or about 16 June 1945, commit a riot in that they together with certain other soldiers to the number of about twenty-five, whose names are unknown, did unlawfully and riotously and in a violent and tumultuous manner, assemble to disturb the peace of the West Garrison, Dale Mabry Field, and having so assembled did wear masks and did unlawfully and riotously assault five or more women and their male escorts threatening violence, attempting rape and committing other unlawful acts against said women and their male escorts to the terror and disturbance of the entire garrison.

Each accused pleaded not guilty to all offenses with which he was charged. After the prosecution rested, a motion by the defense for findings of not guilty as to each accused, except accused Clay, charged under Specification 3 of Charge I was sustained. The findings of the court as to each accused was as follows:

	Simmons	Hausey	Washington	Burns	Clay	Hinnant
CHARGE I	NG	G	G	G	G	NG
Spec. 1	NG	G	G	G	—	—
Spec. 2	—	G	—	G	G	—
Spec. 3	NG	NG	NG	NG	G	NG
Spec. 4	NG	NG	NG	NG	G	NG
Spec. 5	NG	G	NG	G	G	NG
CHARGE II	NG	—	—	—	G	G
Spec.	NG	—	—	—	G	G
CHARGE III	NG	G	G	G	G	G
Spec.	NG	G	G	G	G	G

Evidence was introduced of one prior conviction of accused Clay, Burns, and Hinnant. The following sentences were imposed upon the accused, viz:

Hinnant and Clay - Each to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for the term of their natural lives.

Burns - 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 forty (40) years.

Hausey - 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 thirty (30) years.

Washington - 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 fifteen (15) years.

The reviewing authority approved the sentences, 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 all the incidents which are the subject of the several Charges and Specifications occurred at Dale Mabry Field, Tallahassee, Florida, between about 10:30 p.m., 16 June 1945 and 1:00 a.m., 17 June 1945. All of the accused were members of the 1869th Engineer Aviation Battalion stationed at that field.

a. Charge II, Specification

At about 11 p.m., Miss Leanora Lee, accompanied by her escort, Private George C. Houston, left the non-commissioned officers' club where they had attended a dance. They were walking toward the main gate when they were accosted by a group of between twenty-five and fifty masked colored soldiers, some of whom grabbed Miss Lee and dragged her across a field. Others in the group grabbed Private Houston and took him elsewhere. The group which assailed Miss Lee pawed her body, touching her breasts and private parts. One of the gang, whom she identified the next day, was accused Clay. At the time of the assault upon her, Clay held a stick about a foot and a half long in his hand and threatened to kill her unless she agreed to have sexual intercourse with the men. While the group was conversing about who would first have sexual relations with Miss Lee, she managed to get loose, but was caught again and accused Clay threw her to the ground. A handkerchief was stuffed in her mouth (R. 9, 10, 13).

Several of them pinned her down, holding her arms and legs, while accused Hinnant, whom she identified the following day, had intercourse with her as Clay stood by menacing her with the stick. Hinnant was the only one she could identify as having had intercourse with her. He got his penis into her vagina although he did not have an emission (R. 10, 13, 15). She "hollered and hit at them and screamed" and was "kicking and beating" with her hands. While the attack on her was being made, she exclaimed that she recognized Simmons, one of the bystanders, and heard one of the group say "let her go." Whereupon they released her, returned her escort and directed them to leave in a hurry. Upon being released, Miss Lee and Private Houston proceeded to the main gate and reported the attack to the military police. From there they were taken to the city where a report was made at police headquarters, after which Miss Lee returned to her home (R. 16, 17). She resided with Mrs. Cora Davis, who testified she did not know the hour of Leanora Lee's return on the night of June 16, but upon being awakened she observed that Miss Lee's dress and underclothing was muddy and "her slip and underpants were torn." There were scratches on her face and "her hair was standing up straight on top of her head. She looked awful bad" (R. 22, 23).

The following day, Miss Lee appeared at Dale Mabry Field for the purpose of identifying her assailants. The men were in company formation and she walked down the line slowly and recognized accused Clay as soon as she saw him. She knew it was he by "his features and he was very tall." At the time of the assault his face was masked from the nose down (R. 11, 12, 20). When she reached accused Hinnant in the line, she stood in front of him but did not point him out at the time because she was not sure he was the man. She had never seen accused Clay or Hinnant prior to the night of June 16. Another girl in the inspection line walking behind Miss Lee, pointed Hinnant out (R. 20). Following this attempt at identification, Miss Lee was taken to the orderly room where she again saw Hinnant. On this occasion, she identified him as the man who had carnal knowledge of her person. She recognized him "by his eyes" having observed them when he was on top of her and having noted their shape and light-brown color. They were "slanting eyes." She knew Private Hinnant was the man who raped her only "as far as his eyes are concerned" (R. 10, 11, 13, 17, 20).

Her testimony with respect to her delayed identification of Hinnant was as follows:

"Q. How long did you stand in front of Private Hinnant on the parade ground? Any longer than a minute?
A. About a minute.

Q. And you passed him by, you didn't pick him out then?
A. No, sir.

Q. Then you saw somebody else come along and pick him out?
A. It was after me I am sure.

Q. Then after you went inside you knew somebody else had picked him out before you went in the orderly room?
A. I saw him after I had gotten into the orderly room.

Q. How come you to change your mind?
A. Because I wasn't sure. I wanted to be sure. After I got in the orderly room and I saw him I kept looking at him and I was sure then.

Q. From the time you saw him on the parade ground and the time you saw him in the orderly room what made you change your mind?
A. After I did not pick him out and someone else picked him out I just knew it was him.

* * * * * * * * *

Q. Is there any doubt in your mind that Hinnant is the man who raped you?
A. I still say as far as his eyes and the way they slanted.

Q. Do you identify him?
A. That much" (R. 21).

While it was dark the night of June 16, it was light enough for her to see the color of his eyes and the way they slanted (R. 17, 21). She did not know what kind of headgear accused was wearing (R. 21).

It was stipulated by the prosecution, defense and the accused that if Private George C. Houston were present he would testify that he was Miss Lee's escort on the night in question and that during the intermission at the non-commissioned officers' club, he and Miss Lee went for a walk; also that during the walk they were set upon by a gang of men and were separated. Houston was beaten and knocked out. Later he was taken back to her by the gang. He was positive that Clay was present and he (Houston) "didn't see a handkerchief." He was unable to identify any other accused as being present (R. 24; Pros. Ex. A).

b. Charge I, Specifications 2, 5.

About 1:00 a.m., Corporal Anna Dackerman, stationed at Dale Mabry Field, left the dance at the non-commissioned officers' club with Sergeant William F. Fields and while walking along that part of Mabry Field known as MacArthur

Circle, they were approached by a negro soldier carrying a club. The incident occurred at a point near an over-hanging street light. The colored soldier attempted to separate Corporal Dackerman and Sergeant Fields. He grabbed Sergeant Fields by the arm and raised the club. Simultaneously several other negro soldiers, believed by Corporal Dackerman to number four, grabbed her from behind and dragged her into a clump of trees. She struck at one of them and he struck her in the jaw. One put his hand over her mouth, another kneeled on her chest, a third held her ankles and the fourth sat on her knees and pulled off her panties. She was able to get one hand free and bent back the fingers of the man who was holding his hand over her mouth. When he released his hold, she screamed. Nettie Segatti, a WAC, came running toward her, as did others, and the assailants ran away. Shortly thereafter Sergeant Fields appeared on the scene. Corporal Dackerman was bruised about the face and body generally. At the time of the trial she was still receiving medical treatment for her injuries.

The following day from a group of about fifteen negro soldiers she recognized accused Burns as the short Negro she "met face to face on the morning the incident occurred," and as the one who removed her "panties." Shortly thereafter she was taken to another place and observed another group of colored soldiers. In this group she again identified Burns and also identified two other members of the group which had attacked her the preceding night. One was accused Clay, who was "tall and stocky and his upper teeth protruded;" the other was accused Hausey, who was "tall and slender" (R. 24; Pros. Ex. B).

Sergeant Fields fixed the hour of the assault at about 1:15 a.m. and corroborated Corporal Dackerman's testimony as to the opening phase of the attack. He was unable to identify or describe any of the assailants, except that "they were colored and wore fatigue clothing." The one holding a club struck Fields with it over the shoulder, but Fields got away, went to the orderly room and notified the military police. He returned to the scene with the Charge of Quarters and found Corporal Dackerman standing there. The group had left (R. 24, 25).

Sergeant Nettie Segatti, while outside the non-commissioned officers' club, heard cries for help and upon running with her escort in the direction from which the screams were heard, came upon Corporal Dackerman, who was lying on the ground. Sergeant Segatti observed "a little fellow in fatigue clothes" get off of Corporal Dackerman and run away. Sergeant Segatti's escort gave chase but was unable to overtake him (R. 26).

c. Charge I, Specification 1

Miss Ruby Scott, a post exchange employee at Dale Mabry Field, was on the parade ground about 10:30 p.m. with her friend, Walter Mason, a soldier. They were sitting on the grass talking when twenty-five or thirty masked

men wearing fatigues walked up. They said they were going to take her away from Mason, but withdrew without molesting her when she identified herself. They returned in five or ten minutes, masked and carrying sticks. Again she identified herself as "Ruby" and the group withdrew. Shortly thereafter accused Hausey, who was not masked, came up alone and stated he was going to take Miss Scott away. Mason had a flashlight which he flashed in Hausey's face thereby enabling Miss Scott to recognize him. Hausey cursed Mason and put his hand in his pocket. Miss Scott walked between them asking them not to start anything, but Hausey struck her on the neck and also struck at Mason with an article which he withdrew from his pocket (R.27-29,33). She started running toward the "restricted area," but the same gang which she had previously encountered caught her before she reached the area. They were all masked and she did not at that time recognized any of them. After she got to the restricted area, the guard "cocked the gun on her and clicked it." The gang did not follow her into the restricted area. At that place it was light and she could see the field. She then recognized her assailants, men whom she had previously seen in the post exchange. She recited the events occurring subsequent to her arrival in the restricted area as follows:

> "And Washington was calling me. They said this guard might shoot me. At that time I did not care what happened to me. I had rather be killed than what they were going to do to me. Then I came out again and Washington he got me and he put his fingers all over my body (R.29). All around my body and put his finger in my privates and I got a few scratches. The other fellows were doing the same thing but I did not recognize them. I only recognized Washington. Then Mose Davis was calling me (R. 30).
>
> Then Burns was holding me by my left arm telling me he wanted to help me but he was pulling me in the opposite direction. He was holding me so tight I got some bruises on my arm. Then Mose Davis came up. He told me he would take me to the orderly room and I had to trust somebody" (R. 30).

When asked if accused Burns accompanied her to the orderly room she replied:

> "The group was following me all the time until Mose Davis came along. Burns had me by the arm pulling me in another direction. Burns walked along with me and kept pulling my arm and feeling all over my body. He was pulling me in the opposite direction that Mose Davis was trying to carry me" (R. 32).
>
> He (Burns) said he was going to help me but he couldn't have been helping me when he was feeling all over my body and pulling me away" (R. 33).

All of the time she was surrounded by this mob, Hausey "just kept pulling on" her (R. 33). Miss Scott denied that accused Burns went to the orderly room with her (R. 33). She also stated that she did not see Burns at the orderly room. There she told the Officer of the Day that if it had not been for Davis she "might have been dead" (R. 34).

Private Mose Davis of Company B, 1869th Engineer Aviation Battalion, heard screams and arriving at the scene saw Miss Scott break away from the gang and run toward the Prisoner of War Camp. Accused Burns was holding her when Davis came up and together they took her toward the orderly room. The group attempted to induce Davis to turn Miss Scott over to it upon reaching the orderly room but he refused and the gang was preparing to attack him when the officer of the day came up and fired a shot (R. 34; Pros. Ex. C).

d. Charge I, Specification 4

Miss Estelle Young, accompanied by Corporal Joe Brooks was walking toward the bus stop at about 11:30 p.m. when she encountered a group of twenty or thirty colored soldiers, some of whom were masked. Several of them grabbed Brooks and carried him across the parade grounds. Accused Clay, who was not masked, grabbed her by the left arm and pulled her about two steps. She called her brother, Robert, who came running and pulled her loose and they proceeded to the bus stop. She was near the light at the corner and although she had never seen accused Clay before, she recognized him when she saw him in the line-up the next day because "he has a peculiar lip out in the front and his teeth." In response to a question as to what Clay did to her, the witness replied, "He didn't do anything but grab my left arm. I called for help to my brother Robert" (R. 36). It was stipulated by the prosecution, defense and all the accused that if Corporal Joe Brooks, Company C, 1869th Engineer Aviation Battalion, were present, he would testify that after leaving the non-commissioned officers' club, he was with Estelle Young at a point about two hundred yards from the non-commissioned officers' club when "the bunch of boys attacked us. The only one I can identify is Private Clay. I don't know his name, but I know him by his looks. I've seen him around the area. Private Clay did not have a mask on." One of the group struck Brooks who ran to battalion headquarters and reported to the officer of the day (R. 37; Pros. Ex. D).

e. Charge I, Specification 3

Miss Julia Hannah, after leaving the aforementioned dance and escorted by Corporal James Wideman, at about 10:45 p.m., passed a small group of masked colored men without incident. Shortly thereafter a large group, also masked, came by and grabbed Miss Hannah, pulling her into a thicket. One member of this group was the accused Clay who was not masked. Miss Hannah testified, "and Clay he said turn her aloose. When they turned me aloose I went back and I recognized Clay. He did not have a mask on. But they didn't in no way harm me, no more than pulling me in the thicket" (R.37,38).

4. The evidence for the defense may be summarized as follows:

a. Charge I, Specification 1

Accused Hausey, Washington and Burns were found guilty of the offenses alleged in this Specification. Miss Hannah Belim testified that she, her date and another couple were with Ruby Scott and Mason on the parade ground when they were confronted by a group of about forty men, some of whom had handkerchiefs covering the lower part of their mouths. Miss Belim and the other members of the party were warned to leave. All did so but Miss Scott and Mason. Miss Belim saw Ruby Scott take one drink of liquor and was of the opinion that both Miss Scott and Mason were "high" (R. 40, 41). Lois Daniel, another member of the party also saw Ruby Scott take a drink, but was of the opinion that neither Miss Scott nor Mason was drunk. Subsequent to leaving the parade ground after the admonition of the gang, Miss Daniel discovered that she had left her purse with Miss Scott and upon seeking her, found Miss Scott in the orderly room crying. Her clothing was torn and her hair mussed (R. 43, 44).

It was stipulated that if Lieutenant Norman Force were present he would testify that on June 16, between 10:00 and 11:00 p.m., he went to the non-commissioned officers' club to investigate a reported disturbance and thereafter went to the orderly room of Company B. Upon approaching it he observed a gang of men arguing. He fired a shot and the men dispersed. Upon entering the orderly room, he saw Miss Scott, accused Burns and "a couple of other soldiers." Upon being questioned, Miss Scott told him she had been molested and that "had it not been for these two soldiers, she didn't know what would have happened to her" (R. 45; Def. Ex. 1).

All of the accused were advised as to their rights with respect to becoming witnesses and each elected to testify under oath.

Accused Washington testified as to his activities during June 16, denying that he knew any of the other accused except Clay. He stated that he returned to his barracks and retired before 10:00 p.m.; that Corporal Wideman came in about that time and was excited. Wideman turned on the lights to get a needle and thread. Accused Washington, after this interruption, went back to bed and did not arise until 6:30 a.m. (R. 46, 47). He knew Ruby Scott, but did not see her at any time on the night she was attacked. Upon cross-examination he admitted that prior to trial he told the investigating officer he went to the "War Room" at 11:45 p.m. and that he "shot crap" from 10:45 to 11:00 p.m., but contended that the statements were erroneous in point of time (R. 48).

It was stipulated that if Private First Class Antonio Ludvig were present he would testify that he saw accused Washington "gambling and shooting dice" about 10:15 p.m. (R. 50; Def. Ex. 5); also that if present, Corporal James D. Wideman would testify that he saw accused Washington in the

barracks at 10:00 p.m. or 10:30 p.m. when Wideman went upstairs in the barracks to borrow a needle and thread. Washington was in bed (R.50; Def. Ex. 7)

Accused Burns testified that, while sitting in front of the day room suffering from stomach pains, he heard a scream coming from the field. He ran over and found a crowd gathered around Ruby Scott. He asked her what was wrong and she replied that the men were bothering her. Mose Davis came on the scene and he and accused Burns got on either side of her. They escorted her to the orderly room where accused Burns remained until the officer of the day arrived at which time Miss Scott stated that Burns and Davis had helped her. Burns then returned to his barracks, still sick to his stomach, and went to bed. He denied that he had grabbed Miss Scott's arm or that he pulled her across the field; also denied that he had felt around her private parts, contending that his actions were entirely directed toward getting her to safety (R. 55, 56).

It was stipulated that if Private Mose Davis were present he would testify that when he saw accused Burns, Miss Scott "had left the crowd" and was running toward the Prisoner of War Camp when Burns called her, that Davis and Burns got on either side of her and took her to the orderly room; also he did not see Burns put his hand under her dress (R.59; Def. Ex. 10).

Accused Hausey testified that while returning from the non-commissioned officers' club about 9:45 p.m., a light flashed in his face by "the Officers' Club" and he discovered Ruby Scott and Walter Mason standing by a tree. While discussing the flashlight claimed by Miss Scott to be hers, "the fellows walked up and grabbed Ruby Scott." Hausey told them not to bother her. Mason threw some dirt in Hausey's face and Hausey chased him, then returned to the scene and found the gang around Miss Scott at which time Mose Davis and Burns were holding her. He went "inside," washed his face and as he came out again, Mason threw a bottle and brick which knocked Hausey down. He went to headquarters and reported the incident to the officer of the day after which he went to his barracks and retired about 11:30. He denied being with the gang which attacked Miss Scott or knowing any of the accused prior to the incident involving Miss Scott. He further denied that he struck Ruby Scott (R. 64, 65).

b. Charge I, Specifications 2 and 5

Accused Hausey, Burns and Clay were found guilty of the offenses alleged in these Specifications. Insofar as applicable to these offenses accused Hausey testified that he retired about 11:30 p.m. and that he did not know or see any of the other accused on the night in question. He categorically denied that he attacked Corporal Dackerman or Sergeant Fields (R. 64, 66). Accused Burns testified that following the incident involving Ruby Scott he returned to his barracks and being sick to his stomach, retired (R. 55). He denied any complicity in the incident pertaining to Corporal Dackerman (R. 57). The stipulated testimony of Private First Class Hayward Williams

and Corporal Ford Hicks corroborated Burns' testimony as to his illness during the evening (R. 59; Def. Exs. 11, 12). Accused Clay testified that following the attack upon Julia Hannah (Charge I, Specification 3), hereinafter discussed, he went back to the barracks area and stayed there until about 1:00 a.m., at which time he went to bed. He denied that he was with any of the other accused on the night of 16 June or that he was involved in the attack upon Corporal Dackerman or Sergeant Fields (R. 68, 69).

c. Charge I, Specifications 3 and 4

Accused Clay, the only accused found guilty of the offenses alleged in these Specifications, testified that he was present at the non-commissioned officers' club and engaged in conversation with First Sergeant Stubblefield. He then went to the "bandshell," but upon observing that the show was over, started back for his area. While returning, he ran across Corporal Wideman and Wideman's girl, Julia Hannah, who was surrounded by a "whole bunch of guys." At his and Wideman's request the group released Miss Hannah and he testified, "we went back to the area." He stayed there until about 1:00 a.m., then went to bed (R. 67, 68). He denied that he was with any of the other accused on the night of 16 June or that he was involved in the Estelle Young attack (R. 68, 69). It was stipulated that if present, First Sergeant Thomas Stubblefield would testify that he saw Clay in front of the non-commissioned officers' club at about 10:00 p.m., and that Clay was one of about fifty men (R. 45; Def. Ex. 4).

d. Charge II, Specification

Accused Clay and Hinnant were found guilty of the offense alleged in this Charge and Specification. Accused Clay testified that he returned to his barracks area after the attack on Julia Hannah (Charge I, Specification 3). He denied having anything to do with the assault on Leanora Lee, which the evidence shows occurred at about 11:00 p.m., contending that when he returned to his area, Major Hottenroth was talking to some of the soldiers and he (accused) stayed and listened to the conversation until retiring about 1:00 a.m. (R. 68, 69). Accused Hinnant testified that he was not with any of the other accused during the night of 16 June. He stated that he played pool at the day room until about 9:30 p.m. Then he went to the non-commissioned officers' club with Private Collier but did not remain. They walked to the bandshell, then returned to the day room at 10:00 or 10:15 p.m. and remained there until retiring about midnight. During the evening he was with Privates Riley, Collier and Seegers. At no time during the evening did he see Leanora Lee. He stated that at the time Miss Lee identified him on June 17, she said she thought he was the one who raped her and that at the time of the attack he was wearing a steel helmet and leggings, whereas, in fact, he wore a suntan cap and coveralls on the night in question. He denied that he wore a mask on the night of June 16 (R. 59, 60, 63). The accused Simmons, who was acquitted of all Charges and Specifications, testified he came upon the group which was assaulting Miss Lee when he was

attracted to the scene by her screams. He knew accused Hinnant who lived in the same barracks with him, but he did not see any of the accused at the scene. All members of the group were masked (R. 51, 52, 53).

It was stipulated that if Privates Norman D. Riley and Joe Tyes and Private First Class Elnathan Conley were present, they would testify as follows. Private Riley was in front of the recreation hall when Hinnant came up and they stayed there until about 11:15 p.m. when they went to the barracks. After the shots were fired, they went to the scene and then returned to the barracks from which they later saw someone throwing bricks at Mason (R. 63; Def. Ex. 13). Private First Class Conley was with accused Hinnant all evening. They were in front of the day room and also at the non-commissioned officers' club, but left and returned to the day room where they stayed an hour or more until they heard shots. They went to the scene of the firing and then returned to their barracks (R. 63; Def. Ex. 15). Private Joe Tyes was with accused Hinnant from about 10:15 p.m. to about 12:00 m. when they got ready to go to bed. They were in the orderly room and then went to the barracks. Hinnant was not in the gang (R.63; Def. Ex. 16).

5. After the defense rested, the court recalled accused Hinnant and Leanora Lee for further examination. Hinnant denied that he saw Leanora Lee at any time the night of 16 June 1945 or that he had or tried to have intercourse with anyone (R. 71).

Miss Lee testified that in the line-up on June 17 she hesitated when she came to Hinnant because "when I got to him I remembered his eyes and the shape of them but I wasn't too sure it was him." She did not remember what his headdress was at the line-up or in the orderly room or on the night she was attacked. The handkerchief he wore covered the lower half of his face. She did not know whether anyone else pointed out Hinnant in the identification line-up, but none pointed him out or said anything to her before or while she hesitated, nor was anything said by anyone after she passed him (R.71,72).

6. <u>As to Specification 1 of Charge I</u>

Accused Hausey, Washington and Burns were found guilty of the offense alleged in this Specification. As to Hausey and Washington there is competent evidence to show that Hausey came upon Miss Scott and her escort and struck her after stating that he was going to take her away. She then sought refuge temporarily in a restricted area but, upon leaving it, she found herself surrounded by a group of men including Hausey and accused Washington. While she was in the midst of this mob, accused Hausey "kept pulling on" her and accused Washington, along with other unidentified persons, pawed her body and inserted his fingers in her private parts. Miss Scott's testimony also demonstrates that accused Burns was in the group milling about her and that he held her tightly, pulled her in a particular direction and pawed her body. It is not clear from her testimony whether Burns indulged in these acts before Davis came to her rescue or just as he

approached her or while he conducted her to the orderly room. In view of Davis' stipulated testimony that accused Burns had hold of Miss Scott when he first espied them and that he did not see Burns place his hands under her clothing on the way to the orderly room, the court was warranted in inferring that Burns' overtures were made before or as Davis approached the group and while she was moving toward the orderly room followed by the mobsters. Although there is some testimony in the record to indicate that accused Burns accompanied Davis and her to the orderly room, Miss Scott denied this. However, it appears from other of her testimony that although Burns may have walked toward the orderly room with her, she did not consider he was "accompanying" her because he had pulled her and pawed her body and, accordingly, although he professed to be helping her, his actions, in her opinion, had belied his words.

It is not the function of the Board of Review in passing upon the legal sufficiency of the record under Article of War 50½ to weigh evidence, judge the credibility of witnesses or determine controverted questions of fact. In such cases the law gives to the court-martial and the reviewing authority exclusively the function of weighing evidence and determining what facts are proved thereby (CM 152797; MCM 1928, p. 216).

Assault with intent to commit rape is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted (MCM, 1928, p. 179). In considering the circumstances of the attack, we think the court was fully justified in inferring that the mob of which the convicted accused were members had one intent, and that solely to have carnal knowledge of Ruby Scott by the use of whatever force was necessary. While she was surrounded by this masked mob, Washington fondled her privates, Hausey mauled her and Burns pawed her body. That she screamed during this experience and that her clothing was torn and mussed, and that she was distraught thereafter are undisputed facts. Only upon the intervention of Private Davis did this terror-striking mob unwillingly release its victim. As above stated, abandonment of the intent to rape once formed is no defense and we accordingly hold the evidence legally sufficient to sustain the court's findings of guilty with respect to Specification 1 of Charge I.

<u>As to Specifications 2 and 5, Charge I</u>

Accused Hausey, Burns and Clay were found guilty of jointly assaulting Corporal Dackerman with intent to rape her. They were also found guilty of assaulting her companion, Sergeant Fields, with intent to do him bodily

harm. The undisputed evidence shows that Corporal Dackerman and Sergeant Fields, while walking together were set upon by a group of colored soldiers and separated. Sergeant Fields was pulled away from Corporal Dackerman and struck on the shoulder with a club wielded by one of the men. Corporal Dackerman was dragged into a clump of trees where three of the men held her while a fourth sat on her and removed her "panties." She succeeded in releasing the hold which one of the group had over her mouth and screamed. The men then ran away. From this set of circumstances, no rational hypothesis is possible except that all who participated in the attack on Corporal Dackerman did so with the specific intention of having carnal knowledge of her and of overcoming any resistance by actual force. The evidence clearly shows courageous resistance on the part of Corporal Dackerman far beyond that required under the circumstances. Her identification of Hausey, Burns and Clay as her attackers was certain. She identified Burns as the one she "met face to face" and as the one who pulled off her "panties." She also recognized him by his short stature. She further identified Clay and Hausey as having participated in the attack, describing Clay as "being tall and stocky with upper teeth protruding" and Hausey as being "tall and slender." By reason of their close proximity to her for some little time and the additional fact that there was an over-hanging street light near the place where she was first accosted, she was afforded a fairly good opportunity to observe their features and stature. The defense endeavored to establish an alibi for each of the three accused. All three testified that they were in bed at 1:00 a.m., the time of the occurrence. The court, within its province, rejected the defense offered by each of the accused of being elsewhere and was amply justified in finding them guilty of Specification 2 of Charge I.

While Sergeant Fields could not identify Hausey, Burns or Clay as the men who struck him, they were all guilty of assaulting him by reason of their complicity in the attack upon Corporal Dackerman. The assault on Sergeant Fields was immediately preparatory to their concerted attack upon Corporal Dackerman. All who assemble themselves together with an intent to commit a wrongful act, the execution whereof makes probable in the nature of things, a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such crime (1 Wharton's Criminal Law, 12th ed., sec. 258, p. 343).

The question then arises as to whether the offense committed against Sergeant Fields was the offense charged, i.e., assault with intent to do bodily harm to the person assaulted (Manual for Courts-Martial, 1928, par. 149n, p. 180). In the instant case the evidence is silent so far as concerns a description of the club used and it cannot be said therefore that it was a weapon, per se. The record of trial does not disclose that any injuries resulted from the blow nor does it indicate the manner in which the club was swung at Sergeant Fields. It is reasonable to infer that the assailant who struck Fields with the club did so with the specific intention of frightening him away from Corporal Dackerman rather than to inflict bodily harm upon him. In any event, the prosecution did not sustain the burden of proof beyond a reasonable doubt that accused Hausey, Burns and Clay intended great injury

to Sergeant Fields and therefore the assault falls into the least aggravated class - namely, a simple assault and battery in violation of Article of War 96 (CM 236547, Killian; 23 BR 51).

As to Specification 3 and 4, Charge I

Only the accused Clay was found guilty of the offenses alleged in these Specifications. As concerns the attack on Miss Hannah (Charge I, Specification 3), the undisputed evidence shows that she was grabbed by a large group of masked men and pulled into a thicket about 10:45 p.m., and that she was released without harm when Clay ordered the men to turn her loose. The record contains no evidence whatsoever that he was a member of the mob which assailed Miss Hannah and carried her into the thicket. She was not aware of his presence until after her release and then she recognized him only as the one who had interceded in her behalf.

The hypothesis that he did not arrive upon the scene until after she had been dragged into the thicket and interceded in her behalf is as fair and rational as the one upon which the court must have found him guilty—that he was a member of the group and aided or abetted the offense until for some reason, best known to himself, he ordered the attack abandoned. Indeed, the record contains no substantial proof to support the latter hypotheses and, accordingly, a reasonable doubt exists as to Clay's complicity in the offense.

> "The mere presence of a person at the scene of the commission of an offense by another, in the absence of preconcert or evidence of intent to participate, if need be, is not sufficient basis for an inference of his participation as an accessory or principal therein (Hicks v. United States, 150 US 442; 16 Corpus Juris 132)." (CM 186947; CM 218876, Wyrick, et al, 12 BR 157).

It follows that the evidence is not legally sufficient to support the findings of guilty as to Specification 3, Charge I.

With respect to the assault on Estelle Young (Charge I, Specification 4), the evidence clearly shows that Clay was an active participant, not only in the attack on Miss Young, but also in the one on her escort, Joe Brooks, which resulted in his being driven off leaving Miss Young surrounded by some twenty or thirty of the mobsters. She identified Clay as the one who grabbed her by the arm and pulled her about two steps when her brother, to whom she called, came running and pulled her loose. That was the extent of the attack, thus raising a question as to whether the court was legally justified in inferring that accused Clay, as a member of the group of mobsters, had the specific intention of raping Miss Young. As was said in People v. Moore (100 Pac., 688, 689):

"In all such cases the intent with which an assault is committed is a fact which can only be inferred from the outward acts and circumstances. It is, in other words, a question of fact for the jury, and not a question of law for the court, except in a case where the facts proved afford no reasonable ground for the inference drawn."

On the basis of the evidence presented solely in connection with this assault, we are inclined to the view that the facts proved afforded insufficient ground for the inference drawn. But was the court limited to the evidence presented in connection with this assault to determine what his intention was or could it also look to his acts in connection with the rape of Leanora Lee (Charge II, Specification), which occurred some thirty minutes prior thereto for this purpose. The rule that where intent must be proven, other crimes of like nature, which are so intimately related to the act in question as to show a common purpose or a continuity of purpose in all, may be shown upon the question of motive or intent is well recognized.

"Where intent and motive are in issue in sexual crimes, former acts of the same kind are relevant to show intent and to negative the issue that another or different crime was contemplated or committed than that charged. Thus in rape, circumstantial evidence showing prior acts is relevant where the prior acts are so connected with the particular crime at issue that the proof of one fact with its circumstances has some bearing upon the issue on trial, as showing the intent. Such evidence has a peculiar relevancy where the charge is assault with intent to commit rape, as in this case the act need not be limited to the person assaulted, for it is the general purpose that is involved in the assault, and no particular person is essential to show such purpose and motive, and such evidence is relevant to show the lustful intent" (Wharton's Criminal Evidence, par. 252, p. 298).

What other motive could the accused Clay have had? Was it not he who but a short time before as one of the band of terrorists waylaid Miss Lee and her escort? Was it not he who brandished the stick over Miss Lee and threatened to kill her if she did not submit to sexual intercourse with these mobsters. Was the purpose not accomplished? In the light of what occurred at Dale Mabry Field that night, the pattern of this extraordinary behavior was clear and that was to subject to their lust all women who were so unfortunate as to come into contact with them. In our opinion, these facts established a continuity of purpose, fully warranting the court in inferring that when Clay assaulted Estelle Young, he did so with the intent of raping her. The fact that he abandoned the attack upon the intervention of her brother, who may or may not have been one of the mobsters is of no importance. Paragraph 149l, Manual for Courts-Martial, 1928, states;

"Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted."

We are therefore of the opinion that the evidence is legally sufficient to sustain the court's finding of guilty of this Specification.

As to the Specification of Charge II and Charge II

The accused Clay and Hinnant were found guilty of the offense alleged in this Charge and Specification. The evidence clearly shows that Leanora Lee was set upon by a group of between 25 and 50 masked colored soldiers, and taken away from her escort, George Houston. She was subjected to humiliating and indecent indignities and was dragged across the field where she was ravished by at least one of the rapists. She kicked and screamed in an effort to prevent the sexual intercourse but was unsuccessful because several held her arms and legs while another stood over her threatening her with a stick. Only after she recognized one of the bystanders and made that fact known to the mob did they release her and disperse. The attack was immediately reported and her dishevelled appearance following the incident was compatible with the harrowing experience she had undergone. She was positive both at the identification line-up and at the trial that accused Clay was the man who menaced her with the stick and threatened to kill her unless she would have intercourse with the masked group. She identified him by his features and height. It is noteworthy that Clay was similarly identified by other victims of the orgy of crime which occurred at Mabry Field the night of June 16. One recognized him "by his peculair lip and his teeth." Another said he was "tall and stocky and his upper teeth protruded." While Clay denied his presence at the scene of the attack, contending that he was in his barracks area and went to bed about 1:00 a.m., the court, within its province, rejected the alibi offered and found him guilty as charged. The fact that accused Clay did not have sexual intercourse with Leanora Lee is immaterial. He actively aided and abetted the commission of the crime and, as the distinctions between principals, aiders and abettors have been abolished by Federal statute, he is as guilty of rape as the one who accomplished penetration (3 Bull JAG 62; NATO 1121 (1944)).

As concerns the accused Hinnant in relation to the rape of Miss Lee, her identification of him as the man who had carnal knowledge of her was based upon the color and the slant of his eyes. She was subjected to lengthy cross-examination in this regard and repeated that her only way of knowing him was by the color of his eyes and their peculiar shape. So far as those factors were concerned, she was certain he was the man. Hinnant testified that he was elsewhere at the time of the attack. He stated that he left the day room at 9:30 p.m. and went to the non-commissioned officers' club but did not remain. He went to the bandshell, then returned to the day room at 10:00 or 10:15 p.m., where he remained until retiring about midnight. He was corroborated in part by the stipulated testimony of three enlisted men, but the testimony of two of them, Private Riley and Private First Class Conley, contradicted him so far as concerned his remaining in the day room from 10:15 p.m. until retiring at midnight. In this regard, the pertinent stipulated testimony discloses that upon hearing gun fire, Hinnant, Riley

and Conley went to the scene and then returned to the barracks. According to Riley, they returned to their barracks about 11:00 o'clock. Lieutenant Force fired his gun in the vicinity of the orderly room to disperse the group which had congregated there immediately after the attack on Ruby Scott. The record of trial does not indicate that there was gun fire during the night other than that discharged by Lieutenant Force after the incident involving Miss Scott, and Lieutenant Force estimated the time to be between 10:00 and 11:00 p.m. The weight of the evidence is that Ruby Scott was attacked at about 10:30 p.m. and Leanora Lee at about 11:00 p.m. In the light of Hinnant's presence on the field at or near the hour Miss Lee was raped after he had stated he was in his barracks at the time, and in view of Miss Lee's substantial and quite positive identification of him, we are of the opinion that the court, within its province, was amply justified in rejecting Hinnant's alibi and in finding him guilty as charged.

As to Charge III and the Specification thereof

Accused Hausey, Washington, Clay, Burns and Hinnant were convicted of engaging in a riot with about 25 other soldiers by unlawfully and riotously assembling to disturb the peace of Dale Mabry Field, wearing masks, riotously assaulting women and their escorts, attempting rape and committing "other unlawful acts against said women and their escorts, to the terror and disturbance of the garrison.

> "A riot is a tumultuous disturbance of the peace by three or more persons assembled together of their own authority with the intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful" (Paragraph 147c, Manual for Courts-Martial, 1928).

> "It must be . . . shown in riot that the assembling was accompanied with some circumstances either of actual force or violence, or at least having an apparent tendency thereto, as were calculated to inspire people with terror, such as being armed, making threatening speeches, turbulent gestures, or the like, or being in disguise" (Wharton's Criminal Law, 12th Edition, Section 1862).

> "To connect a riot with a particular defendant the defendant's presence must be first put in evidence; though this rule may be departed from when from its size, and the number engaged, it is more convenient that the general character of the riot should be first proved" (ibid, sec.1871).

Applying to the record of trial the principles announced in the foregoing authorities, it becomes clearly apparent that the offense alleged was indeed a riot in violation of Article of War 89, of which all of the essential elements and each of the accused's participation in one or more phases thereof were competently established by the evidence.

6. The ages and dates of induction of the accused are as follows:

Name	Age	Date of Induction
Henry J. Clay	20	29 September 1943
James A. Hinnant	22	15 January 1943
Leroy Burns	24	20 August 1942
Joseph A. Hausey	26	16 August 1942
George Washington	30	27 September 1943

7. The court was legally constituted and had jurisdiction of the persons and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial except as noted. In the opinion of the Board of Review the record of trial:

a. As to accused Washington is legally sufficient to support the findings of guilty of Charge I and Specification 1 thereof, and legally sufficient to support the findings of guilty of Charge III and its Specification, and the sentence.

b. As to accused Hausey and Burns is legally sufficient to support the findings of guilty of Charge I and Specifications 1 and 2 thereof, legally sufficient to support only so much of the findings of guilty of Specification 5 of Charge I as involves findings of guilty of simple assault and battery, in violation of Article of War 96, and legally sufficient to support the findings of guilty of Charge III and its Specification, and the sentence as to each.

c. As to accused Clay is legally sufficient to support the findings of guilty of Charge I and Specifications 2 and 4 thereof, not legally sufficient to support the findings of guilty of Specification 3, Charge I, legally sufficient to support only so much of the findings of Specification 5, Charge I, as involves findings of guilty of simple assault and battery in violation of Article of War 96, and legally sufficient to support the findings of guilty of Charge II, its Specification and Charge III and its Specification, and the sentence.

d. As to accused Hinnant is legally sufficient to support the findings of guilty of Charge II, its Specification and Charge III and its Specification, and the sentence.

A sentence of either death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. The offense of assault with intent to commit rape is punishable under the Table of Maximum Punishments by dishonorable discharge, total forfeitures and confinement at hard labor for not more than twenty years. Any punishment that a court-martial may direct except death is authorized upon a conviction of a violation of the 89th Article of War.

Thomas N. Tuffy, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert C. Mewhinney Judge Advocate.

1 1946

SPJGH - CM 296534 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 27 February 1946

TO: Commanding General, Third Air Force, Tampa, Florida.

1. In the case of Corporal Joseph A. Hausey (38308590), Privates First Class Henry J. Clay (39711823), George Washington (42036950), and Privates James A. Hinnant (34662684), and LeRoy Burns (34324263), all of the 1869th Engineer Aviation Battalion, I concur in the holding by the Board of Review and for the reasons stated therein recommend that the findings of guilty of Specification 3 of Charge I as to Private First Class Henry J. Clay be disapproved, and that only so much of the findings of guilty of Specification 5 of Charge I as to Corporal Joseph A. Hausey, Private First Class Henry J. Clay and Private LeRoy Burns be approved as involves the lesser included offense of simple assault and battery, in violation of Article of War 96. Upon compliance with the foregoing recommendation, under the provisions of Article of War 50½, you will then have authority to order the execution of the sentence imposed upon the five accused named herein.

In view of the holding of the Board of Review with respect to Specifications 3 and 5 of Charge I, it may be that you will desire to make some reduction in the period of confinement relating to the accused Clay, Hausey and Burns.

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

(CM 296534)

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

SPJGH - CM 296630

UNITED STATES	)	NORTH AFRICAN DIVISION AIR TRANSPORT COMMAND
v.	)	
Captain ALFRED T. SIEDENTOP (0-512188), Air Corps.	)	Trial by G.C.M., convened at Casablanca, French Morocco, 19, 20 November 1945. Dismissal, total forfeitures and additional confinement until fine paid but not to exceed five years.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Alfred T. Siedentop, 1250th Army Air Forces Base Unit, North African Division, Air Transport Command, did, at Casablanca, French Morocco, on or about 1 September 1945, conspire with Flight Officer Allan MacDonald, 1252d Army Air Forces Base Unit, Leon Cohen and Salomon Bohbot, both residents of Casablanca, French Morocco, to wrongfully and illegally import gold into French Morocco.

Specification 2: In that Captain Alfred T. Siedentop, * * *, did, in conjunction with Flight Officer Allan MacDonald, 1252d Army Air Forces Base Unit, Leon Cohen and Salomon Bohbot, both residents of Casablanca, French Morocco, at Casablanca, French Morocco, on or about 2 October 1945, wrongfully and unlawfully engage in illegal gold traffic by importing into French Morocco 390 gold sovereigns of the value of about eight thousand ($8,000.00) dollars, purchased in Karachi, India.

Specification 3: In that Captain Alfred T. Siedentop, * * *, did, at Casablanca, French Morocco, on or about 9 October

1945, conspire with Flight Officer Allan MacDonald, 1252d Army Air Forces Base Unit, Leon Cohen and Salomon Bohbot, both residents of Casablanca, French Morocco, to wrongfully and illegally import gold into French Morocco.

Specification 4: In that Captain Alfred T. Siedentop, * * *, while Assistant Division Chief Pilot of said North African Division, did, at Casablanca, French Morocco, on or about 1 September 1945, conspire with Flight Officer Allan MacDonald, 1252d Army Air Forces Base Unit, Leon Cohen and Salomon Bohbot, both residents of Casablanca, French Morocco, to wrongfully and without authority use United States Army Aircraft, property of the United States, for his, the said Captain Alfred T. Siedentop's, own personal profit and gain.

Specification 5: In that Captain Alfred T. Siedentop, * * *, while Assistant Division Chief Pilot of said North African Division, did, in conjunction with Flight Officer Allan MacDonald, 1252d Army Air Forces Base Unit, Leon Cohen and Salomon Bohbot, both residents of Casablanca, French Morocco, at Casablanca, French Morocco, on or about 2 October 1945, wrongfully and without authority use United States Army Aircraft property of the United States, for his, the said Captain Alfred T. Siedentop's, own personal profit and gain.

Specification 6: In that Captain Alfred T. Siedentop, * * *, while Division Chief Pilot of said North African Division, did, at Casablanca, French Morocco, on or about 9 October 1945, conspire with Flight Officer Allan MacDonald, 1252d Army Air Forces Base Unit, Leon Cohen and Salomon Bohbot, both residents of Casablanca, French Morocco, to wrongfully and without authority use United States Army Aircraft, property of the United States, for his, the said Captain Alfred T. Siedentop's, own personal profit and gain.

Accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, confinement for five years, to pay a fine of $5000 and to be confined until said fine was paid but for not more than five years in addition to the five years' confinement hereinbefore adjudged. The reviewing authority approved the sentence, remitted the first period of confinement for five years and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to show that according to the law of French Morocco, there may be no importation of gold into, exportation of gold from or traffic in gold within French Morocco except upon express permission granted by the Director of Finance or Assistant Director of Finance of French Morocco (R. 77, 78).

From sometime in May 1945 until 4 October 1945, accused was Assistant Chief Pilot of the North African Division, Air Transport Command, and thereafter until 25 October 1945 he was Division Chief Pilot of that Division (R. 7). Early in the month of August 1945, accused and Flight Officer Allan MacDonald, who had known each other for a few years, were dining together. During the meal accused informed MacDonald that "quite a few fellows had made themselves a nice personal stake" in French Morocco and that he (accused) had contacts in Casablanca whereby he "could get the money to carry out the negotiations." He then asked Mr. MacDonald if he was interested in the proposition (R. 18). Mr. MacDonald subsequently reported this incident to military authorities and thereafter met with a Mr. Sneeder and a Mr. Kellett of the Criminal Investigation Division to whom he repeated the conversation (R. 19, 20, 27). He also met with either or both of these two investigators from time to time thereafter and kept them advised of all subsequent developments hereinafter related (R. 52-55).

Sometime between the early part of August and 1 September 1945, accused introduced Mr. MacDonald to Leon Cohen, a tailor, and to Salomon Bohbot, both civilian residents of Casablanca, and informed Mr. MacDonald that these two individuals were to furnish the money for the contemplated transactions. They discussed the price of gold and how much they should pay for it. Bohbot was to furnish a list of the places where it could be purchased in Natal and Dakar (R. 22).

On or about 1 September 1945, Mr. MacDonald went to Bohbot's house with accused and Cohen where he was told that he would be given a half million francs to purchase gold at Dakar. Mr. MacDonald was flying the run to Natal, Brazil, at the time. He was instructed to purchase the gold at the rate of 140 francs per gram but in no event to pay more than 160 francs per gram. It was further agreed that Cohen and Bohbot would pay 225 francs per gram for the gold so acquired and that the difference between the two prices was to be divided between accused and Mr. MacDonald. Bohbot also gave Mr. MacDonald an address in Dakar where he was to purchase the gold. Bohbot then delivered a half million francs to accused, comprised mostly of French Moroccan francs plus a few Algerian francs. Accused and Mr. MacDonald returned to the former's quarters where accused turned the money over to Mr. MacDonald stating that as security for the francs he had posted $4000 in face value of Government checks payable to himself. Mr. MacDonald had not planned, conceived or suggested any part of this arrangement (R. 20, 23-26). On 4 September 1945 Mr. MacDonald flew to Dakar and Natal in a C-54 type of Army aircraft assigned to his organization, transporting personnel and material in performance of his military duties and taking with him the half million francs. Visiting the address in Dakar that had been furnished him, he was told that no gold would be sold for Moroccan francs because it was too difficult to dispose of such francs. Upon his return to Casablanca, Mr. MacDonald met with accused, Bohbot and Cohen, told them of the results of his visit in Dakar and returned the half million francs (R. 27-30, 47, 73, 114).

On or about 21 September 1945, accused told Mr. MacDonald that a new run to Karachi, India, was to be established and that gold could be acquired there. Accused then telephoned a Lieutenant Flood and had Mr. MacDonald transferred to the Karachi flight. Shortly thereafter, Cohen informed accused and Mr. MacDonald that Bohbot had left town because things were "too hot" for him and that Bohbot was not going to deal "in this business any more." On 23 September 1945, while Mr. MacDonald was warming the motors of a C-54 type of Army aircraft which he was about to fly to Karachi to transport personnel and material in performance of his military duties, he was called from the tower and told that a captain was coming to his plane to see him. Accused then drove up in a jeep and threw a package into the plane, saying, "There it is, do what you can with it." The package contained $6000 in gold seal American currency and 500 "mixed English pounds." In Karachi Mr. MacDonald purchased 390 English gold sovereigns with these funds. He returned from Karachi in a C-46 type of Army aircraft on 2 October 1945 and he brought the sovereigns with him. At accused's suggestion he met with accused, Cohen and Bohbot that evening at Cohen's tailor shop and delivered the sovereigns to them. Bohbot gave accused and Mr. MacDonald $1250 to divide between them and after what was presumed an equal division thereof, Cohen wrapped these funds in two packages giving one to accused and the other to Mr. MacDonald. As a matter of fact, the funds were unequally divided and Mr. MacDonald's package contained only $615 while accused's package contained $635 (R. 43,44). During the ensuing conversation, accused asked Cohen and Bohbot if they could accumulate $15,000 for the next trip, stating that he would see that Mr. MacDonald again flew to Karachi (R. 11, 31-37, 47, 73, 114).

On 9 October 1945 Mr. MacDonald informed accused that he was about to leave on a scheduled flight to Karachi. Thereafter he met with accused, Cohen and Bohbot, was given a package containing approximately $10,000 worth of British currency and was told to take it to Karachi and buy as many gold sovereigns as possible with it. Mr. MacDonald asked accused how he was to make the continuous flight to Karachi since the probabilities were he would proceed only to Cairo, Egypt, where he would be given a flight to return to Casablanca. Accused then wrote a note to a Major Scoggins at Cairo and gave it to Mr. MacDonald. In it accused stated that Mr. MacDonald "would like to go on thru to Karachi and, as he is checked all the way thru, maybe you can use him." Mr. MacDonald promptly thereafter delivered the package of currency to Mr. Sneeder of the Criminal Investigation Division (R. 11, 38-41 85; Pros. Ex. P-3).

Mr. MacDonald did not plan, conceive or suggest any of these arrangements for the importation of gold. Accused, Cohen and Bohbot made all necessary plans, knowing that Mr. MacDonald was "flying the line" and that Army aircraft was to be used on the contemplated trips (R. 46, 47, 64). At one time accused informed Mr. MacDonald that he selected him to work on these transactions because Mr. MacDonald "did not have a tendency to go out and get drunk and shoot (his) mouth off." Accused also informed Mr. MacDonald that he had never known of anyone being apprehended importing gold.

Over the period from 1 August 1945 to 11 October 1945, Mr. MacDonald advised the Criminal Investigation Division of all these activities relating to the purchase and importation of gold as he had been told to do by Mr. Sneeder (R. 51, 52, 86).

After Mr. MacDonald had turned over the currency to Mr. Sneeder on 9 October 1945, a search was made of Leon Cohen's tailor shop by civilian authorities and of accused's quarters by military authorities. While accused's room was being searched he stated that a package containing $635 would be found on the top of his wardrobe. The paper in which this money has wrapped seems to the naked eye to be identical to the paper in which had been wrapped the $615 given to Mr. MacDonald and also identical to wrapping paper which had been found during the search of Cohen's tailor shop. All three pieces of paper were of the same consistency, color and material (R. 42-44, 90, 95, 96, 101, 142; Pros. Exs. 5, 7, 11).

At no time prior to 10 October 1945 had any authority been given to Mr. MacDonald to permit him to transport currency for accused to Dakar and Karachi to purchase gold and to return to Casablanca with any gold so purchased (R. 117).

The bulk of the testimony summarized above was given by Mr. MacDonald and was supported by the testimony of Mr. Sneeder and Mr. Kellett in respects relevant to them. Leon Cohen and Salomon Bohbot were introduced as prosecution's witnesses but when the prosecution claimed hostility and surprise, prior statements were introduced to impeach them. After Cohen had been confronted with his prior statement and upon further questioning he admitted (a) that Bohbot gave Mr. MacDonald a half million francs to take to Dakar and that the money was eventually returned to Bohbot; (b) that later Bohbot gave Mr. MacDonald about $8000 and thereafter Mr. MacDonald left a package at Cohen's shop which was picked up by an employee of Bohbot; (c) that Bohbot's employee came to Cohen's shop and gave Mr. MacDonald a package sometime subsequent to the first two transactions and that about two days later Mr. MacDonald returned to his shop with men from the Criminal Investigation Division. He denied, however, that accused had any connection with these transactions (R. 158-165).

4. The defense introduced evidence to show that accused was reputed to be a superior officer and a fine gentleman (R. 183, 186). The accused elected to remain silent.

5. With respect to the Dakar transaction that occurred on or about 1 September 1945, accused is charged in two Specifications with (a) conspiring with MacDonald, Bohbot and Cohen to illegally import gold into French Morocco and (b) conspiring with the same persons to use Army aircraft wrongfully and without authority for accused's own personal gain and profit (Specs. 1, 4). With respect to the Karachi transaction occurring on or about 2 October 1945, it is charged in two Specifications that accused,

in conjunction with the three persons named above, (a) did wrongfully and unlawfully import 390 gold sovereigns into French Morocco and (b) did wrongfully and without authority use Army aircraft for his own personal gain and profit (Specs. 2, 5). With respect to the last transaction occurring on or about 9 October 1945, it is charged that accused did conspire with the above-named individuals (a) wrongfully and illegally to import gold into French Morocco and (b) wrongfully and without authority to use Army aircraft for accused's own personal gain and profit (Specs. 3, 6).

Defense counsel vigorously contested the prosecution's case, making motions for findings of not guilty at the inception of the trial and also at the conclusion of prosecution's case as well as registering numerous objections during the trial to evidence presented by the prosecution. Such of the contentions of defense counsel as are meritorious will be disposed of hereinafter in our discussion of the case.

The evidence introduced to prove accused's guilt of having wrongfully imported 390 gold sovereigns into French Morocco (Spec. 2) and of having wrongfully and without authority used Army aircraft for his own personal gain and profit (Spec. 5), all on 2 October 1945, establishes that the gold was actually imported into French Morocco, and the aircraft actually flown, by Flight Officer MacDonald. Accused's conviction of these two offenses can only be sustained if the acts done by MacDonald can be imputed to accused. It is apparent from the evidence that MacDonald had informed the authorities of all that was transpiring and that he pretended to be a conspirator only so that he might accumulate evidence against accused for the Government. Having no criminal intent, he was no conspirator (CM 187319, Line 1 BR 25). He was in fact being used by the authorities for the purpose of entrapping accused. It is well established that nothing done by an entrapper or informer may be imputed to an accused even though done with the accused's knowledge and consent. Where an informer or entrapper is involved in a criminal transaction undertaken by an accused, the latter can only be convicted if he himself has done everything necessary to constitute the completed offense; if, in order to make out the completed crime, it is necessary to impute to accused something done by the entrapper, the prosecution must fail (State v. Decker, 321 Mo. 1163, 14 SW 2d. 617; Dalton v. State, 113 Ga. 1037, 39 SE 468; Stevens v. State, 51 Okla. Cr. 451, 2 P. ed. 282; Warren v. State, 35 Okla. Cr. 430, 251 P. 101; People v. Lanzit, 70 Cal. App. 498, 233 P. 816). Thus, it is clear that MacDonald's acts in flying Army aircraft to Karachi and returning to Casablanca with gold he purchased in Karachi cannot be imputed to accused. Accused bears responsibility only for those things actually done by himself. At most, so far as this Karachi transaction is concerned, he may have conspired to import the gold that was actually brought into Casablanca. However, conspiracy to commit a crime is not a lesser included offense of the crime itself. Accordingly, the findings of guilty of Specifications 2 and 5 cannot be sustained.

Under Specifications 4 and 6, it is charged that accused conspired with MacDonald, Cohen and Bohbot wrongfully and without authority to use Army

aircraft for accused's own personal gain and profit on 1 September 1945 (Dakar transaction) and on 9 October 1945 (second Karachi transaction), respectively. It is apparent from the evidence that under this conspiracy the aircraft involved was not to be diverted from Government use but while being used on authorized Government business a small quantity of gold was to be transported aboard it. So, the question is whether the offense of wrongfully and without authority using Army aircraft for personal gain is committed when in fact the aircraft actually performs the official mission assigned to it and the private transaction incident to its authorized use does not divert it from its course or interfere with performance of its mission; that is, whether there can be both an authorized and an unauthorized use of Government property at one and the same time.

The offense of wrongfully using another's property is referred to generically in military law as misapplication (MCM, 1928, par. 150i; CM 239304, Stennis, 25 BR 119. Winthrop's Military Law and Precedents, 2d Ed., 1920, p. 708). The offense of misapplication involves "appropriation" of the use of property "for the personal 'benefit' of the offender; as where an officer or soldier makes use without authority of animals, vehicles, tools, etc., of the Government - whether or not specially trusted to his charge - for the purposes of himself or his family" (Winthrop, supra). According to Webster's New International Dictionary, 2d ed., to "appropriate" is defined as "to take to oneself in exclusion of others" and "to set apart for, or assign to, a particular purpose of use in exclusion of all others" (underlining added). Thus, as a matter of definition, unauthorized use or misapplication of property is the wrongful use of the property to the exclusion of all other uses. We believe that this conclusion reached as a matter of definition is also sound as a matter of law inasmuch as we cannot concede that there may be both an authorized and an unauthorized use of property at one and the same time. The use must be one or the other; it cannot be both. In our opinion, the offense of unauthorized use or misapplication of property requires the complete diversion of the property from its authorized use. Accordingly, when a Government vehicle is used to perform and does perform the official mission assigned it without interference therewith and without diversion or deviation of the vehicle, any incidental transportation of private property aboard the vehicle without authority does not constitute the offense of wrongful use or misapplication of such vehicle.

Assuming that the transportation of private property aboard Government vehicles without authority is an offense, and that the proof here establishes that accused conspired so to transport personal property, nevertheless, any such offense is not lesser included of the offense alleged. To be lesser included of a greater offense, the elements of the lesser offense must be included in the greater and necessarily proven when the elements of the greater offense are established (CM 254312, Buchanan, 35 BR 205). The offenses here alleged, i.e., conspiring to use Army aircraft wrongfully and without authority for personal gain, can be established by proof of conspiracy completely to divert such aircraft to numerous unauthorized uses, none of which include the limited purpose of transporting

personal property without authority. Thus, proof of the allegations of Specifications 4 and 6 as here worded do not necessarily require proof of the unauthorized transportation of personal property and, accordingly, such offense is not lesser included of the one alleged in these Specifications.

The conclusions reached herein are consistent with the holding in CM ETO 2966, Fomby. In that case accused was charged under Article of War 96 with (a) wrongfully taking and using a Government vehicle and (b), transporting civilians in it in violation of Army Regulations. The transportation of the civilians occurred during the continuous wrongful use of the vehicle. The Board of Review sustained the findings of guilty of each offense. By such findings the Board inferentially determined that transporting civilians was an offense not alleged by, or included in, the offense of wrongfully taking and using. Thus, it impliedly concluded that transporting civilians was another and a different offense from wrongfully using. If a Specification alleging wrongful use of a vehicle means or includes improper transportation aboard the vehicle, then the Board could not have sustained the findings of guilty of the improper transportation since so to do would have resulted in finding accused guilty twice of the same offense under the same Article of War.

In view of the foregoing, the findings of guilty of Specifications 4 and 6 cannot be sustained.

There remains for consideration Specifications 1 and 3 which alleged, respectively, that accused conspired with MacDonald, Cohen and Bohbot wrongfully and illegally to import gold into French Morocco on 1 September 1945 and 2 October 1945. The Specifications are not fatally defective because of failure to allege an overt act. A Specification alleging a conspiracy to commit an offense need not be drafted with such degree of particularity as is requisite when the offense itself is alleged. Under Federal law an indictment for conspiracy is sufficient if it describes the unlawful object of the conspiracy; indeed, the averment of an overt act cannot operate in aid of the charging part of the indictment (Rulovitch v. United States, 286 Fed. 315, CCA-3d; Zucker v. United States, 288 Fed. 12, CCA-3d, cert. den., 43 S.C. 525, 262 US 750).

The proof, however, does not establish any criminal conspiracy involving MacDonald. He was a Government informer and participated in these conspiracies not as a criminally minded co-conspirator but as an individual bent upon the apprehension of those planning to engage in the commission of crime. There was no criminal combination of minds between accused and MacDonald and, accordingly, no conspiracy existed between them (CM 187319, Line, 1 BR 25). But the evidence does conclusively establish the existence of the alleged conspiracy between accused, Cohen and Bohbot. That Cohen and Bohbot were not subject to military jurisdiction does not affect accused's responsibility under military law for his part in the conspiracy. It is not necessary that all conspirators be tried in the same proceedings or that

they be triable before the same judicial tribunal. Even when all may be tried before the same tribunal the prosecution is free to elect whether to try them in the same or in separate proceedings. For a member of the military establishment to conspire with civilians to violate such local laws as were here involved constitutes, unquestionably, conduct of a nature to bring discredit upon the military service and violative of Article of War 96 (MCM, 1928, par. 152b).

Had accused been entrapped into commission of the conspiracies alleged under Specifications 1 and 3, that fact would constitute a defense to these Specifications. The defense of entrapment exists where an accused is lured or enticed into the commission of a crime by an agent or informer of the authorities. But where the accused has formed the intent to commit the crime and the informer lays a trap to catch him or even cooperates with him to obtain proof of his guilt, the defense has not been established (CM 252103, Selevitz, 33 BR 395; CM 239845, Wohl, 25 BR 279, 3 Bull JAG 55). The evidence shows that accused first approached MacDonald in early August 1945 and sought to induce him to participate with accused and others in the business of importing gold. Accused was the one who had made contact with Cohen and Bohbot and he eventually introduced MacDonald to these two men. Accused also obtained from Cohen and Bohbot the currency to be used in purchasing gold at Dakar (Specification 1) and turned it over to MacDonald only after they had reached accused's quarters following a visit with Cohen and Bohbot. There is not a scintilla of proof that MacDonald enticed accused to enter this first conspiracy. The entire plan originated with accused, he made the necessary civilian contacts and all arrangements to obtain the necessary currency. Accused performed overt acts in execution of this conspiracy by obtaining the currency and by turning it over to MacDonald. MacDonald did nothing more than to appear to cooperate with accused in all that the latter did. Such conduct alone does not constitute entrapment (Wohl case, supra).

The evidence offered to establish the conspiracy alleged in Specification 3 shows that the only acts done by MacDonald in connection with that conspiracy were first, to inform accused that he was soon flying to Karachi whereupon accused sought and obtained funds from his co-conspirators which he delivered to MacDonald and secondly, to ask accused how he was to fly through Cairo to Karachi, whereupon accused penned a note to accomplish continuity of the flight. By neither of these verbal acts was accused induced or enticed to commit the offense charged. MacDonald did not urge or even request accused to have funds available for the impending flight or to arrange for his continuous flight to Karachi. He merely informed accused of situations that existed and accused, without any solicitation or impetus from MacDonald, promptly took such steps as he deemed advisable in furtherance of his plan. MacDonald indeed cooperated with accused but he did no more. Accordingly, in our opinion the defense of entrapment to Specification 3 has not been established. (See Wohl case, supra).

There is no direct proof in the record establishing that accused or his co-conspirators were without authority to import gold into French Morocco,

However, MacDonald testified that he (MacDonald) had no such authority and that accused had informed him that accused had never heard of anyone being apprehended while importing gold. Coupling this to accused's suspicious conversation with MacDonald in August 1945, and with accused's statement to MacDonald that he selected him to work on these transactions because the latter did not have a tendency to get drunk and "shoot (his) mouth off," the only reasonable conclusion can be that accused had no such authority. Clearly, the court was warranted in so inferring.

Various errors were committed during the trial with respect to the admission and rejection of certain evidence but in view of the minor character of the errors and considering the record in its entirety, it is apparent that such errors did not injuriously prejudice any substantial rights of accused.

In view of the foregoing it is our opinion that the record of trial is legally sufficient to sustain the findings of guilty of Specifications 1 and 3 of the Charge.

6. On 15 January 1945, John B. Farese of Ashland, Mississippi, counsellor at law and attorney for accused, appeared before the Board of Review on behalf of his client and was accorded a full hearing. All points stressed by Mr. Farese in his argument and in his brief filed at the hearing have been carefully considered by the Board.

7. Accused is 38 years of age and unmarried. War Department records show that after graduation from high school he attended Machanic's Institute of Architecture for three years, Columbia University for one year and Pace Institute for one year. From 1931 to 1933, as part owner of Jamestown Airways, he conducted a flying school and engaged in the sale of airplanes. Thereafter he was employed as division manager for a publishing concern and and later, from 1939 to 1942, served as syndicate sales manager for General Advertising Agency, Los Angeles, California, earning approximately $8000 per annum. He served two enlistments in the National Guard of the United States from 1929 to 1934, receiving honorable discharges therefrom. He had held a commercial pilot's license since 1928 and in 1942 was employed as Basic Flight Instructor at Maxwell Field, Alabama. On 3 February 1943 he was commissioned a first lieutenant, Army of the United States and assigned to duty with the Air Corps. On 9 October 1944 he was promoted to captain. On 4 September 1945 he was awarded the Air Medal by Headquarters, Persian Gulf Command, for meritorious achievement while participating in aerial flights from 4 April 1944 to 1 July 1944.

8. The court was legally constituted and had jurisdiction of the accused and the offenses. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally

insufficient to support the findings of guilty of Specifications 2, 4, 5 and 6, legally sufficient to support the findings of guilty of the Charge and of Specifications 1 and 3 thereof and to support the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Jaffy, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert C. Trewethan, Judge Advocate.

SPJGH - CM 296630 1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Alfred T. Siedentop (0-512188), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of conspiring on 1 September 1945 and on 9 October 1945 illegally to import gold into French Morocco (Specs. 1, 3); guilty of engaging in illegal gold traffic by importing 390 gold sovereigns into French Morocco on 2 October 1945 (Spec. 2); guilty of conspiring to use Army aircraft without authority for personal gain and profit on 1 September 1945 and 9 October 1945 (Specs. 4 and 6); and guilty of using Army aircraft without authority for personal gain and profit on 2 October 1945 (Spec. 5), all in violation of Article of War 96. He was sentenced to dismissal, total forfeitures, confinement for five (5) years, to pay a fine of $5000 and to be confined until said fine was paid but for not more than five (5) years in addition to the five years' confinement hereinbefore adjudged. The reviewing authority approved the sentence, remitted the first period of confinement for five years and forwarded the record of trial for action under Article of War 48.

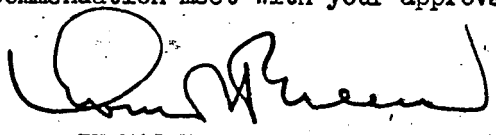
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 2, 4, 5 and 6; legally sufficient to support the findings of guilty of the Charge and of Specifications 1 and 3 thereof, and to support the sentence as approved by the reviewing authority and to warrant confirmation thereof. I concur in that opinion.

The evidence with respect to Specifications 1 and 3 shows that accused, Division Chief Pilot of the North African Division, Air Transport Command, stationed in French Morocco, conspired on 1 September 1945 and on 9 October 1945 with Leon Cohen and Salomon Bohbot, both residents of French Morocco, to import gold into French Morocco with the assistance of Flight Officer Allen MacDonald. On or about 1 September 1945, accused and Mr. MacDonald visited Leon Cohen's tailor shop. Mr. MacDonald was then flying the air run to Dakar, West Africa, and Natal, Brazil, for the Air Transport Command. At that meeting it was decided that Mr. MacDonald should be given a half million francs with which to purchase gold in Dakar on his next flight. It was also decided how much was to be paid for the gold and what remuneration should be paid accused and Mr. MacDonald after the gold had been brought to French Morocco. A half million francs were given to accused by Cohen

and Bohbot and accused later turned these funds over to Mr. MacDonald to be used as previously agreed. On 9 October 1945 accused and his co-conspirators again met in Cohen's tailor shop where Mr. MacDonald was given $10,000 worth of British currency to purchase gold in Karachi, India, on his forthcoming flight to that country. The gold so purchased was again to be brought back to French Morocco by Mr. MacDonald. To insure Mr. MacDonald's continuous flight to India through Cairo, accused penned a note to an Air Transport Command officer in Cairo suggesting that Mr. MacDonald be permitted to fly through to Karachi. Mr. MacDonald had informed military authorities of the progress of these conspiracies and he passively cooperated with accused and the other conspirators in order to obtain the evidence necessary to prosecute accused. The laws of French Morocco prohibited the importation of gold into that country without the consent of the Minister of Finance. Accused had no permission from that authority to import the gold contemplated in these two transactions.

Accused knowingly conspired to violate the monetary regulations of French Morocco for his own personal profit. However, in view of the fact that the findings of guilty of only two of the six Specifications can be sustained and considering accused's otherwise superior military record, I recommend that the sentence as approved by the reviewing authority be confirmed but that the sentence be suspended during good behavior.

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



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed, but sentence suspended during good behavior. GCMO 97, 20 June 1946).

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

(205)

SPJGK - CM 296636

1 FEB 1946

UNITED STATES	)	FERRYING DIVISION AIR TRANSPORT COMMAND
v.	)	
First Lieutenant CLINTON E. SMITH (O-1696750), Air Corps.	)	Trial by G.C.M., convened at Rosecrans Field, Missouri, 5 November 1945. Dismissal and total forfeitures.

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

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

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

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

Specification: In that First Lieutenant Clinton E. Smith, Squadron "B", 561st Army Air Forces Base Unit (First Operational Training Unit), Ferrying Division, Air Transport Command, did, at Kansas City, Missouri, on or about 18 September 1945, by force and violence, and by putting him in fear, feloniously take, steal and carry away from the person of John C. Siskey, about 50¢, lawful money of the United States, a pair of horn rimmed glasses, value about $20.00, and a beige wool gaberdine jacket, value about $7.50, the property of John C. Siskey.

CHARGE II: Violation of the 96th Article of War. (Finding of guilty disapproved by the reviewing authority.)

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

He pleaded not guilty to all Charges and Specifications. During the course of the trial on motion of the trial judge advocate, granted by the court, each Specification was amended to read "One pair horn rimmed glasses, value about $15.00." He was found guilty of all Charges and Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become

due, to pay to the United States a fine of three hundred and fifty dollars, and to be confined at hard labor for one year. Four of the seven members of the court before which he was tried recommended suspension of that portion of the sentence imposing confinement. The reviewing authority disapproved the findings of guilty of Charge II and its Specification, approved only so much of the sentence as provided for dismissal and forfeiture of all pay and allowances due or to become due, and forwarded the record of trial for action under Article of War 48.

3. For the prosecution.

It was stipulated that at the time of the commission of the offense with which he is charged accused was a first lieutenant, assigned to duty at Fairfax Field, Kansas City, Kansas, and that at the time of the trial he held the same commission and was assigned to duty at Rosecrans Field, St. Joseph, Missouri (R. 37).

At about 9:30 P.M. on 18 September 1945, Mr. John C. Siskey, a 19-year old civilian, left the Marie Dunn School of Fashion Designing, located at 3820 Main Street in Kansas City, Missouri, where he had enrolled as a student that night, to return to his home (R. 6,7). As he was traveling North on Main Street, "a main street" of Kansas City, with "innumerable business houses" located on it, and before he had reached the first corner he saw a soldier step out of a doorway. He again saw a soldier at the corner where he had to wait for a change in the traffic signal. He paid no particular attention to these incidents and consequently could not state whether the soldiers he saw were the same person or who they were. He then continued "in a hurry" north on Main Street until he reached 36th Street. He had been aware "of some one walking behind" him but did not pay any attention. He turned east on 36th Street and had gone a few feet when accused "came up and said 'this is a holdup. If you don't want to get hurt get behind that sign board.'" The sign board so indicated runs diagonally ("catacorner") on the corner of 36th and Main Streets, facing in a northwesterly direction (R. 7,8). Mr. Siskey obeyed accused's instruction. According to his testimony the following then transpired:

> "I had no more than stepped through the gate when he struck me. The first blow struck was so hard that it knocked me back against a pole and it kind of dazed me. He kept on striking me. The next thing I knew he was going through my trouser pocket and removed the change from my front right trouser pocket. I had my back to him. He was standing behind me, my back was facing 36th Street, and when he removed my billfold I took my fountain pen set and dropped it on the ground at my feet.
>
> * * *
>
> "*** When he started going through my billfold he didn't find any money and he insisted that I had some, and he moved around to the front of me. About that time a young couple walked by and he had hold of my shirt and he twisted my collar and he ripped the

front of my shirt. Then I really got scared, and after this couple passed why he went back to the billfold and he took all the pictures, and receipts, etc. out of the billfold and was throwing them on the ground, and he kept insisting that I had money on me and he wanted it. He handed the billfold back to me and told me to remove my trousers and I took my trousers off and he went through all the pockets and everything, and he didn't find any money, and he told me to remove my coat. He went through my coat pockets, etc., and still didn't find any. He gave my coat back to me but kept my trousers and I kept insisting I had to have my trousers to go home in so he -- when he took my billfold why he said --- he removed my address from my billfold and a letter and he said a letter from home out to be worth $25.00.

* * *

"*** He handed it [the billfold] back to me after he went through it." (R. 8)

The witness further testified that he had between 50¢ and 75¢ in his pocket, which he permitted accused to take from him because "he was scared" and was afraid that accused had a gun in his pocket. None of the money so taken was returned to the witness. In response to Mr. Siskey's earnest plea, accused returned his trousers to him (R. 8,9). However, accused took and kept the coat, valued at $7.50, and witness's glasses, valued at $16, in addition to the small amount of cash (R. 9, 11,28,29). According to the witness:

"*** he asked me where I had been, and I told him at school, and he asked me what school and I told him the Marie Dunn Fashion Designing School, and he asked me if I worked and I said yes, and he asked me where, and I told him at the Kitty Clover Potato Chip Company, and he said I should have $30.00 the next day at this Potato Chip Company; so he asked me if my boss was a large man and I said yes. He also asked how many men worked at the company and I said five, so then he told me I should have $30.00 at the corner of 36th and Main the next day at 4:15. I said I didn't get off work until 4:30. He said I should have it anyhow. I kept insisting that I couldn't get off then, so he handed me my key case back and he said that would be $5.00 more. He said I should have $35.00 the next day between 4:30 and 5, between 35th and 36th and Main." (R. 9).

Accused warned Mr. Siskey not to call or report the incident to the police. Eventually Mr. Siskey disclosed the details to relatives with whom he resided, and one of them advised the proper authorities (R. 9,22). The following day Mr. Siskey appeared at the corner of 36th and Main Street, at the time designated by accused, who "pulled up" in an automobile about five to ten minutes later and called out, "Hey, do you want this package." Mr. Siskey thereupon took $14 out of his billfold, handed it

to accused and took the package from accused. It contained his coat, his glasses, certain pictures and a receipt he had obtained from his school. As he turned to leave, witness heard "the car stop and start just as fast and when I turned around Captain McCormick had a gun by the side of his [accused's] head" (R. 9,10).

Captain Joseph C. McCormick, CMP, District 3, 7th Service Command, Kansas City, Missouri, was requested by the city police to be present at the corner of 36th and Main Streets at 4:30 P.M. on 19 September, because a man dressed as a soldier who had been involved in a "roll" job the preceding night was supposed to appear at that time. According to Captain McCormick:

> "I was stationed in the drug store on the corner across the street. There is a signboard there, and at approximately 4:30 I saw a dark Pontiac Coupe drive up on 36th Street, cross Main and park over on the southeast corner, and this officer stayed in the car. It was a soldier. At that time I couldn't tell whether he was an officer. He had Army clothes on, and Siskey, I think his name was, was stationed on the same corner. Smith, he was in a car. He just sat there. He didn't get out of the car. I walked out of the drug store and walked into a safety island in the center of the street, and Siskey just stood there; didn't make any attempt to come over to the car. Pretty quick I saw Siskey reach in his hip pocket and bring out his billfold, and at the same time he started walking toward the car where Smith was sitting, and I gradually began making my way to the car. I saw Siskey reach in the car and at the same time Lt. Smith handed something to Siskey. I ran across the street and I had a gun in my hand. By that time Siskey had walked away from the car and Lt. Smith was sitting there ready to drive away.
>
> * * *
>
> "I told Smith to come out of the car with his hands up. He got out of the car. He never said a word. He got out of the car and stood there, and I said, 'Walk over by that tree and stand up against it'. In the meantime he put his hand in his pocket. When I got him over to the tree, Chief Kircher, the Chief of Detectives of the Kansas City Police Dept. with Detective Hanks appeared on the scene, and Kircher said, 'Get your hands out of your pocket'. Lt. Smith did.
>
> * * *
>
> "*** Kircher opened up his hand. If I remember right he had some money in there. In fact, I know he had." (R. 30,31)

Chief Kircher started to ask the accused some question, but Captain McCormick stopped him and then proceeded to explain to accused his rights under the 24th Article of War (R. 31). Thereafter accused

made a voluntary statement which in pertinent part is as follows:

"As I left the Trocadero Tavern, which is located between Main and Baltimore on 39th Street, and walked toward Main Street, I observed a young man was following me. I proceeded to walk north on Main Street and when I arrived at 38th and Main, I turned east and walked to Walnut, and the young man continued following me. When I arrived at 38th and Walnut, I turned back south again and he continued to follow. Arriving at 39th and Walnut, I turned west to go to 39th and Main. At 39th and Main I stopped and the young man passed me, while I was standing on the corner, but said nothing. He proceeded north on Main Street and when he arrived at 38th and Main, he stopped on the corner. I then proceeded to walk to 38th and Main and as I passed this young man standing at 38th and Main, he stopped and spoke to me. He said, 'Good evening. I want to see you.' I said, 'Where do you want to see me at?' He said, 'Up the street where there is a billboard.' That was all that was said at that time. We started walking, this young man and I, north on Main Street. There wasn't a thing said by either of us while we walked from 38th and Main to 36th and Main where there is a large billboard located in a vacant lot on the southeast corner of 36th and Main. The young man went behind the billboard and I followed him. After we got behind the billboard, he reached for my privates and then I beat the hell out of him with my fists. I didn't knock him to the ground. I took from his person some change he had in his pocket, his suit coat, and a pair of spectacles, and after I had taken these articles, I told him that if he wanted them back he could meet me on this corner the next day between 4:15 and 4:30 p.m. and he could have them if he paid me $25.00. He said, 'All right. I'll be here.'

"I then left, taking with me the coat and spectacles, and leaving the young man behind the signboard. I walked south on Main Street for about two blocks, hailed a passing cab, and returned to the State Hotel to my room where I left the coat and spectacles.

"At noon today I reported for duty at the Airport and I was relieved of duty at about 3:30 p.m. Before leaving the Airport I borrowed a car, the property of Lieut. Harold R. Wilkins, who is Flight Supervisor and Pilot at the Airport, and after using the car for some personal errands, I proceeded to 36th and Main to keep the appointment with the young man, arriving there at about 4:30 p.m. I saw the young man standing on the corner and recognized him, drove up and parked at the curb on the southeast corner near where the young man was waiting. After a few minutes the young man came over to the car and handed me some currency. I took the currency and handed him his suit coat and spectacles which I had brought along with me in the car. Immediately after that transaction I started to drive away and was stopped by some men whom I later learned to be Captain Joseph C. McCormick, of the Military Police, L. W. Kircher and Lawrence Hanks, of the Kansas City,

Missouri, Detective Division.

"After my arrest I was commanded to take my hands out of my pockets. I removed my hands from my pockets and in my left hand I was still holding the currency that the young man had given to me. Said currency was then and there taken from my hand by one of the police officers and on examination was found to be two $5.00 bills and four $1.00 bills.

"I was then brought to police headquarters where I have made the foregoing statement." (R. 31, Pros. Ex. 8.)

For the defense.

First Lieutenant Harold Wilkins, who served with accused both in India and the United States, testified to accused's "very good reputation." About 3:30 or 4 o'clock in the afternoon on which accused was arrested accused asked Lieutenant Wilkins for the use of his car, mentioning that "he would be back towards evening" (R. 38,39,40).

After being advised of his rights, accused elected to testify in his own behalf (R. 44). Referring to his military record, he stated that he had enlisted in the Army on 1 April 1941, was appointed a flight officer on 16 February 1943, has been on active duty since that time (R. 44), served fourteen months in the China-Burma-India Theater where he flew 158 cargo missions "over the Hump" (R. 44,45), was awarded the Distinguished Flying Cross, the Air Medal with one Oak Leaf Cluster and two Battle Stars, and is entitled to wear a Presidential Unit Citation (R. 45).

His testimony as to his meeting with Mr. Siskey on 18 September 1945 followed closely his statement already set forth in full. The only substantial difference is the point at which accused claimed he was accosted by Mr. Siskey. In his statement he contended that after he had walked around the square to see whether Mr. Siskey would follow him and returned to 39th and Main Streets Mr. Siskey passed him and was waiting for him at 38th Street. In his testimony the place of meeting is given as 37th and Main Streets, one block closer to the billboard where the incident occurred (R. 51). Accused admitted that he had administered a "sound thrashing" to Mr. Siskey who offered no resistance and made no outcry, and offered the following explanation of his conduct:

"After I hit him I wanted to do something to impress upon his mind what he was doing, running around the streets doing things like that. The pounding him, I didn't think that would. I thought if he would keep paying for something, he would realize what he was doing running around like that, so at that time I took his coat and went through his pockets and he had his glasses in his pockets. I thought if I would take those he would feel that he had really lost something and would not wander around the

streets doing things like that" (R. 49).

He denied that he had ordered Mr. Siskey to remove his trousers (R. 49), or that he had kept the change and bus tokens which he had found in accused's pockets, claiming that he had put these back into the coat pocket. He admitted looking through Siskey's wallet (R. 52,53), and stated that he found nothing in it (R. 53). He further admitted that he had taken Mr. Siskey's coat and glasses to his hotel and that he had made a "bargain" with Mr. Siskey to return the next day:

> "I told him if he wanted his stuff back to be there the next day and I would give him his suit back. I wanted to talk to him and tell him the next time may be the man would not be so generous as to bring his stuff back to him. The next time they would take more or something" (R. 49).

Accused had no intention of keeping any of the articles taken by him, his actions being based solely on his desire to teach Mr. Siskey a lesson (R. 50,55). While admitting that he met Mr. Siskey at the place designated by him the following day and accepted money from him, he contended that he intended to talk to Mr. Siskey about his misconduct and then to return the amount so received to him. This he was prevented from doing by his arrest while he "was trying to figure out how to talk to him [Siskey]."

4. There were no witnesses to the robbery of which accused was found guilty and there are some irreconcilable variances between his version of what occurred and that of his alleged victim. According to accused, he was approached by Mr. Siskey, who he concluded was a sexual pervert, and followed him behind the sign board merely through curiosity to discover the methods adopted by that abnormal type of individual in effecting a satisfactory arrangement with the person solicited. His contention is that he became so enraged by Mr. Siskey's conduct that he decided to teach him a lesson by inflicting physical punishment upon him. This he proceeded to do. Accused then concluded that the severe beating did not constitute a sufficient lesson and determined to impress further upon the young man the iniquity of his conduct by taking some of his personal effects from him and offering to return them the next day upon the payment of $25.00. If the money was paid to him accused, according to his statement, intended to return the money so paid to Mr. Siskey and to tell him how lucky he was to have escaped so lightly. As opposed to this version Mr. Siskey testified that after he had turned off Main Street and was proceeding East on 36th Street toward his home accused walked up behind him, announced that he was effecting a "holdup" and ordered him to proceed back of the sign board where accused severely beat and robbed him, warned him not to make any report of the crime, and not finding more than 75¢ in cash told him to meet him (accused) at a designated time and place the following day when he would return the articles upon the payment of $35.00. There were some features in which the stories agree, namely, the place where accused assaulted Mr. Siskey, the removal of the coat and

glasses by accused, and the offer to return them upon the payment of a sum of money at a designated time and place the following day. The trial court had ample opportunity to see and hear the two witnesses, and clearly refused to give credence to the rather fantastic story related by accused. It should be noted in this connection that the court also found accused guilty of having wrongfully accepted $14.00 from Mr. Siskey as a consideration for the return of the articles taken by him (Specification of Charge II), and that this finding was disapproved by the reviewing authority solely because of pre-trial procedural errors, and not because of lack of proof to support it. The record of trial is convincing that the court's conclusions were not incorrect. Had accused merely desired to teach the alleged pervert a lesson it is hardly probable that he would have driven up in a car the following day, accepted the money, and then started away. It is equally improbable that if his motives were honorable accused would have failed to report the incident to his fellow officers, particularly in view of the risk and danger he was running of being misunderstood. The Board of Review finds no difficulty in concluding that accused in fact took the described property from Mr. Siskey by force and violence and putting in fear, two of the essential elements of robbery (MCM, 1928, par. 149f, p. 171). The only question that arises is as to whether or not the taking amounts to larceny, the third element. For the reasons hereinafter set forth the Board has decided this question in the affirmative.

It may safely be concluded that with the exception of the small amount in cash accused intended at some indefinite time and upon the payment to him of a sum of money to return to Mr. Siskey the articles which he had wrongfully and illegally taken from him by trespass. To constitute larceny there must be an intention permanently to deprive the owner of his property in the money or goods so taken (MCM, 1928, par. 149g, p. 173). The 1917, 1921 and 1928 Manuals are silent on the particular aspect of the subject now under consideration, but the following persuasive statements appear in both the 1917 Manual (p. 261) and the 1921 Manual (p. 429):

> "Whether the required intent exists where property is taken to pawn or hold for a reward depends upon the circumstances. Some cases of taking property to pledge would come within the above rule as to temporary use, as where the intent is in good faith to redeem and return it; but in the absence of such intent the taking is larceny.
>
> "Where the taking is with the design of returning it to the owner, but in the hope of obtaining a reward, it is not larceny; but if the purpose is to keep the property until a reward is offered it is. Taking property with the intent to sell it back to the owner or return it to him for some other consideration is, of course, more indicative of than inconsistent with the existence of the required intent. Thus, stealing a railroad ticket is none the less stealing because it was intended to be returned to the railroad when made use of."

It has also been held that an indefinite intention ultimately to restore stolen property is no defense to a charge of larceny (CM 108849, Barbour, and CM 108850, Hill). In this respect the legal situation may well be assimilated to that so frequently presented in desertion cases in connection with intent not to return to the service of the United States. The Manual for Courts-Martial, 1928 (par. 138, p. 142), lays down this pertinent principle which has been consistently applied:

> "The fact that such intent is coupled with a purpose to return provided a particular but uncertain event happens in the future *** does not constitute a defense."

The views adopted in the civil courts are shown by the following extracts from legal authorities:

> "Taking for the purpose of coercing owner. One who takes the goods of another for the purpose of coercing him into paying a claim which he does not owe or to perform work which he is under no obligation to perform, intending to hold the goods until the claim is paid or the work is done, is guilty of larceny. But one who takes merely to induce another to do or to abstain from doing an act with no intention of depriving the owner of the thing permanently, is not guilty of larceny." (par. 120d, 36 Corpus Juris, 769)

> "To take property with intent to hold until a reward is offered and then to claim the reward is larceny since the intent is to deprive the owner of his property unless and until a reward is paid. But to take property with the intention of returning it, merely hoping for a reward, is not a felonious taking and hence not larceny." (par. 120f, idem)

> "Taking to resell to owner. One who takes goods of another with the intention of reselling them to the owner is guilty of larceny, since the intent is to deprive the owner permanently unless he purchases them back." (120g, idem)

> "When it is said that there must be an intent to deprive an owner permanently of his property it is not meant that the intent must necessarily be to keep the specific property from him. It is sufficient if the intent be to deprive him of its value or a part of its value. For example, it has been held larceny to take a railroad ticket with intent to use it for a journey though by such use the railroad company gets possession of the ticket again. The same is true where the intent is to sell the property back to the owner as the property of the taker or of some third person, or to return it only on the payment of an expected reward. Some of the decisions seem to be at variance with this doctrine, but it is supported by the great weight of

authority." (par. 328, p. 434, Clark and Marshall on Crime, 3d Ed.)

"A mare was missed; and on the next day the prisoner said that if the prosecutor would get the agent to pay the prisoner eight pounds or nine pounds some of the neighbors would go and find the mare, and that unless the matter was settled, the mare would be removed a day's journey. Thereupon it was agreed by the prosecutor's son to give the prisoner twelve pounds as he could not get the mare otherwise, and ultimately the prosecutor paid the prisoner six pounds and the mare afterwards was returned. The Jury were directed that if the prisoner had got some person to take away the mare with the intention of obliging the prosecutor to pay him a sum of money for the return of the mare, which in fact he knew he had no claim for, it was a felonious stealing of the mare, and they convicted the prisoner; and, upon a case reserved, on the question whether the direction to the jury was correct, it was held that the conviction was right, and that the jury were right in their finding, as there was evidence to justify such a finding." (Russell on Crimes, 9th Ed. p. 872.)

If the court had found or if this Board believed that accused as a matter of fact took the articles from Mr. Siskey without intending to procure repayment from him, and with the specific intention of merely attempting to reform him by showing what could happen to him, there would be some justification in holding that there was no larceny; but the Board is convinced that the accused took these articles from the owner by placing him in fear with the intention of holding them until he had received money from the owner as demanded by him, conduct which is at least as serious as contemplated retention, until the payment of a reward, of property taken by ordinary trespass. Had the owner not appeared accused would still have been in possession of the articles and might have retained them for an indefinite period. He had no legal right to retain the articles nor to require as a condition precedent to their return to the rightful owner that the latter pay him what was in the nature of ransom. The Board is of the opinion that under all the circumstances and in the light of the expressions in the Manuals for Courts-Martial, the views expressed by the Board of Review in closely related questions of intent, and the logic and soundness of the principles applied in the civil courts, accused's action amounted to larceny. All elements of robbery have thus been established.

5. War Department records show that accused is 25 years of age and is unmarried. He graduated from high school and attended "college" at Emporia, Kansas, for one year, but did not graduate therefrom. He had no civilian occupation, having been a student prior to enlistment. He enlisted in the Army on 1 April 1941, became an aviation cadet on 23 June 1942, and after the completion of his course of pilot training on 16 February 1943, was appointed a flight officer. He was commissioned a second lieutenant, Army of the United States, 9 February 1944, and was

promoted to first lieutenant 9 March 1945. He was awarded the Air Medal with Oak Leaf Cluster and the Distinguished Flying Cross, and is entitled to wear the Distinguished Unit Badge indicative of a Presidential Unit Citation. He is credited with more than 600 hours of operational flight over the Assam-China air routes. He received a rating of "very satisfactory" for the period from 16 February 1943 to May 1943, and four ratings of "excellent" from 16 June 1943 to 1 February 1945.

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

Norman Moyer, Judge Advocate

William P. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 296636 1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Clinton E. Smith (0-1696750), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of robbery of about 50¢ in cash, glasses of the value of $15, and a gabardine jacket of the value of $7.50 from the person of John C. Siskey (Specification of Charge I), in violation of Article of War 93. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to pay to the United States a fine of $350, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. Four of the seven members of the court before which he was tried recommended suspension of that portion of the sentence imposing confinement. The reviewing authority approved only so much of the sentence as provided for dismissal and forfeiture of all pay and allowances due or to become due, and forwarded the record of trial for action under Article of War 48.

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

Accused "held up" a 19-year old civilian near one of the important streets of Kansas City, Missouri, between 9:30 P.M. and 10:00 P.M. on 18 September 1945, and directed him to proceed behind a sign board, where he struck his victim a number of blows and took from him his jacket, glasses, and a small amount of cash. He warned his victim not to report the incident to the police and advised him that he, accused, would return the articles to him the following day at a designated place upon the payment of $35.00. Accused was arrested the following day after his appearance at the designated place in an automobile and the reception by him from his victim of $14 for the return of the articles. Accused admitted the assault and the asportation of the articles, but contended that his actions were governed by his feeling of rage created by his conclusion that the young civilian was a moral pervert who should be taught a lesson. He contended that he had been approached by the young man, who had requested him to go behind a sign board, denied any intention permanently to deprive his victim of the property so taken, and while admitting receipt of cash from him claimed that he intended to return it to the civilian whom he wished to teach a lesson.

Accused saw extensive service as a pilot in transporting aircraft

over the dangerous and difficult Assam-China air routes in the China-India-Burma Sector, was officially credited with more than 600 hours of operational flight, and was awarded the Air Medal with one Oak Leaf Cluster and the Distinguished Flying Cross. In addition he is entitled to wear the Distinguished Unit badge by virtue of a Presidential citation of his unit. According to accused's statement, he flew 158 cargo missions "over the Hump".

Despite accused's excellent military record, his actions clearly show that he is not morally worthy of his commission. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed, but forfeitures remitted. As modified ordered executed. GCMO 57, 6 March 1946).

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

SPJGN-CM 296654

UNITED STATES	) INFANTRY REPLACEMENT TRAINING CENTER
v.	) Trial by G.C.M., convened at Camp Hood, Texas, 11 December 1945. Dismissal, total forfeitures, and confinement for one (1) year.
First Lieutenant HENRY A. SCHAROSCH (0-1301693), Infantry.	)

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

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

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

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

Specification: In that First Lieutenant Henry A. Scharosch, Infantry Officers Replacement Pool, Infantry Replacement Training Center, Camp Hood, Texas, did, while enroute from Camp Rucker, Alabama, to Camp Hood, Texas, without proper leave, absent himself from his organization at Camp Hood, Texas, from about 21 June 1945 to about 31 July 1945.

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

Specification 1: In that First Lieutenant Henry A. Scharosch, Infantry Officers Replacement Pool, Infantry Replacement Training Center, Camp Hood, Texas did, at Temple Texas, on or about 19 July, 1945, with intent to defraud, wrongfully and unlawfully make and utter to F. J. Marek,

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

Mott, N. Dak.

July 19 1945

FIRST Commercial BANK

Mott, N. Dak.

Pay To The Order Of F. J. MAREK $5 00/100

Five & no/100 DOLLARS

Henry A. Scharosch
01301693

and bearing indorsements as follows:
"F. J. Marek"

and by means thereof did fraudulently obtain from said F. J. Marek five and no/100 dollars ($5.00), he the said First Lieutenant Henry A. Scharosch then well knowing that he did not have and not intending that he should have any account with the First Commercial Bank, Mott North Dakota or any other bank in Mott North Dakota for the payment of said check.

Specifications 2 to 11: Similar to Specification 1 but differing as to dates, payees, places of issue, and amounts, as follows:

Spec.	Dates	Payee	Place of issue	Amount
2	20 July 1945	F.J.Marek	Temple, Texas	$5
3	17 July 1945	Shirley's Cafe	id.	5
4	17 July 1945	Eve Mull	id.	5
5	21 July 1945	Turf Dinner Club	id.	5
6	21 July 1945	Turf Dinner Club	id.	5
7	23 July 1945	F. J. Marek	id.	5
8	21 July 1945	F. J. Marek	id.	10
9	24 June 1945	Ernest Warren	Montgomery, Ala.	20
10	28 June 1945	Reed & Hovis Cartage Co.	id.	40
11	25 June 1945	Victor M. Hovis	id.	20

Accused pleaded not guilty to, and was found guilty of, all Charges

and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence, but remitted four years of the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: It was stipulated that, at the time of the commission of the alleged offenses and at all times since, the accused was in the military service of the United States (R. 6). Pursuant to orders providing for his transfer to the Infantry Replacement Training Center, Camp Hood, Texas, accused left Camp Rucker, Alabama, on 18 June 1945 (R. 6; Pros. Exs. 1, 2). He failed to arrive at his new station and was reported as absent without leave there on 21 June 1945 (R. 3; Pros. Ex. 3). On 31 July 1945 he was returned to military control at Dallas, Texas (R. 7; Pros. Ex. 4).

During his absence accused wrote the eleven checks described in the eleven Specifications of Charge II. All were drawn on the "First Commercial Bank of Mott, North Dakota." On 24 June 1945, he was in Montgomery, Alabama, and at the Elks Club in that city he met Mr. Ernest Warren, a real estate man, who cashed accused's check in the sum of $20. (R. 23-24; Pros. Ex. 13). The following day, on 25 June 1945, accused met Mr. Victor M. Hovis at the Elks Club and induced him to cash a check in the sum of $20. Three days later, on 28 June 1945, accused came to Mr. Hovis' office and asked him to cash another check in the sum of $40. Mr. Hovis acquiesced and accused made the check payable to Mr. Hovis' firm, Reed and Hovis Cartage Company (R. 24; Pros. Ex. 15). Between 17 and 23 July 1945, at Temple, Texas, accused wrote and cashed eight checks; seven in the sum of $5 and one in the sum of $10. Four of these he cashed at the cafe and beer parlor of F. J. Marek, one at the Shirley Cafe, one at the Owl Cafe owned by George Wentzell, and two at the Turf Dinner Club (R. 8-23; Pros. Exs. 5-16).

Accused had no account in the "Commercial Bank" of Mott, North Dakota, at any time subsequent to 1 May 1945 nor any credit arrangements whereby his checks would be honored. Consequently, when the checks previously described were presented to the Commercial Bank for payment, they were dishonored. The Commercial Bank was the only bank in Mott (R. 24; Pros. Ex. 16).

4. Evidence for the defense: Accused testified in his own behalf (R. 24). He asserted that he joined the military service on 10 January 1940 and was stationed in Pearl Harbor at the time of the Japanese attack. In August, 1942, he was sent to Officer Candidate School. He landed in North Africa in April, 1943, and later took part in the Sicilian Campaign. During his residence in Africa and Sicily he contracted malaria. After being sent to rest camp in England, he

returned to duty and took part in the Normandy landings. He was injured in combat three times and received the Purple Heart. In addition he was entitled to wear the Good Conduct Medal, various theater ribbons, three battle stars, the arrowhead, and braid denoting a division citation from the French government (R. 29-30, 36).

He suffered from recurrent attacks of malaria and, after leaving Camp Rucker, felt another attack impending. His first stop being at Montgomery, Alabama, he went to a hotel and obtained a room. After staying in bed two or three days, he got up but was afraid to travel. From Montgomery he went to New Orleans where he suffered another attack. Every time he exerted himself strenuously he had an attack. He finally arrived in Temple, Texas, near Camp Hood, on 13 July but another attack delayed his reporting for duty. He had a girl friend in Dallas, Texas, so he proceeded there and was apprehended by the military authorities on 31 July. During all the intervening period he did not attempt to make any contact with the military and did not report for treatment at any Army hospital. He carried a supply of quinine with him and attempted self-medication. The Army medical authorities could do no more for him (R. 26, 30-31, 37-38).

In defense of his check writing accused asserted that, when he was home at Mott in April, 1945, he asked his brother-in-law to put $500 in the bank for him. He "had reason to believe" that this deposit had been made and drew the checks in question on this assumption. In writing the checks he gave his correct name and address, presented his identification card, and made no attempt to conceal any pertinent facts (R. 27-28). He first learned that the checks had been dishonored about 5 August 1945 in a conversation with "Major Thatcher." Accused wished to make the checks good but was not allowed to send a wire to that end. Major Thatcher instructed him to wait until counsel was appointed for him. Defense counsel got in touch with the accused on 20 November, and the checks were all redeemed about 4 December (R. 28-29, 43). On cross-examination he asserted that he wrote no checks on the account in the period between 10 April, when he left Mott, and 23 June. He had not signed a signature card at the bank, never received a bank statement, or had any communication with the bank (R. 31-32).

It was stipulated that all the checks were redeemed on or about 4 December 1945 (R. 44-45; Def. Ex. A).

Accused's "66-1", showing three ratings of Excellent and one of Superior, was received in evidence (R. 45; Def. Ex. B).

5. Rebuttal testimony: Major Richard M. Thatcher was rather vague in his recollection of the interview with accused about 6 August 1945. Major Thatcher denied, however, that accused made any

statement that he wanted to repay the checks (R. 41-42).

6. The Specification of Charge I alleges that accused was absent without leave from his organization at Camp Hood, Texas, 21 June 1945 to 31 July 1945, in violation of Article of War 61.

It is undisputed that accused failed to report at Camp Hood, Texas, on 21 June 1945, following his transfer and departure from Camp Rucker, Alabama, on 18 June 1945. He remained absent without authority until apprehended at Dallas, Texas, on 31 July 1945. He asserted that en route to his new station he suffered several attacks of malaria which incapacitated him and prevented him from proceeding. However, he did not contend that he was ill in bed for the entire six weeks of his absence, and the evidence shows that in the interim he traveled around and at one time reached a town near Camp Hood but thereafter proceeded away from his destination. Further doubt is cast on his defense by the fact that at no time did he seek medical attention at Army installations although he was in their vicinity on several occasions. His story is considered to be without merit and the Specification is accordingly sustained.

7. The eleven Specifications of Charge II allege that, between 24 June and 23 July 1945, accused made and uttered to various individuals, with intent to defraud, eleven checks totalling $125, and fraudulently obtained that amount in cash, knowing that he did not have and not intending that he should have an account in the bank on which drawn, for payment.

The making and uttering of the checks, and the obtaining of the face amount thereof in cash, is not questioned. It is also not disputed that the checks were presented to the bank and dishonored because accused had no account. Accused, however, denies any intent to defraud and asserts that in writing the checks he acted under the impression that he did have an account. The basis for this misconception was accused's alleged request, some two months prior to the time he wrote the first check, that his brother-in-law deposit $500 in the bank for him. Accused testified that he "had reason to believe" that his request had been granted. On the other hand, he admitted that he had never signed a signature card at the bank, had never asked for nor received any bank statement, and had had no communication with the bank. It was within the province of the court-martial, as the determiner of questions of fact, to accept or reject accused's story, and, by its findings, the court has indicated that it preferred the latter course. No good reason appearing why their conclusions should be disturbed, the Specifications are sustained.

8. After testifying that he had requested his brother-in-law

to deposit $500 in the bank, accused attempted to relate the latter's reply but objection was sustained on the ground that the brother-in-law's statement was hearsay. This was manifestly error, for the Manual for Courts-Martial provides:

> "Of course the fact that a given statement was or was not made may itself be material. In such a case a witness may testify that such a statement was made, but not for the purpose of proving the truth of such statement" (MCM, 1928, par. 113a).

Although no showing was made as to the nature of the brother-in-law's statement, it apparently would have tended to show some basis for accused's expressed belief that the deposit had been made. Accused was, however, permitted to testify that the reply led him to such belief. Under the circumstances the Board is of the opinion that the erroneous exclusion of this testimony did not violate the substantial rights of the accused.

9. War Department records show that accused is about 28 years of age, having been born 22 April 1918, in Michigan. Upon completing two years of high school, he was employed as a grocery store clerk and as a logger for a lumbering company. After joining the Regular Army on 10 January 1940 and attaining the grade of sergeant, he attended Officer Candidate School and was commissioned a second lieutenant in the Army of the United States on 1 December 1942, entering upon active duty at that date. On 1 January 1944 he was promoted to the rank of first lieutenant. He served overseas and was awarded the Purple Heart and the Combat Infantryman's Badge. During his service in the North African Theater of Operations he contracted malaria, and upon his return to this country he was placed on limited service because of chronic, recurrent malaria. By letter to The Adjutant General dated 28 August 1945 he submitted his resignation for the good of the service which was disapproved because of pending charges.

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

Earle Stephens, Judge Advocate.

Oliver Hamer, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 296654 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Henry A. Scharosch (0-1301693), Infantry.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from his organization from 21 June 1945 to 31 July 1945, in violation of Article of War 61; and of making and uttering, with intent to defraud, between 24 June and 23 July 1945, eleven checks totalling $125, knowing that he did not have, and not intending to have, an account for their payment in the bank on which drawn, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence, but remitted four years of the confinement imposed, and forwarded the record of trial for action under Article of War 48.

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

Accused failed to report at Camp Hood, Texas, following his transfer there from Camp Rucker, Alabama, and remained absent without leave from 21 June 1945 to 31 July 1945, when he was apprehended at Dallas, Texas. During his absence he drew eleven checks, totalling $125, on his home-town bank, in which he had no account, and cashed them with various individuals and business firms in Montgomery, Alabama, and Temple Texas. All checks were redeemed prior to the trial.

Accused defended his check writing on the ground that his brother-in-law had promised to deposit $500 in the bank for him. The circumstances, however, tend to discredit his story. He ascribed his unauthorized absence to repeated attacks of malaria which incapacitated him for traveling. Although accused does suffer from chronic, recurrent malaria, it is apparent that it did not prevent him from completing his change of station. He did considerable traveling during his absence but carefully avoided any military installation.

Accused has a creditable war record. As an enlisted man in the regular army he was under attack at Pearl Harbor, and subsequently, as an officer, he took part in the North African, Sicilian, and Normandy landings, during which he received the Purple Heart. He is also entitled to wear the Combat Infantryman's Badge, the Good Conduct Medal, three battle stars, the arrowhead, and braid indicating a division citation from the French government.

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

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. As modified ordered executed. GCMO 75, 11 April 1946.

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

(227)

SPJGH - CM 296674

MAY 28 1946

UNITED STATES	)	BASE SECTION INDIA BURMA THEATER
v.	)	
Major CHARLES J. TREES (0-340358), Ordnance.	)	Trial by G.C.M., convened at Headquarters, Base Section, IBT, APO 465, 29 November 1945. Dismissal and confinement for three (3) years.

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

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

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

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

Specification: In that Major Charles J. Trees, Ordnance, Office Strategic Services, Service Unit Detachment No. 505, did, in conjunction with Captain Carroll C. Garretson, Infantry, Office Strategic Services, Service Unit, Detachment No. 404, at Rangoon, Burma, on or about 4 July 1945, knowingly and wilfully misappropriate fifty automatic pistols, value of about $2000.00 and one Submachine Gun of the value of about $35.00, property of the United States, furnished for the military service thereof.

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

Specification 1: In that Major Charles J. Trees, * * *, did, in conjunction with Captain Carroll C. Garretson, * * *, at Rangoon, Burma, on or about 4 July 1945, unlawfully dispose of fifty automatic pistols, value of about $2000.00 and one Submachine Gun of the value of about $35.00, property of the United States, furnished for the military service thereof.

Specification 2: In that Major Charles J. Trees, * * *, did, at Kyaukpyu, Burma, on or about 15 April 1945, unlawfully,

conspire with Captain Carroll C. Garretson, * * *, to misappropriate fifty automatic pistols, value of about $2000.00 and one Submachine Gun of the value of about $35.00, property of the United States, furnished for the military service thereof.

Specification 3: In that Major Charles J. Trees, * * *, did, at Rangoon, Burma, on or about 10 June 1945, unlawfully conspire with Captain Carroll C. Garretson, * * *, to unlawfully dispose of fifty automatic pistols of the value of about $2000.00 and one Submachine Gun of the value of about $35.00, property of the United States, furnished for the use of the military service thereof.

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

Specification: In that Major Charles J. Trees, * * *, did, at Kyaukpyu, Burma, during the month of April 1945, knowingly, willfully and wrongfully solicit Sergeant Marshall W. Houts, an enlisted man to commit an offense, to wit: to unlawfully dispose of by sale, firearms, property of the United States, furnished for the military service thereof.

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

3. The evidence shows that on or about 22 March 1945 accused was placed in command of the Arakan Unit, Detachment 101 at Kyaukpyu, India, which was a unit of the Office of Strategic Services attached to the Royal 15th Indian Corps. The mission of the unit was to collect all possible intelligence of military value, both tactical and strategical, on the Jap forces and to collect all available information concerning political, administrative, and economic plans of both the British and Burmese people (R. 42, 44). The unit had a Morale Operations radio station at Chittagong, India. Near the end of March 1945 accused visited Chittagong to close the station and make arrangements to move its equipment to Akyab. While at Chittagong accused was informed by the officer in charged of the station that there were about fifty pistols which he didn't need and "which weren't on paper." There was no receipt or anything for them. Accused told the officer that he (accused) wanted the pistols for trading purposes (R. 45).

About the middle of April 1945 Captain Garretson, a subordinate officer of Detachment 101, was sent to Chittagong to expedite the closing of the station and to arrange for the transport of certain equipment including the pistols above mentioned, from Chittagong to Kyaukpyu (R. 8, 45). Captain Garretson brought the pistols and some other equipment back to Kyaukpyu.

The box containing the pistols was unpacked in front of accused's tent and accused had the pistols placed in a foot locker bearing his name. Accused had the balance of the material taken over "to supply" (R. 8, 45).

At Kyaukpyu about 18 April 1945, Sergeant MarshallW. Houts had a conversation with accused and Captain Garretson in accused's tent. During this conversation accused asked Houts if he was adverse to making a little extra money. Houts testified:

> "I asked him what he had in mind. He said that Captain Garretson had returned from Chittagong and had been closing out the camp in Chittagong. He said that while there he had found fifty-one .45 caliber pistols and that there was no record for them any place. Major Trees said he knew I had been in the FBI and if I would help him out, since I knew the ropes and could advise him, he could sell the pistols and would give me one-third of whatever profits were derived from the pistols. I told him I wasn't interested in the transaction - I could think of nothing any hotter to try to handle than pistols. I went back to my tent and thought the matter over and decided if he was trying to sell the pistols I should find out what could be done about it. I went back to Captain Garretson's tent the following night and told him I would help to sell them. My idea was to find out what they were going to do with the pistols" (R. 19).

The following night accused, in the presence of Garretson, told Houts that he might have the pistols flown over the hump or if he was transferred to China he believed that he could take them with him in a jeep. Captain Garretson said that he had heard that American pistols were "worth from 500 to 1000 dollars in China . . . (R. 19).

Accused and Captain Garretson were transferred from Kyaukpyu to Rangoon, Burma, early in May 1945 (R. 8). The accused's foot locker containing the pistols was shipped to Rangoon. There was a supply room in the area at Rangoon but at the direction of accused the foot locker was placed in the quarters of accused. Early in June 1945 Colonel David A. Hunter relieved accused as commanding officer at Rangoon. Accused had an opportunity to discuss the pistols with Colonel Hunter but did not do so. He never informed Colonel Hunter that he had the pistols and also a machine gun (R.50).

A night or two before accused left Rangoon, which was about the 9th or 10th of June 1945, he took the foot locker containing the pistols and the machine gun to the quarters of Captain Garretson, which were in the same building as those occupied by accused (R. 9, 48), and told the Captain

"that this was some equipment he planned to use with Colonel Tun Oung on the Tavoy Operation" (R. 9). On the night of 3 July 1945 Sergeant Houts was informed that Captain Garretson wished to see him. Houts testified in part:

> "Captain Garretson told me that he was being transferred the following morning from Rangoon to Kandy, Ceylon * * * and told me to drive a jeep to my quarters and wait till he called me again. About 9 o'clock Captain Garretson called me and I drove the jeep over to his quarters. At that time he said he thought he had found a safe way to dispose of the pistols. He said it was Colonel Tun Oung in Rangoon. So Captain Garretson had the room boy put the box containing the pistols in the jeep and I drove it to Colonel Tun Oung's house. When we got there Tun Oung came out on the porch. Captain Garretson said to Colonel Tun Oung, "You remember Sergeant Houts?" The colonel said he did. Captain Garretson said, "He's the fourth man on the deal * * *" (R. 20).

The pistols were removed from the jeep. Houts left Captain Garretson at Colonel Tun Oung's and drove the jeep back. Captain Garretson testified that he and Houts delivered the pistols to Colonel Tun Oung after dark on 3 July 1945; that he did not notify Colonel Hunter of the delivery; and that he left Rangoon the next day (R. 12, 13).

On 15 July 1945 Sergeant Houts returned to the home of Colonel Tun Oung and informed him that he had received a communication from Captain Garretson and that Houts was to recover the pistols. Tun Oung's room boys excavated in the yard of Tun Oung's house and uncovered a foot locker bearing the name of accused. It was the same foot locker that had been delivered to Tun Oung on the evening of 3 July 1945. The box contained pistols and a submachine gun. Houts put the box in a jeep and drove it to headquarters (R. 20, 21). At the time Colonel Hunter assumed command at Rangoon an inventory was made of everything" and he assumed responsibility for that equipment. The fifty pistols and the submachine gun in accused's foot locker were not included in the inventory. After the pistols and submachine gun were returned to headquarters by Houts they were picked up on the inventory (R. 56).

The fifty pistols and the submachine gun were the property of the United States, furnished for the use of OSS and were of the aggregate value of about $2,035.00 (Pros. Ex. 1). The Office of Strategic Services received Army items direct from the Service of Supply. The mission of OSS in the India-Burma Theater was a military one (R. 25).

4. Accused elected to take the stand and testify under oath. He admitted that Captain Garretson brought the firearms to Kyaukpyu at his direction; that he kept them in his quarters; that they were shipped to him at Rangoon; and that he delivered them to Captain Garretson shortly before

accused departed Rangoon. He denied that he ordered the firearms delivered to Tun Oung and that he conspired with Captain Garretson to unlawfully dispose of them. He also denied that he solicited the aid of Sergeant Houts to dispose of them, but admitted that there was a conversation "in fun" in his tent between himself and Sergeant Houts concerning the fact "that it was a lot of pistols and they would be worth a lot in China" (R.46).

After accused arrived in Rangoon he planned the "Tavoy" operation. It was orginally planned in Kyaukpyu in the middle of April, a week after he received the box of pistols. The operation was to set up a naval base off the coast of Burma near Tavoy as a base from which to work. Tun Oung's part in the operation was to furnish accused agents and trained Burma fighters. Accused agreed to furnish all the equipment necessary for the operation - boats, arms, food, clothes and ammunition. It was necessary to submit the operation to authorities at Kandy for approval but it was not approved at the time accused was transferred from Rangoon. Accused was on friendly terms with Tun Oung and had had personal business dealings with him (R.42-52). Tun Oung was a Burmese-British officer who before the war had been the British superintendent of police in various parts of Burma and an undercover British agent. Later when the Japs occupied Burma he volunteered to remain in Burma where he obtained information for the British. He has an English wife who was in a Jap prison camp. One of the purposes of the Tavoy operation was to capture that prison camp and free the wife of Tun Oung (R.30,39).

5. Accused stands convicted of (a) misappropriating and conspiring to misappropriate 50 pistols and one submachine gun, property of the United States, furnished for the military service thereof; (b) unlawfully disposing and conspiring to dispose of the same property; and (c) soliciting an enlisted man to unlawfully dispose of the same property.

a. In discussing these several offenses, it is advisable to consider together the misappropriating (Chg. I, Spec.) and the conspiracy to misappropriate (Chg. II, Spec. 2). Misappropriation means devoting property to an unauthorized purpose by one having lawful control or supervision thereof (MCM, 1928, sec. 150i). Accused properly received possession of the small arms but since the property belonged to the United States and was intended for use in the military service, accused should have established appropriate records to reflect his possession thereof and accountability therefor. Not only did he fail to do this but he also kept the small arms in a locker in his own quarters and refrained from turning them over to the supply room of his organization although he did deliver other equipment including fire arms received from Chittagong to supply. Finally, when Colonel Hunter succeeded him as commanding officer of the detachment, accused not only left the organization without informing Colonel Hunter of the existence of these arms but he in fact turned them over to Captain Garretson. All of this conduct was consistent with an intent personally to appropriate these arms. No attempt was made by accused to follow customary practices of turning over

all accountable equipment to his successor and thus terminate his responsibility therefor. When we add to the foregoing the testimony of Houts that accused expressed the intention of appropriating these small arms to his own use, it becomes clear that the court's findings of guilty of the Specification of Charge I was amply warranted.

If the conviction of conspiracy to misappropriate is to be sustained, the proof must establish that accused and Captain Garretson agreed to misappropriate these pistols and committed an overt act in furtherance of that agreement (United States v. Kissel, 218 US 601; United States v. Robinovich, 238 US 78; Hyde v. United States, 225 US 347). The conspiracy is alleged to have occurred on or about 15 April 1945 at Kyaukpyu, Burma, It was at that time and place that accused (a) received possession of the small arms and other equipment brought from Chittagong by Captain Garretson; (b) indicated to Houts that he and Garretson were going to sell the pistols for their personal aggrandizement and (c) stored the pistols in a footlocker which he retained in his possession although he turned the other equipment including shotguns and carbines obtained from Chittagong into the supply room. Accused's subsequent conduct in refraining from informing his successor, Colonel Hunter, of the existence of these pistols and in turning them over to Garretson instead of Colonel Hunter amply demonstrated that his overt act of taking personal possession of these arms on or about 15 April 1945 was in furtherance of the agreed plan to make personal disposition of them for the benefit of accused and Captain Garretson. Accordingly, the court's findings of guilty of Specification 2 of Charge II were sustained by the evidence.

(b) Next we consider accused's alleged unlawful disposition of the pistols (Chg.II,Spec.1) and his alleged conspiracy with Captain Garretson to dispose of them (Chg.II,Spec.3). More exactly, it is alleged that on 10 June 1945 accused conspired with Captain Garretson to dispose of these small arms and that on 4 July 1945, acting in conjunction with Captain Garretson, he did dispose of them. The evidence shows that on 9 or 10 June 1945, some two months after accused had obtained possession of these arms and had indicated his intention of disposing of them for personal benefit, accused left his detachment at Rangoon, having been succeeded as commanding officer by Colonel Hunter. Prior to his departure he turned the pistols over to Captain Garretson who thereafter retained possession of them for approximately a month. They were never turned in as organizational equipment nor was Colonel Hunter, who was present for several days before accused left Rangoon, ever informed of the existence of these pistols either by accused or Captain Garretson. Such facts amply warranted the courttin inferring the existence, on or about 10 June 1945, of an agreement between accused and Captain Garretson to dispose of these arms.

Accused's act, on or about that date, of turning the weapons over to Captain Garretson constituted the necessary overt act to establish the conspiracy if in fact it was done in furtherance of the plan to dispose of these arms. That it was done in furtherance of the scheme is established by the fact that about a month after Captain Garretson obtained possession of these

pistols, he, accompanied by Houts, delivered them to Colonel Tun Oung without informing Colonel Hunter thereof and at the time of delivery told Tun Oung that Houts was "the fourth man on the deal." Hout's testimony that Garretson made this statement was competent evidence against accused since declarations made by a co-conspirator in pursuance of the conspiracy and before consumation thereof are admissible against a conspirator on trial although made outside his presence (Wharton's Criminal Evidence, 11th ed., Vol. 2, sec. 709). Considering the evidence of conspiracy before the court, it was amply warranted in concluding that, since Houts was the "fourth man" and Captain Garretson and Tun Oung constituted two others, the accused who had engineered retention of possession of the arms for several months, must be the remaining conspirator in the scheme. Thus, it is apparent that delivery of possession of these arms to Captain Garretson on 9 or 10 June 1945 was an overt act in furtherance of the plan subsequently to dispose of them to Tun Oung or to some third person.

It is apparent from the foregoing that the evidence sustains the court's findings of guilty of Specification 3 of Charge II unless the results of the trial of Captain Garretson which was held prior to accused's trial prohibits such a conclusion. In a separate trial concluded on 16 October 1945, over a month before the instant trial, Captain Garretson was acquitted of a Specification which alleged that near Kyaukpyu, Burma, on or about 15 April 1945, he conspired with accused (Trees) and Houts wrongfully to dispose of these small arms (CM 307375, Garretson). It is well established that if one of two conspirators is acquitted of a conspiracy, the other must also be acquitted because no man can conspire with himself (Morrison v. California, 291 US 82, 78 L. ed. 664; Worthington v. United States, 64 Fed. (2d) 936; auth. coll. 72 ALR 1186 and 97 ALR 1316; 11 Am. Jr. sec. 27; Wharton's Criminal Law, 12th ed., Vol. 2, sec. 1677). This rule is the same if the acquitted conspirator was tried in a separate trial (Miller v. United States, 277 Fed. 721). However, it is apparent from the Specifications that the conspiracy of which Garretson was acquitted was not the same conspiracy for which accused was here tried. As stated above, Garretson was acquitted of conspiring to dispose of these arms with accused and Houts on 15 April 1945 at Kyaukpyu, Burma. In the present trial, accused is charged with conspiring with Garretson at Rangoon, Burma, on or about 10 June 1945, wrongfully to dispose of the small arms. Thus, the conspiracy here charged occurred at another place and some two months after the conspiracy of which Garretson was acquitted. Accordingly, since Garretson was acquitted of a conspiracy different from the one here charged, his acquittal has no legal relation to or effect on the conspiracy here involved.

From the evidence before it, the court was not only warranted in concluding that the conspiracy to dispose of these weapons existed on 10 June 1945, but furthermore, was entitled to conclude that the conspiracy continued to the time Garretson disposed of the weapons to Tun Oung. The acts of Garretson as a co-conspirator are chargeable to accused and accordingly he is legally responsible for the substantive offense committed when Garretson

turned the weapons over to Tun Oung. Clearly, such conduct in view of all the circumstances here present constituted a wrongful disposal of these arms. Accordingly, the record of trial sustains the finding of guilty of Specification 1 of Charge II.

(c). There remains finally for consideration the offense alleged in the Specification of Charge III, i.e. that the accused wilfully and wrongfully solicited Sergeant Houts to commit a military offense, to wit: unlawfully dispose of the small arms. Not only are solicitations to commit certain acts denounced as crimes by the civil law (Wharton's Criminal Law, 12th ed., Vol. 1, sec. 218), but such conduct constitutes a military offense when in fact it is violative of the proscriptions of Articles of War 95 or 96 (CM 226156, Young, 15 BR 1; CM 256407, Jaycox, 36 BR 269). It is violative of Article of War 95 for an officer to solicit funds from an individual in exchange for assistance to be rendered by the officer in securing the individual employment with the United States (Young, case, supra), or for one officer to solicit another officer to make a false official statement (Jaycox case, supra). In our opinion, it is similarly dishonorable, under the proscription of Article of War 95, for an officer to solicit an enlisted man of his command to engage in the wrongful disposition of military equipment.

Sergeant Hout's testimony established the solicitation alleged. It was denied by accused although he did admit that at the time and place alleged, there was a conversation "in fun" between him and Sergeant Houts about the number of pistols and their value if disposed of in China. With such evidence before it, it was for the court initially to determine the credibility of the witnesses and the testimony to be believed. We cannot say that the court erred in finding as it did upon this evidence. The record of trial sustains the findings of guilty of the Specification of Charge III.

6. War Department records show that accused is 30 years of age, is married and has two children. He was appointed a second lieutenant, Field Artillery, Officers' Reserve Corps, in 1936. He was promoted to first lieutenant in 1940 and transferred to the Ordnance in the same year. At his own request he was ordered to active duty for one year effective 15 November 1940 and has been on active duty since that date. He was promoted to captain 1 February 1942 and to his present grade on 28 October 1942. He is a graduate of Purdue University. He served in the European Theater of Operations from 12 August 1942 until September 1943 when he was returned to this country and assigned to the Parachute School, Fort Benning, Georgia. In August of 1944 he was assigned to the Office of Strategic Services and in October 1944 was assigned to the West Coast Training Center at Newport Beach, California. According to accused, he arrived in the India-Burma Theater on 22 February 1945. In civilian life he operated a company engaged in manufacturing flavoring extracts for beverages. There is nothing in the War Department records to indicate that he was ever previously convicted of any offense.

7. Numerous communications, including letters from Messrs, Brubaker and Rockhill, Warsaw, Indiana, counsel for accused, have been received and

considered by the Board of Review and are forwarded herewith. Further, we have considered a "Report of Investigation for Major Charles J. Trees, 0-340358," dated 13 February 1946 made by Major William P. King and Captain Robert L. Bohlen, and submitted on behalf of the accused. On 10 April 1946 a full hearing before the Board of Review was accorded counsel for accused at which Lieutenant Commander Derek A. Lee of the British Navy and James R. Withrow, Jr., a former officer attached to the Office of Strategic Services, appeared and offered information as to OSS activities and its attitude toward the expendability of military equipment furnished to it. Written statements subsequently made by these two persons and submitted to the Board of Review are also forwarded herewith.

8. The court was legally constituted and had jurisdiction of accused and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The sentence imposed is authorized upon conviction of a violation of Article of War 94 or Article of War 96 and dismissal is mandatory upon conviction of a violation of Article of War 95.

Thomas N. Tait, Judge Advocates.

Joseph J. Stern, Judge Advocates.

Robert E. Trevethan, Judge Advocates.

JAGF CM 296674 1st Ind

WD, JAGO, Washington 25, D. C. JUL 1 3 1946

TO: Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Major Charles J. Trees (0-340358), Ordnance Department.

2. Upon trial by general court-martial this officer was found guilty of knowingly and willfully misappropriating 50 automatic pistols and one sub-machine gun, property of the United States, furnished for the military service thereof, in violation of Article of War 94; of wrongfully disposing of the same property; of unlawfully conspiring with a fellow officer to misappropriate the same property; and of conspiring with the same fellow officer unlawfully to dispose of the same property, in violation of Article of War 96; and of knowingly, willfully, and wrongfully soliciting an enlisted man to commit an offense, to wit: unlawfully to dispose of the same property by sale, in violation of Article of War 95. He was sentenced to dismissal, total forfeitures and confinement at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A complete summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I am not in agreement with the opinion of the Board of Review.

4. The evidence, briefly summarized, shows that about 22 March 1945, accused assumed command of a unit of the Office of Strategic Services, located at Kyaukpyu, India. A few days later he went to Chittagong, India, to close a radio station there and to arrange for disposition of the equipment. The officer in charge of the radio station advised accused that he had 50 surplus pistols which were not accounted for "on paper." Accused stated that he wanted the pistols for trading purposes - apparently for the purpose of delivering them to officers of the British Army in exchange for other property or services. Some two weeks later a Captain Garretson, a subordinate in accused's unit, under orders, went to Chittagong, secured the pistols, a sub-machine gun and other equipment and brought them to Kyaukpyu. At Kyaukpyu the pistols and machine gun were placed in a foot locker which in turn was placed in accused's tent. The other equipment was turned in to the unit supply room.

A Sergeant Houts, a college graduate and a former member of the Federal Bureau of Investigation, who was at the time a member of

accused's unit, testified that about 18 April 1945 he took part in a conversation in accused's tent in the course of which accused asked Houts if he wanted to make some money and proposed that Houts arrange for the sale of the pistols and machine gun. Houts testified that Garretson later stated that he might have the pistols and machine gun taken into China; and that Garretson remarked that they might be sold in China for $500 to $1,000 apiece. In his testimony at the trial accused stated that conversations of the tenor described by Houts had taken place but that the remarks concerning disposition of the pistols and machine gun were made wholly in jest.

Early in May 1945 accused and his unit were transferred to Rangoon, Burma. The foot locker containing the pistols and machine gun was shipped to Rangoon and there again placed and kept in the quarters which accused occupied. Early in June accused was relieved as commanding officer of the unit by a Colonel Hunter. Accused did not discuss the pistols and machine gun with Colonel Hunter.

Accused was ordered to duty in India and about 9 or 10 June 1945, a day or so before his departure for his new station, delivered the foot locker containing the pistols and machine gun to the quarters occupied by Garretson, in the same building. At the time of the delivery accused told Garretson that the pistols and machine gun constituted equipment which accused planned to use with a Colonel Tun Oung on the "Tavoy Operation."

On the night of 3 July 1945 Sergeant Houts and Garretson took the pistols and machine gun to a dwelling occupied by Colonel Tun Oung and left them there. The weapons were buried in the yard near the dwelling. About 15 July the weapons were recovered through Sergeant Houts and delivered to the supply room of the unit.

Colonel Tun Oung was an officer of the British Army, educated in England, who had been a British superintendent of police in Burma prior to the war and who during the war had remained in Burma as an undercover British agent. He was married to an English woman who during the war was incarcerated in a Japanese prison camp at Tavoy, Burma. Accused testified that prior to and after his arrival in Rangoon plans were made within his unit and with the British to arm and equip an expedition for a raid on Tavoy for the purpose of securing information and liberating the wife of Tun Oung and other prisoners. The plans were submitted to higher headquarters for approval but prior to his departure from Rangoon no notice of approval had been received. Garretson was the Operations Officer for the unit and accused turned the pistols and machine gun over to him for use in equipping the expedition. Accused denied any intention to misappropriate the arms. He also denied having solicited Sergeant Houts to dispose of them and denied knowledge of the actual delivery to Tun Oung.

The evidence shows that the Tavoy operation was in fact disapproved but that notice of the disapproval did not reach Rangoon until after the departure of accused from that city.

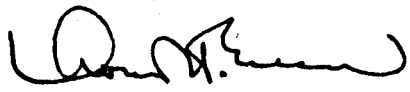
5. Subsequent to the receipt in this office of the record of trial consideration has been given to written and oral statements by Mr. James R. Withrow, Jr., formerly an officer of the Navy connected with the Office of Strategic Services In Burma, and of Lieutenant Commander Derek A. Lee, an American citizen, but an officer of the British Royal Navy, who was also connected with the operations of the Office of Strategic Services in Burma. The statements of these individuals support in detail the testimony of accused concerning the planning of the Tavoy operation and the appropriateness of utilizing the firearms in equipping the expedition. They have stated that the method of handling the pistols and machine gun was not, under the conditions then prevailing in Burma, unusual or indicative of any fraudulent purpose.

6. There is evidence to support the findings of guilty, but I am not convinced that the transactions involving the weapons were attended by any intention on the part of accused to defraud the United States or to profit financially. The circumstances are consistent with the contention of the defense that the pistols were held and delivered to Garretson only for the purpose of advancing the interests of the United States and furthering military operations against the Japanese. The methods used were, of course, irregular but the surrounding circumstances must be given due weight. If the testimony of Sergeant Houts is taken at its face value it is indicative of a dishonest purpose on the part of accused. The conversations were, however, susceptible of the interpretation placed upon them by accused and I do not find in the attendant circumstances any substantial support for the theory of fraud. It does not appear that at the time the weapons were turned over to Garretson accused knew that the Tavoy operation had been disapproved. Garretson was the Operations Officer for the unit and if the weapons were to be used in equipping the expedition the delivery to Garretson was a normal and not an implicating step. In so far as the record shows accused did not know what happened to the arms after his own departure from Rangoon. The inference that Garretson delivered the arms to Tun Oung by prearrangement with accused is tenuous and is no stronger than the rest of the proof.

7. This is a case which requires your action under the 48th Article of War and it is our duty, therefore, to weigh the evidence and determine what ought to be done. My study of the record of trial and the additional matters presented do not convince me that guilt has been proved beyond reasonable doubt and accordingly I recommend that the findings of guilty and the sentence be disapproved.

8. I am inclosing alternative forms of action. Form A is designed to disapprove the findings and sentence. Form B is designed to confirm

the sentence, remit the forfeitures, reduce the term of confinement to two years and to direct execution of the sentence as thus modified, as recommended by the Board of Review.



3 Incls
1. Record of trial
2. Form A - form of action
3. Form B - form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(Findings and sentence disapproved. GCMO 235, 23 July 1946).

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

SPJGK - CM 296759

1 FEB 1946

UNITED STATES v. First Lieutenant JOHNNY M. DAVIS (O-1554161), Ordnance Department.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Turner Field, Albany, Georgia, 10 December 1945. Dismissal, total forfeitures and confinement for two (2) years.

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

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

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

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

Specification 1: In that First Lieutenant Johnny M. Davis, Squadron C-1, 2109th AAF Base Unit, Turner Field, Albany, did, at Birmingham, Alabama, on or about 31 July 1945, with intent to defraud, falsely make in its entirety, a certain check in the following words and figures, to-wit:

No. _____

THE CITIZENS AND SOUTHERN BANK
OF ALBANY

ALBANY, GA. 31 July 19 45

PAY
TO THE
ORDER OF Cash ---------- $20/00

Twenty & no/100 ---------- DOLLARS

Rex E. Grimm
1st Lt., O-1560200

Indorsed: Sqd "B"
2109-B.U.
Turner Field, Ga.

which said check was a writing of a private nature, which might operate to the prejudice of another.

Note: Specifications 2, 3 and 4 are similar in form to Specification 1 and vary materially therefrom only with respect to designation of drawee bank, which in each Specification is alleged to be "Bank of Independence, Independence, Missouri", and place of offense, date of offense, date of check, amount of check, designation of drawer and indorsement, as follows:

Spec.	Place of Offense	Date of Offense	Date of Check	Amount	Drawer	Indorsement
2	Albany, Georgia	8 August 1945	"8 Aug. 1945"	$50.00	"Rexdel E. Grimm O-1560200, Sqd-B-Turner Field"	None
3	Albany, Georgia	11 August 1945	"Aug 11-1945"	$50.00	"Rexdel E. Grimm O-1560200-Sqd-B-Turner Field"	"Rexdel E. Grimm"
4	Columbus, Georgia	9 August 1945	"9 Aug 1945"	$50.00	"Rexdel E. Grimm O-1560200"	None

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

Specification: (Finding of not guilty).

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

3. Evidence for the prosecution.

It was stipulated between the accused, his counsel and the personnel of the prosecution that "the accused at no time ever secured permission or authority from Lieutenant Rexdel E. Grimm, sometimes known as Rex E. Grimm, to sign the name of the said Lieutenant Grimm to any check, bank draft or other paper of any description whatsoever" (Ex. H).

On 23 November 1945 at Turner Field, Albany, Georgia, accused subscribed and swore to a statement, offered by the prosecution and admitted in evidence without objection (R. 6, Ex.A), which reads in part as follows:

"I, 1st Lt. JOHNNY M. DAVIS, ASN O-155416, after having been duly warned of my rights and the Twenty-Fourth Article of War read and explained to me, do hereby make the following statement of my own free will, voluntarily and without coercion or duress.

"On or about July 28th I was put on orders to proceed to Birmingham, Alabama to pick up fifteen government vehicles to return to this station. While at Birmingham, Alabama I cashed one check in the name of Rex E. Grimm for the sum of $20.00 at Gafford Tire and Battery Company Inc., 23rd Street, Avenue F, Birmingham, Alabama. Then after receiving the money returned to Turner Field, Georgia, not hearing anything else about the check until about 8 October 1945.

"I met Rex Grimm while attending school at Aberdeen, Maryland. I came back to Turner Field and cashed two checks each for fifty dollars ($50.00) at the First State Bank in his name. These checks were cashed approximately three months ago and were drawn on the Bank of Independence, Independence, Missouri, at which bank I knew that the real Rex Grimm had an account. Both of these checks were payable to cash.

"On or about 9 August 1945, I also cashed another check for $50.00 at the Columbus Bank and Trust Company, Columbus, Georgia, to which I signed the name and serial number of Rexdel E. Grimm. On another occasion I wrote a check for twenty-five dollars ($25.00), payable to Cash and signed with the name and serial number of Rexdel E. Grimm and cashed it at the Post Exchange, Fort Benning, Georgia.

* * *

"I had full knowledge when I signed Rex E. Grimm's name and I was sober and sane when these acts were committed. I have communicated with Lt. Grimm at the A.P.O. address given for him by the Post Legal Officer at Turner Field and in the belief that Lt. Grimm had suffered a pecuniary loss due to my actions, I sent him a Post Office Money Order in the amount of Two Hundred Twenty Dollars ($220.00). I now understand that Lt. Grimm did not incurr losses due to my actions and it is my wish that the money be sent to the banks or bank suffering such loss. ***"

"My actions are the result of extreme necessity and I now have no other desire than to bring this matter to a conclusion as soon as possible. I have made every attempt to restore myself to the good faith and confidence of everyone concerned by remitting the amount of all these checks to Lt. Grimm. Because my wife and our child are of necessity implicated in anything related to me, I am willing to suffer just punishment but request that some consideration be made of my personal repentance."

In support of this confession the prosecution introduced four checks into evidence without objection (Exs. B,C,D and E). Exhibit B corresponds in all material respects to the check described in Specification 1 of Charge I, Exhibit C to that described in Specification 2, Exhibit D to that described in Specification 3, and Exhibit E to that described in Specification 4.

4. <u>Evidence for the defense.</u>

Accused, after having been apprised of his rights, elected to make a sworn statement (R. 8). He testified that he enlisted in the service 12 July 1935, rose to the grade of technical sergeant, and subsequently became a commissioned officer "by going to Officers' Candidate School" (R. 9). In December 1944 he incurred a debt of $400 in order to "help pay" a hospital bill for his father. His baby also became ill. He borrowed $300 at Fort Myers "to pay some necessary bills" (R. 9). His rent was $110 a month, and "living conditions" were "high" (R. 10). He borrowed some money from the Albany Bank in Georgia to "repay my debt," and also borrowed $75 from the Red Cross at Aberdeen, Maryland (R. 10). He repaid the Red Cross, and borrowed from an "individual" to repay the Albany Bank (R. 10-11). "I had to pay the individual back so I wrote out a check using Lieutenant Grimm's signature, and paid back the money" (R. 11). He had seen Lieutenant Grimm's signature in card games (R. 11,12), and copied his serial number from his footlocker to "use it" (R. 12). He wrote, signed with Lieutenant Grimm's signature and cashed the checks admitted in evidence as Exhibits B, C, D and E (R. 11,12).

War Department Adjutant General's Office Form 66-2, "AAF Officers' Qualification Record," pertaining to accused, was offered by the defense and admitted in evidence without objection (Ex. G). This exhibit was a true copy of his record and showed he entered active commissioned service 6 March 1943 at Aberdeen Proving Ground, Maryland. Between that date and 11 April 1945 his efficiency ratings were successively as follows: 6 months, "excellent"; 8 months, "superior"; 2 months, "excellent"; 6 months, "3.6"; 1 month, "very satisfactory"; 2 months, "excellent".

The deposition of Captain Andrew B. Marion, Camden, South Carolina, was offered in evidence by the defense and admitted without objection (Ex. I). In his deposition Captain Marion stated that accused was Assistant Ordnance Officer from June 1945 to October 1945, during which time Captain Marion was Base Ordnance Officer at Turner Field, South Carolina. While he was thus associated with Captain Marion accused was "very attentive to his duties" and "well informed and of good sound judgment in both technical and non-technical matters." Captain Marion gave accused "a wide range of authority in the duties which I delegated to him and always received loyal and efficient performance by him. At no time during my association with Lt. Davis did I find any reason to doubt his honesty and integrity. On the contrary, I found him to be very careful with the government equipment over which he had supervision and control. It was my opinion then, and is now, that Lt. Davis was thoroughly dependable and honest in performance of his army duties during this period."

5. The forgeries alleged in the Specifications of Charge I were admitted by the plea of guilty and were proved by accused's confession and by the checks admitted in evidence. The checks were false, since they were signed with a name not that of accused, and they would, if genuine, apparently impose a legal liability upon the purported drawer. Fraudulent intent admitted by the plea of guilty is established by evidence that

accused signed Lieutenant Grimm's name without authority, copied Lieutenant Grimm's serial number from his footlocker in order to "use it," did use it, and thereby gave a verisimilitude to his forgeries, and uttered the checks in question (CM 294487, Spillner; 247111, Grannell, 30 B.R. 258; CM 234195, Woods, 20 B.R. 292; and see CM 253054, Howard, 34 B.R. 251,252). Restitution to the injured parties is not a defense (Woods, supra).

The record shows that the law member was absent from the trial because he had been "transferred." The appointing authority did not prohibit trial in the absence of the law member and did not revoke his detail. Under an opinion rendered by this office, the transfer did not invalidate the proceedings (CM 224424 (1942), Sec. 365 (9), I Bull. JAG, p. 212).

6. War Department records disclose that this officer is 29 years of age, is married, and on 1 November 1942 had no children. He completed the first year only of high school. From January 1934 to September 1934 he was a "labor foreman," supervising 20 negroes "loading and unloading freight" for Bibb Manufacturing Company, Columbus, Georgia, and from September 1934 to June 1935 was employed by the same concern in various types of mechanical work. Since his enlistment 12 July 1935 he has been in the service continuously. Upon completing the Officer Candidate Course at the Ordnance School, Aberdeen Proving Ground, Maryland, he was commissioned second lieutenant, Army of the United States, 6 March 1943, and ordered to active duty effective the same date. He was promoted to first lieutenant 13 October 1943.

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

Herman Mayer, Judge Advocate

William J. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 296759 1st Ind

Hq ASF, JAGO, Washington 25, D.C. 28 February 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Johnny M. Davis (O-1554161), Ordnance Department.

2. Upon trial by general court-martial, this officer pleaded guilty to and was found guilty of forging four checks in the total amount of $170 between 31 July 1945 and 11 August 1945, in violation of Article of War 93 (Specifications 1,2,3 and 4 of Charge I). No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The accused forged the signature and serial number of a fellow officer to a check for $20 at Birmingham, Alabama, 31 July 1945, and similarly forged three other checks for $50 each, at Albany, Georgia, 8 and 11 August 1945, and at Columbus, Georgia, 9 August 1945. The accused had seen this officer's signature in card games, and had copied his serial number from his footlocker. The accused, according to his sworn statement made before trial and admitted in evidence, cashed these checks and later made restitution of the sums so obtained. He testified he forged the checks to obtain funds to repay debts incurred as a result of the illness of his father, and of "high living conditions" at Fort Myers, Florida.

The accused is married and has one child. He enlisted 12 July 1935 and has been continuously in the service since that date. On 6 March 1943 he was commissioned second lieutenant and was promoted to first lieutenant on 13 October 1943. He deliberately planned and executed these forgeries and should be punished therefor. It is recommended, therefore, that the sentence be confirmed but that the forfeitures be remitted,

that the sentence as thus modified be ordered executed, and that a United States disciplinary barracks be designated as the place of confinement.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. GCMO 42, 6 March 1946).

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

SPJGH - CM 296779

25 JAN 1946

UNITED STATES v. Private OLIVER L. CRENSHAW (18064130), Squadron M, 324th Army Air Forces Base Unit, Chatham Field, Georgia.	THIRD AIR FORCE Trial by G.C.M., convened at Chatham Field, Georgia, 28 November 1945. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
TAPPY, STERN and TREVETHAN, Judge Advocates.

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Oliver L. Crenshaw, Squadron M, 324th AAF Base Unit, Chatham Field, Georgia, did, at Chatham County, Georgia, on or about 30 September 1945, by force and violence and by putting him in fear, feloniously take, steal, and carry away from the person of Sergeant Malaquias Trujillo about $85.00, lawful currency of the United States, the property of said Sergeant Malaquias Trujillo.

Accused pleaded not guilty to the Charge and Specification. He was found guilty of the Charge and guilty of the Specification except the words "by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Sergeant Malaquias Trujillo about $85, lawful currency of the United States, the property of said Sergeant Malaquias Trujillo," substituting therefor the words "with intent to do him bodily harm, commit an assault upon the person of one Sergeant Malaquias Trujillo by striking him on or about the head and face, with a dangerous instrument, to wit, a glass bottle," of the excepted words not guilty, of the substituted words guilty. Evidence of two previous convictions, one for wrongfully living with a woman not his wife and the other for being drunk and disorderly in public, were introduced. In the present

case, accused was sentenced to dishonorable discharge, total forfeitures and confinement for five years. The reviewing authority approved only so much of the findings of guilty as involved a finding of guilty of aggravated assault and battery, in violation of Article of War 96, approved only so much of the sentence as provided for dishonorable discharge, total forfeitures and confinement for one (1) year. designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of War might direct, as the place of confinement, and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. The prosecution's evidence is sufficient to warrant the conclusion that accused committed an assault and battery upon Sergeant Trujillo by hitting him on the head at least twice with a soda water bottle (R, 8, 14, 15, 22, 30, 32). The material question presented by the record of trial, however, is whether or not the approved findings of guilty of aggravated assault and battery and the sentence to one year of confinement can be sustained.

4. Accused was charged with and tried for the offense of robbery under Article of War 93, the Specification alleging that accused did "by force and violence and by putting him in fear" feloniously take, steal and carry away $85 from the person of Sergeant Malaquias Trujillo. The Specification does not allege that any assault accused may have committed was committed with the specific intent to do bodily harm with a dangerous weapon. Furthermore, the Specification contained no matter alleging that a battery was committed upon Sergeant Trujillo by striking him on the head with a bottle. It is elementary that an accused may not be found guilty of an offense requiring a particular specific intent when he has not been charged with any offense which has such specific intent as an essential element thereof (CM ETO 4825, 4 Bull. JAG 89). The offense of robbery does not involve the specific intent to do bodily harm with a dangerous weapon. Accordingly, assault with intent to do bodily harm with a dangerous weapon is not lesser included of robbery. Realizing that fact, the reviewing authority refused to approve <u>in toto</u> the court's findings of guilty, However, he did approve so much thereof "as involves a finding of guilty of aggravated assault and battery." Such an approved finding by the reviewing authority can only be sustained if aggravated assault and battery is lesser included of the offense with which accused was originally charged.

A lesser included offense is one that is always lesser than and <u>necessarily included</u> in the offense originally charged, i.e., an offense the elements of which necessarily are proved in proving the offense charged (CM 254312, <u>Buchanan</u>, 25 BR 205). An essential element of robbery is that the taking be by force and violence or putting in fear (MCM, 1928, par. 149<u>f</u>). Patently such conduct might well amount to something less than an aggravated assault. A taking of property from the person of another accompanied by commission of a simple assault and battery constitutes the offense of robbery. Thus, it seems clear that aggravated assault and battery is not, as a matter of law, lesser included of robbery. It might well be that, had

the Specification here specifically alleged that the force and violence exercised by accused against his victim consisted of striking him over the head with a bottle, then so much of the court's findings of guilty as involved an assault and battery by so striking the victim could have been sustained (CM 220396, Shepherd, 12 BR 393; 1 Bull. JAG 20). However, the Specification does not so allege; it merely alleges the taking of property by force and violence and putting in fear. Such general language is insufficient to apprise and accused that he is being charged, among other things, with an aggravated assault and battery by striking his victim over the head with a bottle.

Simple assault and battery is a lesser included offense of robbery inasmuch as the word "violence" as used in a robbery specification means "actual violence to the person" (MCM, 1928, par. 149f; People v Allie, 216 Mich. 133, 184 NW 423; 23 RCL 1162; 46 Am.Jr. 166). Accordingly, in our opinion, the record of trial is legally sufficient to sustain only so much of the approved findings of guilty as involve simple assault and battery, and legally sufficient to support only so much of the sentence as approved as involves confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months.

Thomas M. Tappy, Judge Advocate.

Joseph J. Stern, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

SPJGH - CM 296779 1st Ind

Hq ASF, JAGO, Washington 25, D. C. FEB 5 1946

TO: The Commanding General, Third Air Force, Tampa, Florida

1. In the case of Private Oliver L. Crenshaw (18064130), Squadron M, 324th AAF Base Unit, Chatham Field, Georgia, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that so much of the approved findings of guilty of the Charge and Specification be vacated as involve findings of guilty of an offense other than simple assault and battery committed at the time and place alleged, in violation of Article of War 96, and further recommend that so much of the sentence be disapproved as exceeds confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months. Thereupon you will have authority to order the execution of the sentence.

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

(CM 296779)

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

SPJGH - CM 296781

7 FEB 1946

UNITED STATES v. First Lieutenant EDWARD K. NICHOLS, Jr. (0-566318), Air Corps.	FIRST AIR FORCE MITCHEL FIELD, NEW YORK Trial by G.C.M., convened at Godman Field, Kentucky, 26 November 1945. Dismissal.

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 1st Lt. EDWARD K. NICHOLS, JR, Air Corps, Squadron "D", 118th AAF Base Unit, did, at Godman Field, Fort Knox, Kentucky, on or about 12 September 1945, with intent to defraud wrongfully and unlawfully make and utter to 1st Lt. HORACE M. KING, 477th Composite Group, Godman Field, Kentucky, a certain check, in words and figures as follow, to wit: "Louisville, Ky, 12 September 1945, No. 6, Citizens Fidelity Bank and Trust Company, 21-10/8-Lou, Pay to the order of Cash $50.00, fifty dollars, s/ EDWARD K. NICHOLS, JR", and by means thereof, did fraudulently obtain from 1st Lt. HORACE M. KING, 477th Composite Group, $50.00, he the said 1st Lt. EDWARD K. NICHOLS, JR, then well knowing that he did not have, and not intending that he should have, sufficient funds in the Citizens Fidelity Bank and Trust Co., Louisville, Kentucky, for the payment of said check.

Specification 2: Same allegations as Specification 1.

Specification 3: Same allegations as Specification 1 except check in the amount of $30.00.

Specification 4: Same allegations as Specification 1 except check in the amount of $30.00.

Specification 5: Same allegations as Specification 1 except check in the amount of $30.00.

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

Specification: In that First Lieutenant Edward K. Nichols, Jr., Air Corps, "D" Squadron, 118th Army Air Forces Base Unit (Bombardment (M) & Fighter), Godman Field, Kentucky, did, without proper leave absent himself from his station at Godman Field, Kentucky, from about 2 October 1945 to about 24 October 1945.

He pleaded guilty to and was found guilty of all Charges and Specifications. Evidence of one previous conviction by a general court-martial for absence without leave from 18 May 1945 to 24 May 1945 was introduced, for which accused was sentenced to forfeit $50 of his pay per month for four months and to be restricted to his post for 60 days. For the instant offenses, 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. With respect to the Charge and its five Specifications, the prosecution's evidence shows that on 12 September 1945, accused made five checks payable to cash, and uttered each of them to First Lieutenant Horace M. King, at Godman Field, Kentucky. Three of the checks were for $30 each and two were for $50 each, all drawn upon the Citizen's Fidelity Bank & Trust Company of Louisville, Kentucky. In each instance, accused received cash for the face amount of the respective checks. Each of the five checks made and uttered by accused were thereafter indorsed by Lieutenant King and cashed at Fort Knox Post Exchange. The Post Exchange in turn presented the checks to the drawee bank for payment, where they were each dishonored because of insufficient funds to the credit of accused's bank account. At the time Lieutenant King cashed these checks, accused assured him that the checks were good and would be honored when presented for payment. The vice president and cashier of the Citizen's Fidelity & Trust Company testified that on 12 September 1945, the date on which all of the checks were made and uttered, the balance to the credit of accused's account was $14.20, and that the bank would not on that date have honored a check drawn on accused's account in excess of that amount.

With respect to the Additional Charge and its Specification, the prosecution's evidence shows that on 2 October 1945, accused absented himself from Godman Field, Kentucky, where he was stationed, and remained absent without leave until 24 October 1945. On the last mentioned date, Captain

Carl B. Taylor and another officer, both of whom were friends of accused and stationed at Godman Field, were visiting in Louisville, Kentucky and by chance learned that accused was living in an apartment in that city. They located accused and persuaded him to return to Godman Field in a reconnaissance car driven by a military policeman.

4. After being warned of his rights as a witness, accused elected to be sworn and give testimony in his own behalf. He testified that following the commission of the offenses alleged in Specifications 1-5 of the Charge, he began to brood and became remorseful. He was too humiliated to confront the people at Godman Field, and did not wish to acquaint his family with his predicament. After a period of about two weeks he decided that only one course was left open to him and that was self-destruction. With this in mind, he left Godman Field, 30 September 1945 and thereafter made several attempts to destroy himself, none of which was successful. Finally he mustered sufficient courage to confer with members of his family who assured him that they would stand by him and at the same time persuaded him to return to his station and accept such punishment as might be administered.

5. The prosecution's evidence together with accused's plea of guilty establish that on 12 September 1945 he made and uttered five checks, aggregating $190, all drawn against his bank account in which he had a balance of but $14.20. Uttering five checks aggregating such a substantial amount, considering the meager balance then on deposit to his account, justifies an inference of intent to defraud and demonstrates that his pleas of guilty to these offenses were not improvidently entered. The findings of guilty of the Charge and its five Specifications are, accordingly, fully sustained by the record.

The prosecution's evidence, accused's plea of guilty and his testimony at the trial also clearly establish accused's absence without leave from his station for the period of time alleged in the Additional Charge and its Specification and fully supports the court's findings of guilty.

6. Records of the War Department show accused to be 27 years of age and single. He completed high school and graduated in 1941 from Lincoln University with an A.B. degree. He was inducted into the Army on 26 February 1942 and following his graduation from Army Air Forces Officer Candidate School was commissioned a second lieutenant, Army of the United States, 28 October 1942. He was promoted to the grade of first lieutenant on 3 July 1943.

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

the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61, and mandatory upon conviction of a violation of Article of War 95.

Thomas N. Tappy, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert C. Truschau, Judge Advocate.

SPJGH - CM 296781 1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Edward K. Nichols, Jr. (0-566318), Air Corps.

2. Upon trial by general court-martial this officer was found guilty, with intent to deceive, of wrongfully and unlawfully making and uttering five checks on 12 September 1945 (Charge, Specifications 1-5), by means whereof he fraudulently obtained the sum of $190.00, in violation of Article of War 95, and of being absent without leave from 2 October 1945 to 24 October 1945 (Additional Charge, Specification), in violation of Article of War 61. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Charges and Specifications, legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion. On 12 September 1945, at Godman Field, Kentucky, accused made five (5) checks payable to cash and uttered each of them to a fellow officer, by means of which he fraudulently obtained the aggregate sum of $190. Three of the checks were for $30 each and the other two were for $50 each, all drawn upon the Citizen's Fidelity Bank & Trust Company of Louisville, Kentucky. In each instance, accused received cash equal to the face amount of the respective checks. All of the checks were presented in due course of business to the drawee bank and dishonored because of insufficient funds on deposit to accused's credit. On the date the checks were made and uttered by accused, his bank balance was $14.20. Uttering five checks aggregating such a substantial amount and, considering the meager balance then on deposit to his account, is indicative of his fraudulent intent.

On 2 October 1945, accused absented himself without leave from Godman Field, Kentucky, where he was then stationed, and remained absent without leave until 24 October 1945.

Following receipt of the record of trial, this office received from the Commanding General, First Air Force, a report of the proceedings of a Board of Officers conducted according to AR 420-5 and relating to the mishandling of certain funds by accused as commanding officer and Class "A" agent for his squadron, during the month of August 1945. The Board found,

among other things, (1) that accused failed to make a turnback to the finance officer of the sum of $357.45 for troops of Squadron "D" not paid on the 31st of August 1945; (2) that he made a false official statement to the finance officer on the 2d of September 1945 to the effect that all troops of Squadron "D" had been paid for the month of August 1945; (3) that during the months of September and November 1945, the post Chaplain, acting as agent for the parents of accused, paid four enlisted men of accused's squadron a sum totalling $121.95, which was equivalent to their aggregate Army pay for the month of August 1945, and (4) that on or about 15 September 1945 the post Chaplain paid to the finance officer the sum of $235.50, which amount had been received by accused for the purpose of paying Sergeant Donald B. Fisher on 31 August 1945, and who at that time was not a member of Squadron "D". Action upon the additional offenses is being held in abeyance pending disposition of the present case. I recommend that the sentence be confirmed and carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(Sentence confirmed and ordered executed. GCMO 49, 6 March 1946).

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

SPJGN-CM 296782

UNITED STATES	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Godman Field, Kentucky, 1 and 5 November 1945. Dismissal.
Second Lieutenant STRATMAN COOKE (0-863907), Air Corps.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Stratman Cooke, Air Corps, 618th Bombardment Squadron (M), 477th Composite Group, did, without proper leave, absent himself from his organization and station at Godman Field, Kentucky, from about 21 August 1945 to about 27 August 1945.

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: In that Second Lieutenant Stratman Cooke,

Air Corps, 618th Bombardment Squadron (M), 477th Composite Group, did, at Godman Field, Kentucky, on or about 8 September 1945, with intent to defraud, wrongfully and unlawfully make and utter to Second Lieutenant Elliotte A. Taylor, a certain check in words and figures as follows:

MORRIS PLAN INDUSTRIAL BANK DATE 8 Sept. 1945

LOUISVILLE, KY
City or Town

PAY TO THE
ORDER OF Cash $ 80.00

Eighty and No/100 Dollars

For the purpose of obtaining payment of this check I hereby represent that the amount stated therein is on deposit in said Bank in my name subject to this check and is hereby assigned to the payee or holder thereof.

PX 8775 /s/ Lt Stratman Cooke

and by means thereof, did fraudulently obtain from Second Lieutenant Elliotte A. Taylor, $80.00, he the said Second Lieutenant Stratman Cooke, then well knowing that he did not have and not intending that he should have sufficient funds in the Morris Plan Industrial Bank for the payment of said check.

Specification 4: (Findings disapproved by reviewing authority).

Specification 5: In that Second Lieutenant Stratman Cooke, Air Corps, 618th Bombardment Squadron (M), 477th Composite Group, did, at Godman Field, Kentucky, on or about 11 September 1945, with intent to defraud, wrongfully and unlawfully make and utter to First Lieutenant H. M. King, a certain check in words and figures as follows, to wit:

MORRIS PLAN INDUSTRIAL BANK 21-71
THE
The bank for MORRIS the Individual
PLAN

No. Louisville, Ky., 11 Sept 1945

PAY TO THE
ORDER OF Cash $100.00

One Hundred and No/100 DOLLARS

FOR _____ /s/ Lt Stratman Cooke

and by means thereof, did fraudulently obtain from First Lieutenant H. M. King $100.00, he the said Second Lieutenant Stratman Cooke, then well knowing that he did not have and not intending that he should have sufficient funds in the Morris Plan Industrial Bank for the payment of said check.

Specifications 6, 7, 8, and 9 are identical with Specification 5 except as to date, amount, and the name of the person or organization to whom the check was issued, these exceptions being as follows:

Specification	Date	Amount	Person
6	11 September 1945	$50	1st Lieutenant H.M. King
7	12 September 1945	150	Fort Knox Post Exchange
8	12 September 1945	200	Fort Knox Post Exchange
9	11 September 1945	50	1st Lieutenant H.M. King

Specification 10: (Finding of not guilty).

He pleaded not guilty to the Charges and Specifications and was found not guilty of Specifications 1, 2, and 10 of the Additional Charge and guilty of the Charges and the remaining Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specification 4 of the Additional Charge; approved only so much of the finding of guilty of Specification 3 of the Additional Charge as involves a finding that the accused did wrongfully make and utter a certain check as alleged, knowing that he did not have and not intending that he should have sufficient funds in the bank upon which the check is alleged to have been drawn for the payment of said check; approved the sentence; and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution in support of the findings of guilty as approved may be summarized as follows:

a. The Charge and its Specification.

On 21 August 1945 accused was in the military service and assigned to the 618th Bombardment Squadron stationed at Godman Field, Kentucky. From that date until 27 August 1945 he failed to appear at his proper place of duty and could not be found (R. 51, 52). Upon his

return on 27 August 1945 he told his commanding officer that he had been at his home (R. 51). He had no authority to be absent (R. 53). A certified copy of the morning report of the accused's organization was introduced in evidence without objection (R. 52) showing a change of his status from "Dy to AWOL 0800 21 Aug 45" and from "AWOL to dy 0800" on 27 August 1945 (Pros. Ex. 11).

On 5 September 1945 accused voluntarily signed a statement, introduced in evidence without objection, in which he admitted that on 21 August 1945 he absented himself without leave from his command because of worries concerning his inability to pay his debts and went to his home in Middleboro, Kentucky, to arrange for their payment. He returned to his command on 27 August 1945 after completing his arrangements (R. 55; Pros. Ex. 12).

b. Specification 3 of the Additional Charge.

On 8 September 1945 the accused engaged in a gambling game with Second Lieutenant Elliott A. Taylor and lost. In payment of part of his losses accused made and delivered to Lieutenant Taylor his check for $80, dated 8 September 1945, payable to cash, and drawn on the Morris Plan Industrial Bank, Louisville, Kentucky (Pros. Ex. 3). The check was presented for payment, on or about 14 September 1945, to the bank upon which it was drawn and payment was refused because of insufficient funds then on deposit with that bank (R. 16-17, 71-73; Pros. Ex. 3).

c. Specifications 5, 6, and 9 of the Additional Charge.

First Lieutenant Horace M. King testified that on or about 11 September 1945 at Godman Field he gave to the accused $250 in cash for four checks totalling the same amount. One check was for $100, the remaining three for $50 each (R. 46). Accused told him the checks were good and that he had the money in the bank. The checks were dishonored when presented for payment on or about 13 September 1945 because of insufficient funds on deposit (R. 17-18, 45). All of the checks were drawn on the Morris Plan Bank, Louisville, Kentucky, dated 11 September 1945, payable to cash, and signed by the accused as maker (R. 17-18; Pros. Exs. 4, 5, 6, 7).

d. Specifications 7 and 8 of the Additional Charge.

On 12 September 1945 at Godman Field, Kentucky, accused delivered to Flight Officer Walter H. Lively two checks and asked him to cash them at the Fort Knox Post Exchange. On the same date Flight Officer Lively endorsed and delivered the checks to the cashier of the Fort Knox Post Exchange and received from the latter $350, being the total face amount of the checks, and delivered that sum to the accused (R. 33-34, 37, 38). The two checks were for $200 and $150 respectively, dated 12 September 1945, signed by the accused as maker, and drawn on the Morris Plan Industrial Bank, Louisville, Kentucky (Pros. Ex. 8-9). They were presented to that bank for payment on

13 September 1945 and payment was refused because of insufficient funds on deposit at that time (R. 18, 33-34).

The accused's bank balance on the dates herein set forth was as follows:

8 September 1945	$230.99 (R. 19, 29)
11 September 1945	485.49 (R. 20)
12 September 1945	450.49 (R. 21)
13 September 1945	15.59 (R. 26)

On 13 September 1945 two checks totalling $200 which accused had deposited in his account on 11 September were charged against his account and he was notified of this action by mail (R. 23). He was given credit for these checks when they were deposited on 11 September 1945 (R. 23-24). On 13 September 1945 his balance was also reduced by the payment of other checks which he had issued (R. 31).

4. The accused, having been advised concerning his rights as a witness, elected to testify in his own behalf in respect to all of the Specifications except Specifications 1, 2, 3, and 10 of the Additional Charge (R. 58). Defense counsel's motion for a finding of not guilty of Specifications 1, 2, and 10 of Additional Charge had previously been granted (R. 56-58).

With reference to the Specifications of the Additional Charge of which the accused was found guilty and the findings were approved by the reviewing authority the accused testified that he received no money in exchange for the checks that he had given to Lieutenant King on 11 September 1945. He contended that he was playing in a black-jack game with Lieutenant King on that date and had run out of money. Lieutenant King then agreed to permit the accused to continue to play by using his checks in lieu of cash. Accused lost the checks in the game (R. 59-60). He admitted the issuance and cashing of the two checks through Lieutenant Lively at the Post Exchange on 12 September 1945 (R. 60). He contended that on the 11 and 12 September 1945 when he uttered the checks complained of he did not know that he did not have sufficient funds on deposit at his bank for their payment. He had ascertained his bank balance on 11 September while at the bank. It was then $485.00. He deposited $415 on that date. On the 12th his balance was $450.49. He knew this because he checked the status of his account with the clerk at the bank (R. 60). He did not keep a record of the status of his account because in the game he did not have his bank book and he was using blank checks to draw on his account. On 14 September he learned that he was overdrawn. Two of the checks that he had deposited on 11 September in his account proved to be "bad." This fact did not come to his knowledge until after 14 September (R. 61). After he learned that his own checks had been dishonored,

he redeemed all of the checks given to Lieutenant King (R. 62-63) and the check for $150 cashed at the Fort Knox Post Exchange (Specification 7) (R. 62) but had not up to the date of trial redeemed the $200 check cashed there (Specification 8).(R. 63).

When he ascertained his bank balance during 11 and 12 September he did not know that checks he had previously issued were still outstanding. Thus, on 11 September, when he gave Lieutenant King checks totalling $250 on his account reported to contain $485.49, he did not know that his checks issued between 8 and 11 September totalling $300 were still outstanding (R. 65), and that on 12 September, when he wrote the two checks totalling $350, there were checks of his totalling $550 outstanding (R. 65).

Accused admitted that from 1 to 13 September he deposited in his account a total sum of $1075 and that during that same period of time he issued checks against that account totalling $2050 thereby causing the dishonoring of checks totalling $975 (R. 70) but contended that this was due to his failure to keep an actual account of the checks that he issued (R. 71).

5. a. The Charge and its Specification.

The evidence clearly establishes without contradiction that the accused did, without proper leave or authority, absent himself from his organization and station at Godman Field, Kentucky, from 21 to 27 August 1945 as alleged in the Specification. Such conduct constitutes a violation of Article of War 61 (MCM, 1928, par. 132, p. 145). The accused made no attempt to deny the charge but voluntarily admitted his guilt in a pre-trial statement.

b. The Additional Charge.

The evidence for the prosecution and the admissions of the accused made as a witness also establishes that he did at the times and at the place alleged in the Specifications of the Additional Charge make and utter the checks described therein to the persons named and that these checks were dishonored by the drawee bank when presented for payment because of insufficient funds on deposit for their payment.

c. Specification 3 of the Additional Charge.

The finding of guilty of this Specification, which alleges that accused fraudulently obtained $80 from Lieutenant Taylor by means of his worthless check, was approved by the reviewing authority only to the extent that he did wrongfully issue the check knowing that he did not have and not intending to have sufficient funds in the bank

for its payment. This conclusion is fully supported by the uncontradicted evidence of Lieutenant Taylor that he received the check in payment of a gambling debt and, when it was presented to the bank upon which it was drawn, payment was refused because of insufficient funds. The court was justified in inferring from these circumstances and the circumstances surrounding the issuance of the check and the condition of his account that the accused knew he did not have sufficient funds on deposit to meet this check because of having recently issued numerous other checks more than sufficient in amount to consume his bank deposit. It is not necessary to show intent to defraud in order to sustain a finding of a violation of Article of War 96 in the giving of a worthless check even in payment of a gambling debt (CM 249006, Vergara, 32 BR 5, 8, and cases cited therein). The evidence of record therefore sustains the findings as approved.

d. Specifications 5, 6, and 9 of the Additional Charge.

In support of these Specifications Lieutenant King testified that he gave $200 in cash for the three worthless checks involved and that the accused represented the checks to be good. The accused contended in defense that he received nothing for the checks but used them in lieu of cash in a gambling game. At some date not appearing in the record he redeemed the checks. He also contended that he did not know that his account would be depleted by outstanding checks by the time these three checks were presented for payment. The court has resolved both issues against the accused and found that he did receive cash for the checks, that he did know that the checks were worthless, and that therefore he intended to defraud Lieutenant King. It was shown that in the short space of a few days the accused issued checks totalling $2050 when his total deposits amounted to $1075. Under such circumstances the court was justified in concluding that he knew the checks were worthless and that, having obtained cash for the checks, he intended to defraud. We can find no good reason for disturbing this finding.

e. Specifications 7 and 8 of the Additional Charge.

By virtue of the same reasoning the findings of guilty of these Specifications should also be sustained. The accused's conduct in requesting another officer to obtain $350 from the local Post Exchange by means of checks drawn on an account which the accused must have known was or would be depleted by other checks recently issued far in excess of his deposits strongly indicates an intent to defraud the Post Exchange (CM 270910, Persinger, CM 274174, Reid).

6. War Department records show the accused to be a colored officer, 27 years of age, and unmarried. He graduated from high school

and for two years attended Tuskegee Institute majoring in Electrical Engineering. He received six months training in Radio Operating and Mechanics under Army supervision and on 15 July 1943 was appointed and commissioned Second Lieutenant Air Corps, A.U.S.

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

Earle Hepburn, Judge Advocate.

[illegible], Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 296782 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Stratman Cooke (0-863907), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave for a period of seven days from his organization and station, in violation of Article of War 61; and of wrongfully and unlawfully issuing seven checks with intent to defraud and thereby fraudulently obtaining a total sum of $810, in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 4 involving the issuance of a check in the amount of $180; approved only so much of Specification 3 which involved a check in the amount of $80 as involves a finding that the accused wrongfully uttered the check knowing that he did not have and not intending that he should have sufficient funds in the bank; approved the sentence; and forwarded the record of trial for action under Article of War 48.

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

The accused absented himself from his post without leave for a period of seven days. He claimed he went home to arrange for the payment of his debts. During the period of two weeks following his return he engaged in gambling and issued checks totalling $2050 drawn on a bank in which he deposited, during that time, $1075. As a result many of his checks were dishonored and made the basis of the Additional Charge and its Specifications. Most of these checks were issued for cash. Some were used in gambling games or for payment of gambling obligations. Prior to trial he redeemed all of the checks except one in the sum of $200 due the Fort Knox Post Exchange. The total amount of checks involved in the approved findings of guilty is $630.

The offenses of which accused has been found guilty demonstrate that he is unworthy of his commission. Accordingly it is

recommended that the sentence be confirmed and ordered executed.

4. Consideration has been given to letters received from Mrs. Leola Cooke, the accused's mother, requesting clemency on his behalf.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 - Record of trial
2 - Form of action
3 - Two letters from Mrs. Leola Cooke

(Sentence confirmed and ordered executed. GCMO 72, 11 April 1946).

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

SPJGK - CM 296841

31 JAN 1946

UNITED STATES	)	SIXTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
Second Lieutenant JOHN W. NOTT (0-1541999), Medical Administrative Corps.	)	Trial by G.C.M., convened at Fort Sheridan, Illinois, 20 December 1945. Dismissal, total forfeitures and confinement for ten (10) years.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Second Lieutenant John W. Nott, Medical Administrative Corps, Station Hospital, New Orleans Port of Embarkation, did, at New Orleans, Louisiana, on or about 12 March 1943, desert the service of the United States and did remain absent in desertion until he surrendered himself at Chicago, Illinois, on or about 21 November 1945.

He pleaded guilty to the Specification and Charge, 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, and of the substituted words, guilty, and to the Charge not guilty, but guilty of a violation of the 61st Article of War. In conjunction with these pleas he submitted a special plea of the Statute of Limitations as to the Charge and Specification under the 61st Article of War. After an explanation by the law member he expressed his acquiescence in the court's understanding that he was pleading not guilty to a violation of Article of War 58. The law member thereupon ruled that trial as to the violation of Article of War 61 was barred and that the trial would proceed as to the violation of Article of War 58. Accused was found guilty of the Charge and its Specification. 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 twenty-four years. The reviewing authority approved the sentence but reduced the period of confinement to ten years and forwarded the record of trial for action under Article of War 48.

3. Evidence.

For the prosecution.

The accused absented himself without leave from his station at the Station Hospital, New Orleans Port of Embarkation, New Orleans, Louisiana, on 12 March 1943 (R. 8, Pros. Ex. 1). He was employed by Barney's Market Club, 741 West Randolph Street, Chicago, Illinois, under the name of Guy Banks, from 16 June 1945 to 25 June 1945 (R. 12,13). While so employed, he was dressed in civilian clothes and did not have on Army clothes (R. 14). Mrs. Lottie Grimson, the timekeeper and bookkeeper at that Club, made up his pay checks and made deductions for his social security, under the name of Guy Banks (R. 13,14). He was employed at the Terminal Restaurant, 2529 N. Kedzie Boulevard, Chicago, Illinois, under the name of Guy Banks, as a short-order cook, from the last week in June 1945 to the middle of September 1945 (R. 15,16). He did not work at that restaurant during the last two or three weeks in September 1945 but worked there again from the beginning of October 1945 to about the third week of that month (R. 16). When the accused was hired by Constantine J. Papas, who operated that restaurant with his father and was its personnel manager, the accused told Mr. Papas that he had worked at certain mentioned places, "was a discharged veteran, an officer, was married, and had two children" (R. 17). When Mr. Papas first saw the accused, which was in the last week of June 1945 (R. 16), the accused was wearing summer civilian clothes and had on no military articles of clothing (R. 17). During all of the time that the accused was working at the Papas Restaurant, he was dressed in civilian clothes (R. 17). While employed at that restaurant, social security deductions were made for the accused under the name of Guy Banks (R. 17,18).

On the night of 21 November 1945 at about 2335 hours, John R. Phillips, Jr., who is a special agent for the Federal Bureau of Investigation, received a phone call while on duty in his office in Room 1900, Bankers Building, 105 W. Adams Street, Chicago, Illinois, from a person who stated that his name was John W. Nott and that he thought he was wanted by the Federal Bureau of Investigation (R. 8,9). During the course of the telephone conversation, the files of the Bureau were checked but no record was found under the name of John W. Nott (R. 9,10). Mr. Phillips suggested to the person calling that he come to the office for a further discussion (R. 10). About ten minutes later (2345 hours, 21 November 1945) a person, who was alone, came to that office and identified himself as John W. Nott. That person was the accused (R. 10). When he came in, he was wearing dark brown work trousers, a gray sweat shirt, a green felt hat and a pair of black work shoes (R. 10). The accused told Mr. Phillips that he had been absent without leave from the Army since some time in the spring of 1943, that his true name was John Worthington Nott, that he had used the name of Guy Banks during the past two years (R. 10), and that he had been on various jobs in different parts of the country, usually as a laborer (R. 10, 11). Mr. Phillips turned the accused over to the Chicago (Military) Police Detachment (R. 11).

For the defense.

After an explanation of his rights, accused elected to remain silent and offered no evidence in his behalf, other than a stipulation that on and prior to 12 March 1943, he "was permanently assigned to and was a member of the staff of the Station Hospital, New Orleans Port of Embarkation, and was not at that station awaiting assignment to an overseas' station" (R. 18).

4. The record clearly sustains the findings of the court. In view of the prolonged unexplained period of unauthorized absence of the accused, 12 March 1943 to 21 November 1945, his civilian employment under the alias of "Guy Banks," the receipt of pay and social security deductions under that alias, his wearing of civilian clothes while so employed, his surrender in civilian clothes at Chicago, Illinois, which is a considerable distance (over 900 miles) from his station in New Orleans, Louisiana, and the fact that most of the unauthorized absence was during the period of active hostilities with Germany and Japan, the court properly found the accused guilty of desertion in violation of the 58th Article of War as charged.

5. There are no War Department records available to show the date of accused's commission or other data pertaining to his personal history. The Charge Sheet, the statement by accused, and the review of the staff judge advocate show that accused served two years and six months with the National Guard prior to his induction into the Federal service on 24 September 1941. He served as an enlisted man from that date to 17 October 1942. He was commissioned second lieutenant, Medical Administrative Corps, Army of the United States, on 17 October 1942. He is 31 years and two months of age.

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

Norman Mayer, Judge Advocate

Earl W. Wingo, Judge Advocate

William S. Nuder, Judge Advocate

SPJGK - CM 296841 1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John W. Nott (O-1541999), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of desertion for a period of more than two years and eight months, beginning 12 March 1943 and terminating 21 November 1945, in violation of Article of War 58. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for twenty-four years. The reviewing authority approved the sentence but reduced the period of confinement to ten years, and forwarded the record of trial for action under Article of War 48.

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

Accused, who was commissioned a second lieutenant 17 October 1942, absented himself without authority from the Station Hospital, New Orleans Port of Embarkation, to which he was assigned, on 12 March 1943 and remained absent from the military service for more than two years and eight months, until he surrendered to the F.B.I. in Chicago, Illinois, on 21 November 1945. No extenuating circumstances were presented.

Desertion in war time, particularly by a commissioned officer, is a most serious offense. However, in view of the apparent policy of the War Department Clemency Board as indicated by its action in similar cases, I recommend that the sentence as approved by the reviewing authority be confirmed, but that the period of confinement be reduced to six years, and that the sentence as thus modified be ordered executed, and that a disciplinary barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(Sentence as approved by reviewing authority confirmed, but confinement reduced to six years. As modified ordered executed. GCMO 50, 6 March 1946).

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

SPJGN-CM 298046

UNITED STATES	) 12TH HEADQUARTERS & HEADQUARTERS DETACHMENT, SPECIAL TROOPS, FIRST ARMY
v.	) Trial by G.C.M., convened at Fort Jackson, South Carolina, 15 December 1945. Dishonorable discharge and confinement for six (6) months. Post Stockade, Fort Jackson, South Carolina.
Private RAYMOND ANDERSON (33884767), Company D, 802d Replacement Battalion.	)

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Raymond Anderson, Company D, 802d Replacement Battalion, Fort Jackson, South Carolina, did, at Columbia, South Carolina, on or about 2 November 1945, wrongfully take and use without consent of the owner, a certain automobile, to wit, a 1940 Plymouth station wagon, property of City of Columbia, South Carolina, of a value of more than $50.00.

He pleaded not guilty to, and was found guilty of, the Charge and Specification thereunder. After considering evidence of four previous convictions, accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence,

remitted four years and six months of the confinement imposed, designated the Post Stockade, Fort Jackson, South Carolina, as the place of confinement, and forwarded the record of trial for review pursuant to Article of War 50½.

3. The Specification alleges that the accused did wrongfully take and use a certain automobile, property of the city of Columbia, South Carolina, "without consent of the owner." The evidence clearly shows that the accused used the automobile as alleged and the only question requiring discussion is whether that use was "without consent of the owner." The only evidence relative to this issue is presented in the following colloquy:

"A: My name is Mrs. W.D. Ott. I live at 1727 Maplewood Drive, Columbia, South Carolina. I am a supervisor for the Servicemen's Recreation Center in Columbia, South Carolina.

Second interrogatory: In your capacity as supervisor, did you have occasion to use a 1940 Plymouth Station Wagon?

A: I did.

Third interrogatory: On the morning of 2 November 1945 were you using this Plymouth Station Wagon?

A: Yes, I was.

Fourth interrogatory: At what time and where did you park this station wagon when you were finished with it?

A: Sometime between 12 o'clock and 1 o'clock on the morning of 2nd of November I parked it in front of Fellowship Hall, 1324 Marion Street, Columbia, South Carolina.

Fifth interrogatory: Did you give any serviceman permission to use the station wagon at any time?

A: I did not.

Sixth interrogatory: To whom did the station wagon belong?

A: To the City of Columbia, South Carolina.

Seventh interrogatory: What was the South Carolina state license number of this particular station wagon?

A: S.C. V-50" (Pros. Ex. 4).

The above testimony shows that Mrs. Ott, in her capacity as a supervisor of the Servicemen's Recreation Center in Columbia, South Carolina, had occasion on 2 November 1945 to use the car which the accused is alleged to have wrongfully taken, and that between 12 o'clock and 1 o'clock on the morning of 2 November she parked it in front of Fellowship Hall in the city of Columbia. Her testimony does not establish, however, that the Servicemen's Recreation Center was an agency of the city of Columbia, or that she was an employee of that city. Her testimony contains no statement which would justify the inference that she had any exclusive legal right or authority over the car in question, or any authority either to permit or to withhold its use by another. There is no evidence, therefore, to show that the car was wrongfully taken and used by the accused without the consent of the owner, the city of Columbia, South Carolina. Since such a taking was the essence of the offense charged and since the prosecution failed to discharge its burden of proof on this essential issue, the record is legally insufficient to sustain the findings of guilty and the sentence.

4. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to sustain the findings of guilty and the sentence.

Abner E. Lipscomb, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGN-CM 298046 1st Ind
Hq, ASF, JAGO, Washington 25, D. C.
TO: Commanding General, 12th Headquarters & Headquarters Detachment, Special Troops, First Army, Fort Jackson, South Carolina.

1. In the foregoing case of Private Raymond Anderson (33884767), Company D, 802d Replacement Battalion, I concur in the holding of the Board of Review and for the reasons therein stated recommend that the findings of guilty and the sentence be disapproved.

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

(CM 298046).

1 Incl
Record of trial

THOMAS H. GREEN
Major General,
The Judge Advocate General

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

SPJGH - CM 298315

13 FEB 1946

UNITED STATES v. First Lieutenant BERYL H. STEVENS (O-1703135), Air Corps.	)	AIR TRANSPORT COMMAND FERRYING DIVISION Trial by G.C.M., convened at Romulus Army Air Field, Romulus, Michigan, 6 and 7 December 1945. Dismissal and total forfeitures.

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

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

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

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

Specifications 1 through 24, inclusive: (Findings of not guilty).

Specification 25: In that First Lieutenant Beryl H. Stevens, Squadron "D", 553rd Army Air Forces Base Unit, (3rd Ferrying Group), did, without proper leave, absent himself from his command at Romulus Army Air Field, Romulus, Michigan, from about 11 October 1945 to about 15 October 1945.

Specification 26: In that First Lieutenant Beryl H. Stevens, * * *, did, without proper leave, absent himself from his station at Romulus Army Air Field, Romulus, Michigan, from about 16 October 1945 to about 24 October 1945.

Accused pleaded not guilty to the Charge and all Specifications. He was found guilty of the Charge, not guilty of Specifications 1 through 24, inclusive, guilty of Specification 25 and by exceptions and substitutions, guilty of Specification 26, except the words "station at Romulus Army Air Field, Romulus, Michigan," substituting therefor the words "command at Romulus Army Air Field, Romulus, Michigan, from about 16 October 1945 to about 18 October 1945, and from his station at Romulus Army Air Field, Romulus, Michigan, from about 19 October 1945 to 24 October 1945." No evidence of previous convictions was introduced. He was sentenced to dismissal

and total forfeitures. The reviewing authority approved only so much of the finding of guilty of Specification 26 of the Charge as involved a finding that accused absented himself without proper leave from his station at Romulus Army Air Field, Romulus, Michigan, from about 19 October 1945 to 24 October 1945, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that accused is in the military service and that on 1 July 1945 he was assigned to Squadron D, of the 553d Army Air Forces Base Unit at Romulus, Michigan (R. 8, 13). His squadron commander was Major James H. Meyer (R. 20). An extract copy of the morning report of the Base received in evidence shows the accused absent without leave as of 11 October 1945. Said entry was made on 22 October 1945 (R. 30; Pros. Ex. D). Accused was seen at the "Westwood Gardens" on 18 October 1945, at which time he stated that he was leaving that night for Indianapolis, but was returning the following day (R. 33). He was also observed on 18 October 1945 aboard a train en route from Detroit, Michigan, to Indianapolis, Indiana, and on 19 October was seen in Indianapolis. At Stout Field Hospital in Indianapolis, Private Beatrice Hunt "had occasion or opportunity to see Lieutenant Stevens" on October 20, 21, 22, 23 or 24, 1945 (R. 37, 39, 40). On 24 or 25 October, accused was found under guard in the office of the Provost Marshal of Stout Field (R. 31).

On 29 October 1945, after being advised of his rights under the 24th Article of War, accused was questioned concerning the alleged offenses by the Base legal officer who, thereafter, assisted accused in drafting an affidavit which was signed and sworn to by accused (R. 22). Said affidavit sets forth in pertinent part that on 11 October 1945, accused executed a statement indicating his desire to remain on active duty for the duration of the emergency and six months, at which time he was in the process of being cleared for separation, that he did not report for duty at his squadron or to anyone and that during the period 11 October 1945 to 15 October 1945, accused was off the Base most of each day in the company of Private First Class Beatrice Hunt, although he slept in his quarters on the Base each night. It further relates that on the evening of 18 October 1945, he and Private Hunt boarded a train at Detroit, Michigan, and went to Indianapolis, Indiana, arriving there on the morning of 19 October 1945, where accused obtained his car; also that while returning to Detroit, accused and Private Hunt were involved in an automobile accident at about 1900, 19 October 1945 and were hospitalized at Stout Field, Indianapolis, accused being released from the hospital on the following day. On 24 October 1945 he was apprehended by the military police while visiting Private Hunt, who was still confined in the hospital at Stout Field (R. 26,27; Pros. Ex. C).

4. The defense introduced evidence to show that accused was observed on the Base between the period 11 October and 17 October. During that time he was seen each day on several occasions in the barracks and in the post exchange (R. 45, 46). An extract copy of the morning report of the Base for 29 October 1945, received in evidence, shows Lieutenant Stevens' status on 24 October 1945 "from AWOL to duty, 1600" (R. 47; Def. Ex. 7). Major

James H. Meyer was called as a witness and testified that he had personal knowledge of accused's absence without leave from his organization, Squadron D, on 11 October. He explained that the entry of the unauthorized absence was not made on the morning report until 22 October because he understood that accused had been separated from the service on 11 October. He later ascertained, however, that accused was still a member of Squadron D and on 22 October 1945 assisted in a search for him without avail. Major Meyer knew that accused had not reported to the squadron after October 11 (R. 50, 51).

Accused, after being informed of his rights as a witness, elected to make an unsworn statement in which he related the following: He entered the Army at the age of 18 and is presently 22 years old. He served in the Rome-Arno battle and in part of the European offensive. While on the Ploesti Raid his plane blew up, he parachuted to the ground and was injured. He was captured by the Rumanians. Thereafter, while attempting to escape from a Prisoner of War Camp he was captured and altogether was a prisoner for almost four months (R. 55, 56).

5. The prosecution's case was vigorously contested by the defense. At the outset, the defense counsel offered a special plea in bar of trial as to Specifications 1 to 24 of the Charge on the ground that accused had been punished under Article of War 104 for those offenses. While the plea was not granted, the court found accused not guilty of these Specifications and we therefore consider it unnecessary to discuss the merits of said plea.

Defense counsel next entered "a plea for multiplicity of Charges" to Specifications 25 and 26 contending that there should be but one Specification since the inclusive dates of the alleged unauthorized absences represented a continuous period of time from 11 to 24 October 1945. Specification 25 of the Charge alleges that accused absented himself without leave from his command from about 11 October 1945 to about 15 October 1945. Specification 26 of the Charge alleges that he absented himself without leave from his station from about 16 October 1945 to about 24 October 1945. Absence without leave, not being a continuous offense, it was appropriate to allege in separate Specifications first, the offense involving unauthorized absence from command commencing on 11 October 1945 and second, the different offense of unauthorized absence from station commencing on a later date not included in the former. The plea was properly overruled.

Defense counsel objected to the receipt in evidence of the extract copy of the morning report showing accused's absence on 11 October 1945 (Pros. Ex. D), for the reason that the recording of the fact was delayed until 22 October 1945 and no evidence was offered to show that the officer having the duty to make the entry had personal knowledge thereof. In support of this position, defense counsel relied upon the case reported in 3 Bull JAG 337 (CM 254182, Roessel, 35 BR 179 and cases cited therein),

in which it was held that the record of trial was legally sufficient to support only so much of the findings of guilty of absence without leave as involved the period of absence of which the officer who testified had personal knowledge. In that case, the entry on the morning report showing the absence was delayed for a period of twenty-three days and the officer who prepared the morning report testified that he had no personal knowledge of the absence until fourteen days after the date it was alleged to have occurred. While the entry was made nine days subsequent to his ascertaining the absence, the Board of Review held the evidence legally sufficient to sustain a finding of guilty of absence without leave, commencing on the date the officer concerned had personal knowledge thereof. That case did not go so far as to hold that morning reports which are not prepared strictly within the rules governing their preparation are incompetent. It simply said "that when evidence is introduced from any source tending to show error or lack of authenticity in the entries (of the morning report), they must be weighed as any other documentary evidence to determine the extent to which they shall be accepted as competent, credible proof of the facts they recite."

In a more recent holding of this office (SPJGN 1945/3492, 29 March 1945, 4 Bull JAG 87), the principles announced in the Roessel case, supra, with respect to morning report entries were the subject of further explanation. If any doubt existed prior thereto, the rule as stated is now clear that "it is not necessary that the entry be made contemporaneously with the happening of the event recorded. This principle permits the delayed entry in the morning report to be received in evidence as proof of the unauthorized absence of an accused which occurred prior to the date of actual entry. Although personal knowledge need not be shown as a prerequisite to the introduction of the morning reports into evidence, lack of such personal knowledge may be shown by the defense for the purpose of impeaching the entries."

In the instant case, the defense called the officer who prepared the morning report as a witness, ostensibly for the purpose of impeaching the entry by showing a lack of personal knowledge of the absence; however, the evidence shows that this officer had personal knowledge of the absence from the date alleged and his testimony, rather than impeaching the entry, conclusively established the unauthorized absence from command as of the date alleged.

Defense counsel raised strenuous objections to the admission in evidence of accused's confession, contending that it was not voluntarily made. To establish admissibility of the confession, the prosecution introduced a stipulation, entered into between prosecution, defense and accused, that if Lieutenant Colonel James K. Kneussel were present, he would testify that as legal officer he interviewed accused, that he questioned accused as to the offenses alleged, "after advising him of his rights under the 24th Article of War" and that he "then assisted him (accused) in drawing up an affidavit consisting of two pages sworn and subscribed to before me on

29 October 1945 * * *" (R. 22). This "affidavit" was the accused's confession. Thereafter, accused took the stand and, after testifying that Colonel Kneussel warned him that he did not have to make a statement, he further testified as follows:

> "Q. On or about 29 October 1945, when Lieutenant Colonel Kneussel took your statement did he tell you before signing it that if you made it he would make things as easy as possible for you or words to that effect.
>
> "A. Yes, he did."

On cross-examination, accused was asked to state exactly the language used by Colonel Kneussel to which accused replied, "He said he would do all he could for me and that he would see that I got off as easy as possible" (R.25).

A confession to be admissible in evidence must have been voluntarily made and the burden of proof is upon the prosecution to establish that fact (MCM, 1928, par. 114a; CM 233543, McFarland, 20 BR 15; Winthrop, Mil. Law and Prec., 2d ed., p. 328). Facts indicating that the confession was induced by hope of benefit is evidence that the confession was involuntarily made (MCM, 1928, par. 114a). Under military law, when a confession is made to a military superior, careful inquiry must be had to determine whether or not the confession was voluntary (MCM, 1928, par. 114a). In Winthrop's, supra, p. 329, the rule is stated as follows:

> "Statements, by way of confession, made by an inferior under charges to a commanding officer, judge advocate, or other superior whom the accused could reasonably believe capable of making good his words, upon even a slight assurance of relief or benefit by such superior, should not in general be admitted. Thus, in a case where a confession was made to his captain by a soldier upon being told by the former that 'matters would be easier for him' or 'as easy as possible,' if he confessed, such confession was held not to have been voluntary and therefore improperly admitted."

Here the defense introduced evidence to show that when accused was questioned by Lieutenant Colonel Kneussel, the Base Legal Officer, he was told that if he made a confession the Colonel would see that he "got off as easy as possible." Such evidence, assuredly, is some proof that an improper inducement was offered accused to extract his confession. Since the burden of proof was on the prosecution, it was incumbent upon it to proceed thereafter to introduce such evidence as might serve to discharge that burden. However, the prosecution introduced no evidence to refute the evidence offered by the defense. Accordingly, it is clear that the prosecution failed to sustain its burden of proving that accused's confession was voluntarily made (CM 284485, Brown).

In the confession itself, accused stated that it was "fully and voluntarily made." However, that assertion cannot be considered by us to buttress the prosecution's case since it was not before the court when it passed upon the admissibility of the document containing it. We cannot on this review marshal for the prosecution matters not in evidence before the court which the accused had no opportunity to answer. In view of the foregoing, it is unnecessary for us here to decide whether or not, when the accused submitted himself for examination only with respect to the nature of the confession, he could have been questioned by the prosecution about any statement appearing in the confession - even such a statement as that the confession had been freely and voluntarily given. For the foregoing reasons, it is our conclusion that the confession was inadmissible in evidence.

The court, by exceptions and substitutions, with respect to Specification 26 of the Charge, found accused guilty of absenting himself without leave from his command from about 16 October 1945 to about 18 October 1945 and from his station from about 19 October 1945 to 24 October 1945. Inasmuch as the evidence showed that accused was present at the Base from 16 October through 18 October, accused could not be found guilty of unauthorized absence from his station for that period. Accordingly, the court sought to find him guilty of unauthorized absence from his command during that period and from his station for the balance of the time alleged. By so doing, the court divided the period of unauthorized absence charged into two separate periods, constituting thereby, two separate offenses and changing the identity of the offense charged, contrary to the provisions of paragraph 78c, Manual for Courts-Martial, 1928. Realizing this, the reviewing authority properly approved only so much of the findings of guilty of Specification 26 of the Charge as involved unauthorized absence from station from about 19 October 1945 to 24 October 1945.

6. The evidence as introduced by the prosecution in the form of an extract copy of the Base morning report, its verity confirmed by the testimony of a defense witness, established the initial unauthorized absence of accused beyond reasonable doubt. Further by direct testimony of witnesses, in no manner contradicted by the defense, it was conclusively shown that accused was absent without authority from his command during the period from 11 October 1945 to 15 October 1945 and from his station during the period from 19 October 1945 to 24 October 1945. The Board of Review is of the opinion that the evidence other than the confession is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the findings of guilty, and that the substantial rights of the accused were not injuriously affected by the erroneous admission of his confession.

7. War Department records disclose that this officer is 23 years of age and married. He attended high school for two years but did not graduate. In civil life he was employed for about four months by an optical company as a polisher and for about nine months by another employer as a truck driver.

He entered the service on 28 May 1942 as an enlisted man and was appointed a Flight Officer in the Army of the United States on 1 October 1943. On 9 April 1944 he was appointed a second lieutenant with a pilot's rating and was promoted to first lieutenant on 7 September 1944. Awards received by him consist of the Purple Heart and the Air Medal with two Oak Leaf Clusters. On 6 May 1944 he was reported missing in action over Rumania during an operational flight when the aircraft of which he was co-pilot was shot down by enemy fire. His status as a prisoner of war of the Rumanian government was verified on 4 July 1944. Thereafter he was repatriated and evacuated to the United States about 16 September 1944.

The review of the Staff Judge Advocate sets forth that accused, while a member of another command, was given punishment in the form of a reprimand and forfeiture of pay, under the 104th Article of War, for an absence without leave of eight days.

8. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial except as above noted. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Charge and Specifications 25 and 26, as approved by the reviewing authority, and the sentence and to warrant confirmation of the sentence. Dismissal is authorized for a conviction of a violation of Article of War 61.

Thomas N. Jaffy, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert C. Trueblood, Judge Advocate.

SPJGH - CM 298315 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 27 February 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Beryl H. Stevens (O-1703135), Air Corps.

2. Upon trial by general court-martial this officer pleaded not guilty to and was found guilty of absenting himself without leave from his command for a period of four days (Chg., Spec. 25). He also pleaded not guilty to the offense of absenting himself without leave from his station for a period of eight days and by exceptions and substitutions was found guilty of unauthorized absence from his command for two days of said period and of unauthorized absence from his station for five days of said period (Chg., Spec. 26). No evidence of previous convictions was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved only so much of the findings of guilty under Specification 26 as involved the accused's unauthorized absence of five days from his station, approved the sentence and forwarded the record of trial for action under Article of War 48.

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

From 11 October 1945 to 15 October 1945 this officer, without authority failed to report to his squadron for duty and spent the greater part of each day off the Base in company of a WAC private. On 19 October 1945 he left his Base without authority and, accompanied by this young lady, went to Indianapolis, where he was apprehended on 24 October 1945. No explanation was made by this officer for his disregard of regulations and he testified solely to his combat record, presumably in mitigation of the offenses.

War Department records show that he arrived in the European Theater of Operations sometime in January 1944; that he was awarded the Air Medal and two Oak Leaf Clusters for meritorious achievement in aerial flight while participating in sustained operational flights against the enemy from 2 March 1944 to 25 April 1944; also that he was awarded the Purple Heart for wounds received on 6 May 1944 when his plane was shot down by enemy fire while participating in an aerial bombardment mission over the

Ploesti oil fields in Rumania and that he was a prisoner of war of the Rumanian government from that date until about September 1944. It appears that subsequent to his return from overseas he was punished under the 104th Article of War for an unauthorized absence of eight days.

Giving due consideration to accused's combat service, I recommend that the sentence be confirmed but that all forfeitures in excess of $50.00 pay per month for three months be remitted; that the sentence as thus modified be ordered executed, but that execution of that portion adjuging dismissal be suspended during good behavior.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(Sentence confirmed but forfeitures remitted, GCMO 144, 28 May 1946).

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

SPJGK - CM 298331

11 FEB 1946

UNITED STATES v. Private LAWRENCE B. MARTIN (33526545), East Coast Processing Center, Camp Edwards, Massachusetts.	)	FIRST SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Edwards, Massachusetts, 28 December 1945. Dishonorable discharge (suspended) and confinement for seven (7) years. Disciplinary Barracks.

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

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1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Lawrence B. Martin, East Coast Processing Center, Camp Edwards, Massachusetts, did, at Camp Van Dorn, Mississippi, on or about 8 February 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Marion, Virginia on or about 11 September 1945.

The accused pleaded not guilty to the Charge and Specification and was found guilty of the Charge and guilty of the Specification, except the words "at Camp Van Dorn, Mississippi," and "he was apprehended at Marion, Virginia", substituting for the latter the words "terminated in a manner and at a place not shown". 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 ten years. The reviewing authority approved the sentence, reduced the period of confinement to seven years, suspended the dishonorable discharge and designated the Midwestern Branch, United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 1447, 29 December 1945, Headquarters First Service Command, Army Service Forces, Boston 15,

Massachusetts. The record of trial was forwarded to the Office of The Judge Advocate General pursuant to Article of War 50½.

3. The prosecution offered in evidence, as its Exhibit 1, a photostatic copy of the front page of the Morning Report of Company A, 394th Infantry, for the month of February 1943, and of a sheet, attached thereto, containing "Remarks" for the 8th day of the month. Among other entries on this latter sheet is the following:

"*** Pvt's Martin, L. & Rayner duty to A.W.O.L. 0600".

Certain illegible initials follow the entry. Both sheets bear the impress of a seal, containing the following words:

"The Adjutant General's Office War Department. Official Copy".

The exhibit was admitted in evidence over the objection of the defense. No other evidence to establish the inception of the desertion alleged in the Specification was adduced.

In the recent opinion in CM 296303, Burdick, a similar entry of a surname only was held to be insufficient to connect the accused with the offense charged. It was there said that:

> "The accused, by his plea of not guilty, admitted that he was the person named in the Specification and a member of the East Coast Processing Center of Camp Edwards, Massachusetts. His plea did not, however, admit that he was the unidentified Private Burdick who was a member of Company C, 101st Engineer Combat Battalion in June 1943. Although the Manual for Courts-Martial states that 'Identity of names raises a presumption of identity of persons ***" it appears that the cases in which such a presumption has been employed involved considerable more description than a surname only (Wigmore on Evidence, 3rd Ed. Sec. 2529 and cases therein cited). When the presumption is used its 'strength *** will *** depend upon how common the name is, and other circumstances' (MCM, 1928, par. 112a). In this particular instance we not only do not know how many Private Burdicks there may be in the Army, but we cannot narrow our inquiry as to identification to a Private Burdick of any one organization; for the Specification alleges that Private William F. Burdick belonged to one organization and the morning report declares 'Pvt. Burdick' to be absent without leave from an entirely different organization."

The views therein expressed apply in all respects to the issue here presented. The addition of the initial "L" does not serve to identify accused, particularly as there was neither allegation nor proof that he was ever a member of Company

"A", 394th Infantry.

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

Herman Moyer, Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 208331 1st Ind

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

TO: 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 Lawrence B. Martin (33526545), East Coast Processing Center, Camp Edwards, Massachusetts.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of the sentence so vacated be restored.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 62, 18 March 1946).

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

SPJGK - CM 298371

18 FEB 1946

UNITED STATES v. Private JOHN LOFARO (32499737), East Coast Processing Center, Camp Edwards, Massachusetts.	FIRST SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Edwards, Massachusetts, 26 December 1945. Dishonorable discharge (suspended) and confinement for seven (7) years. Disciplinary Barracks.

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

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1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John Lofaro, East Coast Processing Center, Camp Edwards, Massachusetts, did, at Camp Claiborne, Louisiana, on or about 25 March 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Brooklyn, New York on or about 17 October 1945.

The accused pleaded not guilty to the Charge and Specification and was found guilty of the Charge and guilty of the Specification, except the words, "he was apprehended at Brooklyn, New York", substituting therefor the words, "terminated in a manner and at a place not shown." 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 ten (10) years. The reviewing authority approved the sentence, reduced the period of confinement to seven years, suspended the dishonorable discharge and designated the Midwestern Branch, United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 1446, 29 December 1945, Headquarters First Service Command, Army Service Forces, Boston 15, Massachusetts. The record of trial was forwarded to the Office of The Judge Advocate General pursuant to Article of War 50½.

To support the original absence there was offered in evidence an authenticated extract copy of the morning report of "Hq & Hq Det 60th QM BN (Ldry)" for 27 March 1943. This offering was objected to by the defense on the following grounds:

> "*** First, that the serial number as noted is not the serial number of the accused. Second, the organization listed is not one that the accused was ever a member of."

The objection having been overruled the offering was admitted as Prosecution's Exhibit 1. The complete document is as follows:

> "*EXTRACT COPY OF MORNING REPORT OF -
> Hq & Hq Det 60th QM Bn (Ldry)
>
> Mar 27/43. Correction for Mar 22/43.
> So much as reads Pvt Lofaro sk sta hosp
> is amended to read fur. Pvt Lofaro fur
> to AWOL as of 0001, Mar 25/43. Pvt lcl
> Smalley fur to duty. VNF
> VNF
>
> Hq & Hq Det, 60th QM BN (Ldry) Mar 28/43
> Cp Claiborne, La.
> I, 2nd Lt, QMC, certify that I am the commanding officer of Hq & Hq Det, 60th QM BN (Ldry) and official custodian of the morning reports of said command, and that the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted at Camp Claiborne, La. for the dates indicated in said copy which relates to John Lofaro, 32499737, Pvt, Hq Det, 60th Qm Bn (Ldry), Camp Claiborne, La. /underscoring of number supplied/
>
> /s/ Vaden N. Ford
> VADEN N. FORD, 2nd Lt. QMC
>
> *In case the Extract Copy of Morning Report is offered in evidence before a court martial, it must be detached from pages 1 and 2."

Without objection, the following offering by the prosecution was then accepted in evidence as Prosecution's Exhibit 2:

> "EXTRACT COPY OF MORNING REPORT OF:
> LoFaro, John 32499797 /underscoring supplied/ Conf
> 18 Oct 45 W.T.W.
> POST GUARD HOUSE, FORT JAY, NEW YORK 22 October 1945
> I, WILLIAM T. WILFONG Capt. CMP certify that I am the Commanding Officer of POST GUARDHOUSE, FORT JAY, N.Y., and official custodian of the Morning Reports of said command,

and that the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the Morning Report of said command submitted at FORT JAY, NEW YORK for the dates indicated in said copy which relates to:

John LoFaro 32499797 Pvt. 14th Evacuation Hospital Unit
(Full name, Army serial number, grade and organization of person

Referred to in extract copy)

W. T. Wilfong
(Signature)

WILLIAM T. WILFONG
Capt. CMP"

No other evidence was offered by the prosecution.

3. After accused's rights had been explained to him he made an unsworn statement through his counsel. He asserted that his serial number was 32499797 and that he had never been a member of "Hq and Hq Det, 60th QM BN (Ldry)", Camp Claiborne, Louisiana. He further stated that in addition to being greatly overweight he suffered from various ailments and that -

> "*** They were going to give me a discharge as being unfit for military service due to overweight, but meanwhile I was permitted to go home on an emergency furlough to see my sick mother. I didn't return because I just couldn't stand any more ridicule and embarrassment heaped upon me by the other men because of my excessive overweight. ***"

4. It will be noted that the Specification does not allege that accused was at any time a member of "Hq and Hq Det, 60th QM Bn (Ldry)", his organization being described as East Coast Processing Center, Camp Edwards, Massachusetts. It will further be noted that the entry on the morning report of the Post Guard House, Fort Jay, New York, describes him as a member of the 14th Evacuation Hospital Unit, and that there is a minor variance between the serial numbers of the "John Lofaro" in the two entries. In his unsworn statement accused admitted that at some undesignated time during his term of service he absented himself without authority from his organization. The extract in the morning report of the Post Guard House, Fort Jay, New York, clearly establishes that on 18 October 1945 he was under military control. Therefore the real question that is presented is whether there is sufficient proof of the desertion charged and a proper identification of accused with the alleged offense.

In a recent case, CM 296303, Burdick, the sole proof of the inception of the desertion was a photostatic copy of an extract from a morning report of an organization of which it was not alleged that accused was a

member. There was no evidence adduced to establish that accused had ever been a member of the organization other than through the extract so offered, and as, in the present case, the entry merely contained the accused's surname. In holding such an entry insufficient to connect the accused with the offense charged the Board of Review stated:

> "The accused, by his plea of not guilty, admitted that he was the person named in the Specification and a member of the East Coast Processing Center of Camp Edwards, Massachusetts. His plea did not, however, admit that he was the unidentified Private Burdick who was a member of Company C, 101st Engineer Combat Battalion in June 1943. Although the Manual for Courts-Martial states that 'Identity of names raises a presumption of identity of persons ***' it appears that the cases in which such a presumption has been employed involved considerable more description than a surname only (Wigmore on Evidence, 3rd Ed. Sec. 2529 and cases therein cited). When the presumption is used its 'strength *** will *** depend upon how common the name is, and other circumstances' (MCM, 1928, par. 112a). In this particular instance we not only do not know how many Private Burdicks there may be in the Army, but we cannot narrow our inquiry as to identification to a Private Burdick of any one organization; for the Specification alleges that Private William F. Burdick belonged to one organization and the morning report declares 'Pvt. Burdick' to be absent without leave from an entirely different organization."

As in the Burdick case, the entry on the Morning Report in the present case contains only the surname of the absent soldier. In the certificate authenticating the extract, the commanding officer of the organization of the absent soldier inserted the latter's first name and serial number, describing him as being a member of "Hq and Hq Det, 60th QM Bn (Ldry)". However, assuming, without so holding, that this statement in the certificate may be accepted as evidence of the soldier's name, it does not establish that the John Lofaro, who is described in the Specification as a member of "East Coast Processing Center," without any reference to any prior organization, is the same John Lofaro who was a member of and absented himself without leave from "Hq and Hq Det, 60th QM Bn (Ldry)" almost three years prior to the date of the filing of the charge. The opinion in the Burdick case has been approved in two subsequent cases, CM 298783, Morris and CM 298331, Martin. As there is no substantial difference between the proof adduced in the present case and that in the three cases referred to, the Board has no difficulty in finding that the identity of the accused and the inception of the absence have not been properly established.

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

Thomas W. Moore, Judge Advocate.

William B. Kuder, Judge Advocate.

Earl W. Wingo, Judge Advocate.

SPJGK - CM 298371 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 27 February 1946

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private John Lofaro (32499737), East Coast Processing Center, Camp Edwards, Massachusetts.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence and, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which this accused has been deprived by virtue of the findings and sentence so vacated be restored.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Findings and sentence vacated. GCMO 83, 29 April 1946).

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

SPJGN-CM 298598

UNITED STATES	)	FIFTH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 5, Camp Campbell, Kentucky,
Private First Class HENRY	)	18 December 1945. Dishonorable
E. MARKS (34575143),	)	discharge (suspended) and con-
Battery C, 46th Field Ar-	)	finement for two (2) years.
tillery Battalion.	)	Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Private First Class Henry E. Marks, Battery C, 46th Field Artillery Battalion, did, without proper leave, absent himself from his organization at Camp Campbell, Kentucky, from about 14 September 1945, to about 27 November 1945.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. He was sentenced to be reduced to the grade of private, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for a period of two years. The reviewing authority approved the sentence and ordered it

executed, but suspended execution of the dishonorable discharge and designated the Midwestern Branch, United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 2, Headquarters 5th Infantry Division, APO 5, Camp Campbell, Kentucky, 9 January 1946.

3. Evidence for the prosecution: Accused was a member of Battery C, 46th Field Artillery, which was stationed at Camp Campbell, Kentucky (R. 6). He was placed on temporary duty at Reception Station #15, Fort McPherson, Georgia. On 13 September 1945 he left Fort McPherson under orders from the Reception Station to return to his own organization. The orders prescribed 14 September 1945 as the effective date of change on the morning report (R. 7-8; Pros. Ex. A).

Private First Class Gilbert Lang, who had seen the accused at least once a day during their previous service together, was present in Battery C during the approximate period from 14 September to November 1945 and did not once see him during that time. At an unspecified date in November Private Lang saw accused in the battery latrine (R. 18-20).

About 5 October 1945, Captain Raymond E. Trinter became the commanding officer of Battery C (R. 7). Accused was not present for duty at that time and Captain Trinter did not give him permission to be absent (R. 7). About 20 November 1945 Captain Trinter checked the morning reports and found that accused was still carried on temporary duty. Pursuant to instructions to drop from the rolls all persons on temporary duty who had not returned to Camp Campbell, accused's name was dropped and his record was forwarded to Washington (R. 21).

Accused was confined in the Post Stockade, Fort McPherson, Georgia, on 27 November 1945 (R. 10-11; Pros. Ex. C). On 1 December 1945 he was placed in confinement in the division guardhouse at Camp Campbell, Kentucky (R. 9-10; Pros. Ex. B).

4. Evidence for the defense: Accused, advised of his rights as a witness, elected to remain silent (R. 17-18). Captain Trinter, recalled as a defense witness, testified that between December 1942 and June 1943, he had been an officer in a battery to which accused was then assigned. He gave accused his basic training and found him to be an excellent worker, cooperative and willing. Accused was considered a good soldier (R. 12-14). Private First Class Lang had known accused and served with him in the same battery since March 1944. They were overseas and in combat together. Accused was "about the best soldier" in the battalion because "he did his duty and done other duties too" (R. 14-16).

5. The Specification of the Charge alleges that accused, a member of Battery C, 46th Field Artillery Battalion, was absent without leave from his organization at Camp Campbell, Kentucky, from about 14 September 1945 to about 27 November 1945.

It is shown that accused, following a period of temporary duty at Fort McPherson, Georgia, was ordered to return to his organization, Battery C, 46th Field Artillery Battalion, at Camp Campbell, Kentucky. Pursuant to these orders he left Fort McPherson, Georgia, on 13 September 1945. We may take cognizance of the distance between Fort McPherson and Camp Campbell and conclude that accused should have arrived at his home station on 14 September or on the day following. The record is devoid of any direct evidence that he did not complete the change of station. The usual proof, a competent morning report entry showing his absence without leave at Camp Campbell on 14 September, is not contained in the record.

Direct proof of absence without leave, although desirable, is not in all cases requisite. Like any other fact, absence without leave may be proved by circumstantial evidence. CM 255083, Hargrove, 36 BR 29; 1912-40 Dig. Op. JAG, Sec. 419(2). To establish accused's absence at Camp Campbell on 14 September the prosecution produced a fellow soldier in the same battery who testified that he had not seen accused in the battery between 14 September and some time in November. Although his testimony is not without probative force it is considered insufficient to establish beyond reasonable doubt that accused was not present for duty at that time. Commencing with 5 October, however, we have the testimony of the battery commander that accused was not present for duty. Since the battery commander knew the accused personally and was himself on duty continuously during this period, the fact that accused was absent cannot be seriously questioned.

The only question arises as to whether his absence from and after 5 October was "without leave." The battery commander testified that he had not given accused permission to be absent. There is the possibility that the previous battery commander had given accused permission to be absent. However, it may be presumed that if he were absent on furlough that this status would have been recorded on the battery morning report. The fact that accused was still being carried on the morning report as on temporary duty at Fort McPherson shows that he had not reported for duty and had not been given permission to be away. Although these circumstances do not preclude the possibility of his innocence of the offense alleged, in the opinion of the Board they do exclude every reasonable hypothesis save that of guilt. The rules governing the quantum of circumstantial evidence required to convict are, therefore, satisfied. 1912-40 Dig. Op. JAG, Sec. 395(9).

The absence without leave which is shown to have existed

from and after 5 October 1945 was not terminated until his confinement at Fort McPherson, Georgia, on 27 November 1945.

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support so much of the offense alleged as includes absence without leave by accused from his organization at Camp Campbell, Kentucky, from 5 October 1945 to 27 November 1945, and legally sufficient to support the sentence.

Earle Hepburn, Judge Advocate.

Robert J. Olomon, Judge Advocate.

Samuel L. Morgan, Judge Advocate.

SPJGN-CM 298598 1st Ind
TO: The Judge Advocate General

For his information.

Earle Hepburn
EARLE HEPBURN
Lt. Col., JAGD
Chairman, Board of Review #3

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

SPJGK - CM 298601

18 FEB 1946

UNITED STATES	)	AIR TECHNICAL SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Wright Field, Dayton, Ohio, 5 December 1945. Dismissal.
First Lieutenant JOHN R. SCHIPPERS (O-1638445), Air Corps.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant John R. Schippers, AC, 4020th AAF Base Unit, Wright Field, Dayton, Ohio, did, at Wright Field, Dayton, Ohio, on or about 13 June 1945, wrongfully and unlawfully make and utter to the Wright Field Officers' Club a certain check in words and figures as follows, to wit:

13 June 1945

Bank of Manhattan Co - 761-765 Nostrand Ave - Brooklyn City Bank New York City, N.Y., State

Pay to the Order of THE WRIGHT FIELD OFFICERS' CLUB $15 00/100

Fifteen & no/100 ---------- DOLLARS

Printed Name John R. Schippers Sign /s/ John R. Schippers
Address Wright Field, Dayton A.S.N. O-1638445
Phone No. 2-4101 Rank 1st Lt. AC
Acct #2287

and by means thereof, did fraudulently obtain from The Wright Field Officers' Club the sum of $15.00, he, the said John R. Schippers, then well knowing that he did not have and not intending that he should have sufficient funds in said Bank of

Manhattan Company for the payment of said check.

Specification 2: In that First Lieutenant John R. Schippers, ***, did, at Wright Field, Dayton, Ohio, on or about 2 August 1945, wrongfully and unlawfully make and utter to The Wright Field Officers' Club a certain check in words and figures as follows, to wit:

Aug 2, 1945

Check No. B73589

BANK OF THE MANHATTAN COMPANY
763-765 Nostrand Avenue, Brooklyn, N.Y.

Pay to the Order of WRIGHT FIELD OFFICERS' CLUB $20.00/100

Twenty & no/100 DOLLARS

/s/ John R. Schippers
1st Lt. A.C.

Account No. 2287
0-1638445
2-4101

and by means thereof, did fraudulently obtain from The Wright Field Officers' Club the sum of $20.00, he, the said John R. Schippers, then well knowing that he did not have and not intending that he should have sufficient funds in said Bank of Manhattan Company for the payment of said check.

NOTE: Specifications 3 to 9 inclusive vary materially from Specification 2 only with respect to date of offense, number of check, date of check and amount of check, as follows:

Spec.	Date of Offense	Number of Check	Date of Check	Amount of Check
3	7 August 1945	"B 73592"	"7 Aug 1945"	$10.00
4	8 August 1945	"B 73600"	"8 Aug 1945"	$ 5.00
5	12 August 1945	"B 74465"	"12 Aug 1945"	$10.00
6	13 August 1945	"B 74466"	"13 Aug 1945"	$10.00
7	14 August 1945	"B 73599"	"14 August 1945"	$ 5.00
8	18 August 1945	"B 74479"	"Aug 18, 1945"	$10.00
9	24 August 1945	"B 74467"	"Aug 24, 1945"	$20.00

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

Specification: In that, First Lieutenant John R. Schippers, AC, ***, did, at Wright Field, Dayton, Ohio, on or about 28 August

1945, wrongfully make and utter to the Winters National Bank and Trust Company, a certain check in words and figures as follows, to-wit:

Aug 28 1945

B74471
FILL IN NAME OF BANK
Bank of Manhattan Co - 763-765 No. Strand Ave. BANK
Brooklyn - N.Y.
PAY TO THE ORDER OF Cash $60.00/100
Sixty and no/100 - - - - - - - - - - - - - - - - - DOLLARS

Acct No. 2287 /s/ John R. Schippers
2-4101 1st Lt., AC

he, the said First Lieutenant John R. Schippers, then well knowing that he did not have and not intending that he should have, sufficient funds in said Bank of The Manhattan Company for the payment of said check.

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

3. The checks in question will be identified in this opinion by numbers corresponding in sequence to the order in which the checks are listed in the ten specifications involved. The original charge was preferred 24 September 1945 and the additional charge was preferred 12 October 1945.

4. Evidence for the prosecution.

Checks 1 through 10, attached to a written stipulation executed by counsel for the prosecution and defense, and the accused, were admitted in evidence without objection (Pros. Ex. 1 and "Attachments" 1-10). This stipulation provided that if Mr. Elton W. Merrill had been present in court he would have testified that he was Assistant Treasurer of the Bank of the Manhattan Company, Brooklyn, New York; that "from prior to 1 June 1945 until subsequent to September 15, 1945, the accused, ***, maintained a special checking account with said Bank of the Manhattan Company"; that on or about the following dates checks 1 through 10 were presented to that bank for payment:

Check	Presented for Payment
1	22 June 1945
2	10 August 1945
3	16 August 1945
4	16 August 1945

5	22 August 1945
6	22 August 1945
7	25 August 1945
8	29 August 1945.
9	4 September 1945
10	8 September 1945

and that "each of the checks *** were dishonored upon such presentment for payment and payment thereof was refused because there was not sufficient funds in the account of the said John R. Schippers at the time such checks were so presented for payment to pay the same."

Private First Class Howard H. Leagan testified that he was a bartender at Orville Wright Branch of the Officers' Club at Wright Field when accused "handed" check 4, dated 8 August 1945, "across the bar" to him, and he gave accused $5.00 "in place of it" (R. 14,15,17; Att. 4, Pros. Ex. 1). The date on the check was "approximately about the time I took it in as well as I can remember" (R. 14).

Mrs. Sally J. Anderson testified that from about 1 June 1945 to about 1 September 1945 she was general cashier for the Wright Field Officers' Club. Each of the checks 1 through 9 bore the "genuine stamped endorsement of the Orville Branch, Wright Field Officers' Club" (R. 19). She did not know whether accused "actually received cash" for these checks (R. 20), but "the only checks that came through the Orville Club were for cash because that was the only way we took checks there because they never paid dues at the Orville Club and all checks coming through the Orville Club were marked that way and they were the only checks marked with the Orville Stamp" (R. 19).

Mrs. Irene Buckley testified that she was secretary to the Assistant Administrator in the finance office of the Officers' Club, and that it was her "duty to collect the returned checks, checks which are returned from the bank for one reason or another" (R. 20). "I make every effort to collect the money from the officers for whom they were returned" (R. 21). She kept a record of all returned checks. This record showed that checks 1 through 9 had been returned to her office after having been dishonored by the bank (R. 22). On cross-examination by the defense she testified that checks 7, 8 and 9 had been subsequently "paid by cash; the others are listed as having been redeposited to the bank for payment" (R. 25). There was no record that "the checks or the redeposit itself were dishonored for the second time," and "whether or not they were redeposited after their original return *** they are all marked paid" (R. 26).

Mr. Fred A. Collins testified that he was Assistant Cashier of the Winters National Bank and Trust Company, Dayton, Ohio. Check 10 was given by accused to that bank to redeem three other checks of his drawn on Manhattan Bank in the total sum of $60, which had been deposited by the payee in Winters Bank for collection and had been returned unpaid. Check 10 was also returned unpaid about 3 September, and witness called accused

"by phone and told him that the check had been returned" (R. 31). The day he was thus notified accused paid witness $60 in cash (R. 30,31,33).

On 26 September 1945, after his rights under the 24th Article of War had been explained to him, accused signed and swore to a statement which was admitted without objection into evidence, attached to the deposition of the Investigating Officer (Att. 1, Pros. Ex. 5). In this statement accused said that he had examined checks 1 through 9, "and the signatures thereon are mine." All these checks were cashed for him by Wright Field Officers' Club. He "made good to the Wright Field Officers' Club the amounts represented by said checks," after they had been returned by the bank unpaid. He had a special checking account with the "Bank of Manhattan Company of Brooklyn, New York," in which no minimum balance was required, a fee being paid for each check drawn. At the time he wrote checks 1 through 9 he did not know his "account was insufficient to cover the amount of these checks *** because I had been neglectful and had not maintained a record of my balance *** I was in the habit of drawing two or three checks at a time out of the check book and carrying those in my wallet and did not make entries in the stub after I had drawn the checks. Purely a matter of no bookkeeping." He learned 18 July that check 1 had been returned unpaid. On 23 July, while home on leave, he went to the bank, where he found his balance "was around two dollars," and deposited $85 in his account. Although he had "informed the Officers' Club that as soon as I reached home I would see that there was sufficient money in the bank to cover the amount of this check," and was "under the impression that the club had recently put the check for collection," he learned late in August "that the club had never put the check through." While on leave he wrote some checks "for small amounts" on this account. Early in August his monthly pay check, approximately $210, was sent to the bank for deposit in his account, and a similar deposit was made 1 September. He had no other income, no assets, no dependents, and no one else was authorized to draw checks on his account. He did not realize he was spending money in excess of his income.

On 14 October 1945, after stating to the same investigating officer "that he did remember his rights as *** previously explained them to him," accused signed and swore to a second statement, admitted in evidence without objection as Attachment 2 to the investigating officer's deposition (Pros. Ex. 5). In this statement he admitted uttering check 10 to Mr. Collins to pay for three other checks of his in favor of "Sully's Bar" which had been dishonored. When he learned that check 10 had been returned, he told -

> "*** Mr. Rowe, connected with the Winters National Bank and Trust Company *** I would have the money the next day. The following day 30 Aug 1945 I paid Mr. Rowe $60.00 cash and received the three checks which I had given Sully's Bar and which were returned unpaid. I did not, however, obtain the check for $60.00 as I did not at the time have the receipt present which the bank had given me for the $60. check, which receipt indicated that it had been

given to pay for the three aforesaid checks."

5. Evidence for the defense.

After having been apprised of his rights, accused elected to testify under oath (R. 49). He testified that he was born 1 September 1914 at Brooklyn, New York, and "graduated from St. Paul's School, Garden City, taking a course *** preparatory to taking entrance examination to West Point *** due to political reasons I did not get the appointment to West Point." He thereupon entered the "fire insurance business" in which he was engaged six and one half years. There he "started out as a runner, worked my way up to a fire insurance underwriter" (R. 50,51). On 7 March 1942 he was inducted into the military service and served as an enlisted man approximately seven months. Soon after he had completed the course at the Signal Corps Officer Candidate School, Fort Monmouth, and had received his appointment as second lieutenant, he was assigned to a technical division at Wright Field, where he served as Military Personnel Officer for twenty-two months. He was subsequently assigned to Shipments Control Division of the Dayton Signal Corps Supply Agency at the request of the chief of the division.

The substance of his testimony bearing on pertinent matters which had been omitted from or differently reported in his statements is as follows:

a. He established his special checking account at Manhattan Bank in September 1944. There was a "ten cent charge on each check," and an additional service charge of $2.00 on each check dishonored (R. 52,61). He did not know, when he opened the account, that service charges were to be made; "I did not read the front of the book very carefully" (R. 66), but he had learned in June 1945 that there was such a service charge (R. 71). He received bank statements every three or four months, the last two statements having been received 10 July 1945 and 6 October 1945 (R. 52,53,54). His government pay check had been deposited in this account "the first four or five days" of every month since October 1944 (R. 53).

b. In April 1945 he gave a friend, Mr. George Miller, three checks which were admitted in evidence without objection (Def. Exs. A,B,C), each in the amount of $100, to repay a loan. "The checks were dated May 1st, June 1st and July 1st, and the man said, 'Well, Dick, not to strap you I will deposit these checks May 30th, June 30th and July 30th" (R. 55). The only withdrawals of sums of $100 shown in accused's bank statements dated 13 August and 4 October, which were admitted in evidence without objection (Def. Ex. D), were one paid by the bank 1 August and another paid 8 August. Accused testified that these two payments were for the Miller checks dated 1 June and 1 July (R. 59,65,67). "Because of the low balance in the account" when he went to the bank 23 July, accused was "under the assumption" that the Miller check for June had previously "gone through on schedule" (R. 57,67), and he was not anticipating presentation of both

$100 checks in August (R. 59), which presentation drew his August balance down $100 lower than he thought it was (R. 70). Thus funds were insufficient to meet checks 2 through 9, "due to that extra $100 check going through during the month of August" (R. 59,71). Service charges on twenty checks dishonored in August further reduced the balance by $40, and "that is what threw that $60 check (number 10) out" (R. 61,70).

c. On 18 July Mrs. Buckley of the Officers' Club called him and told him check 1 had been returned unpaid. "I was preparing to go on leave and I went around to see her and asked her if she would just hold that check for a couple of days that if she would resubmit it on or about the 20th that there would be funds in the account to take care of the check" (R. 53). On 23 July 1945 he made a deposit of $20 to "take care of" check 1, and another deposit of $110 on 25 July (R. 54). He had said in his first written statement that he deposited only $85 in July, in addition to his pay check, because "I was not quite certain, I did not want to make the amount over and I underestimated the amount of the deposit I made when I was up home" (R. 65).

d. On 27 August 1945 he was called to the club and shown six of the checks 1 through 9, in the total sum of $70, including check 1, which had been returned unpaid (R. 58,59). He telephoned his mother the same day and asked her to deposit $100 in his account (R. 58). The bank statement shows a $100 deposit made 27 August (Def. Ex. D). On 28 August he drew a check for $70 to redeem the six unpaid checks held by the club. The $70 check "cleared the bank September 4th" (R. 59). Also on 28 August he drew check 10 for $60, to redeem the three checks in favor of Sully's Bar held by Winters Bank (R. 61). On 29 August a deposit of $40 was made in his account (R. 58; Def. Ex. D). "Around the 6th or 7th" of September, before investigation of the original charge had been completed, accused voluntarily "went to the club just to make sure there wasn't anything further, and it so happened that they did have three checks totalling $35" (R. 62). These were checks 7, 8 and 9. Accused "immediately paid cash, the $35 due on those checks, but the three checks were in the hands of Captain Howard, Investigating Officer, he apparently had gotten them the night before and when I went to see him I immediately gave him the receipt for the $35 *** but the checks were not given to me" (R. 60).

e. Accused did not "ever intend to defraud anyone by means of those checks," nor "ever intend to defer the payment of any of these obligations for the purpose of defrauding anyone" (R. 61). He always honestly believed there were sufficient funds in the account "to take care of these checks" (R. 62).

f. He made check 7 payable to "Cash," and "the writing 'Wright Field Officers' Club' is not mine" (R. 62; Pros. Ex. 1, Att. 7).

An examination of Defense Exhibit D, accused's bank statements, shows that between 23 July, when he made the deposit of $20 to meet check 1 for $15, and 13 August, his balance fluctuated between $169.71 and $15.71.

Captain E. F. Heflin, custodian of "the WD AGO 66-2 for all officers assigned to 4020th AAF Base Unit," testified that accused's "Officers' Qualification Record" showed that he had "five excellent ratings, two very satisfactory, two unknown," and that his most recent rating, 30 June, was 4.0 (R. 48).

Captain Raymond M. Rosenstein testified that accused worked under his direction from November 1944 to April 1945, that accused's "Reputation for truth and veracity was as good as any man's I have ever seen," and that he was dependable. Captain Rosenstein had "volunteered" his "services" as a witness when he "overheard from what" accused "said several weeks ago that he was in a jam" (R. 73).

Captain Bert B. Lavengood testified that he had "worked with" accused since "Thanksgiving Week of 1944", and that so far as he knew accused's reputation for telling truth was "O.K. He has never at any time that I know of not told the truth to me, and he has worked for me directly ever since around the first of April of this year" (R. 74).

Captain Richard L. Gay testified that he had known accused socially "since approximately the beginning of 1943," and that he had "no reason to question" accused's reputation for telling truth (R. 75). "I have made him small loans which have always been returned" (R. 76).

6. The evidence establishes that accused uttered the checks described in the specifications of the original charge, that he received cash in exchange for these checks, that there were not sufficient funds in the bank to meet them, and that they were not paid by the bank. However, it is the opinion of the Board that there is insufficient evidence to prove beyond a reasonable doubt that accused thus "fraudulently" obtained the sums specified, and knew that he did not have and did not intend to have sufficient funds for the payment of these checks, as alleged and found. The record shows that accused, within five days after having been notified at Wright Field that check 1 had been dishonored, went to his bank in Brooklyn and created and thereafter maintained for 21 days a balance sufficient to pay this check. If it had been promptly redeposited as accused had requested, it would have been paid. When accused was notified 27 August that this check and five others which had been dishonored were held by the club, he immediately caused $100 to be deposited in his account, and the next day issued a valid check for $70 which liquidated this debt. On his own initiative he discovered that checks 7,8 and 9 had been dishonored, whereupon he redeemed them with cash forthwith. All the checks were for relatively small amounts and restitution thereof was made before charges were preferred. Presentation of the Miller check for June, which was delayed until August through no fault of accused, did in fact reduce his August balance by a sum sufficient to have paid all the checks. He received no bank statements between 10 July and 6 October and had not been otherwise notified of the deficiency in his account when he uttered these checks. Under all the circumstances it does not appear

beyond a reasonable doubt that accused uttered these checks with the intent of deceiving the payees and causing them financial loss for his own gain (CM 237741, Ralph, 24 B.R. 107; CM 240885, Holley, 26 B.R. 161, 2; CM 249006, Vergara, 32 B.R. 14). Nevertheless, his negligence in failing to maintain sufficient funds to meet these checks was clearly demonstrated. He was not justified in assuming on 23 July, merely because his account at that time contained but $2.00, that the Miller check for June had previously been presented and paid in accordance with their understanding. He could very easily have ascertained when he was at the bank that this check had not been presented. His failure to keep a record of his checks, particularly after he knew that check 1 had been dishonored, and his consequent failure to maintain a sufficient bank balance, was conduct of a nature to bring discredit upon the military service in violation of the 96th Article of War, and in each case constituted an offense lesser than and included within the offenses of fraudulent uttering alleged in the specifications of the original charge (CM 228793, Petterson, 16 B.R. 313; Ralph, Holley, Vergara, supra).

There is ample evidence that accused uttered the check described in the specification of the additional charge and that he wrongfully failed to maintain a sufficient balance to meet this check, but not enough evidence to prove beyond a reasonable doubt that he knew he did not have and did not intend to have sufficient funds for the payment of this check as alleged and found. His previous conduct showed that when he uttered this check he was eager to pay, and that he thought he had and intended to have funds to meet it; his previous experience should have warned him to examine his account and to increase his balance at once to a sum sufficient absolutely to insure payment of this check.

7. War Department records disclose that this officer is 31 years of age, is single, and is a high school graduate. In civil life he was employed for eight years as a fire insurance underwriter. He entered the service 7 March 1942 and, upon completion of the Officer Candidate Course at the Eastern Signal Corps School, Fort Monmouth, New Jersey, was commissioned a second lieutenant, Army of the United States, 16 October 1942, and ordered to active duty effective the same date. He was promoted to first lieutenant 19 April 1944.

8. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted, no errors injuriously affecting the substantial rights of 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 as involves findings that accused wrongfully failed to maintain a sufficient bank balance to meet the checks described in the Specifications, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Thomas Moyx, Judge Advocate

William B. Tude, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 298601 1st Ind 20 FEB 1946

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant John R. Schippers (O-1638445), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully making and uttering nine checks and fraudulently obtaining by means thereof $95 (Specifications 1-9 of the Charge), and of wrongfully making and uttering one check in the sum of $60 (Specification of the Additional Charge), in violation of Article of War 96. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that the accused wrongfully failed to maintain a sufficient bank balance to meet the checks described in the specifications, and legally sufficient to support the sentence and to warrant confirmation thereof.

The accused cashed a check for $15 at the Wright Field Officers' Club about 13 June 1945. On 18 July he was notified by the club that this check had been returned unpaid by his bank, located in Brooklyn, New York. He asked the club representative to hold the check for "a couple of days" and then to present it again for payment. The accused went to his bank on 23 July and deposited $20. On 25 July he deposited $110, and until 13 August maintained a balance of more than $15 in his account. However, the check was not again presented to the bank by the club. On 27 August the club representative notified the accused that this check and five others which he had cashed there in August, and which had been dishonored, were held by the club. The accused immediately caused $100 to be deposited in his account and the next day issued a valid check for $70 which liquidated this debt. During an investigation prior to the preferring of charges in this case the accused on his own initiative went to the club and inquired whether any more of his checks had been dishonored. Upon finding that there were three totaling $35, also cashed at the club in August, he paid this amount immediately in cash. The last eight checks heretofore mentioned, totaling $80, would not have been dishonored if a check for $100, dated 1 June, which accused had some reason to believe had been presented to the bank and paid early in July, had not in fact been held by the payee until

early in August, when it had been presented to the bank and paid. On 28 August the accused uttered a check for $60 to redeem three other checks of his which had been dishonored. He was notified a few days later that this $60 check had likewise been unpaid, whereupon he immediately made restitution in cash. Bank statements were sent only at intervals of three months. His difficulties appear to have been caused by failure to keep any record of the checks he drew, and to acquaint himself at more frequent intervals with the state of his account. This officer is 31 years of age, is single, and has no dependents. His efficiency is rated excellent and his reputation for honesty and dependability in his work is good. His conduct does not show any moral turpitude, but does indicate that he was extremely careless and inefficient in the management of his checking account. I therefore recommend that the sentence be confirmed, but commuted to a reprimand and forfeiture of $50 pay per month for three months, and that the sentence as thus modified be ordered executed.

4. Consideration has been given to a letter from the accused to Honorable Patrick McCarran, United States Senator from Nevada, a copy of which letter is forwarded herewith.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Form of action
3. Ltr fr accused to Sen McCarran

(Findings disapproved in part. Sentence confirmed but commuted to a reprimand and forfeiture Of $50. pay per month for three months. GCMO 56, 6 March 1946).

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

SPJGN-CM 298783

UNITED STATES	)	FIRST SERVICE COMMAND ARMY SERVICE FORCES
v.	)	Trial by G.C.M., convened at Camp Edwards, Massachusetts, 28 December 1945. Dishonorable discharge (suspended) and confinement for seven (7) years. Disciplinary Barracks, Fort Benjamin Harrison, Indiana.
Private ROBERT C. MORRIS (33443129), East Coast Processing Center, Camp Edwards, Massachusetts.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Robert C. Morris, East Coast Processing Center, Camp Edwards, Massachusetts, did, at Fort Dix, New Jersey, on or about 11 May 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Lydia, Virginia, on or about 2 September 1945.

The accused pleaded not guilty to the Charge and Specification and was found guilty of the Charge and guilty of the Specification, except the words "at Fort Dix, New Jersey," and, "he was apprehended at Lydia, Virginia," substituting for the latter the words, "terminated in a manner and at a place not shown." 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 fifteen years. The reviewing authority approved the sentence, reduced the period of confinement to seven years, suspended the dishonorable discharge, and designated the Midwestern Branch, United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement. The result of the trial was published on 2 January 1946 in General Court-Martial Orders #6, Headquarters First Service Command, Army Service Forces, Boston 15, Massachusetts. The record of trial was forwarded to the Office of The Judge Advocate General pursuant to Article of War 50½.

3. The only evidence adduced by the prosecution to establish the inception of the desertion alleged in the Specification is the following entry in the morning report of Detachment Medical Department, 90th General Hospital:

"* * * Duty to AWOL * * * Pvt. Morris as of 1700, 5/10/43 * * *"

In the recent opinion in CM 296303, Burdick, a similar entry of a surname only was held to be insufficient to connect the accused with the offense charged. It was there said that:

> "The accused, by his plea of not guilty, admitted that he was the person named in the Specification and a member of the East Coast Processing Center of Camp Edwards, Massachusetts. His plea did not, however, admit that he was the unidentified Private Burdick who was a member of Company C, 101st Engineer Combat Battalion in June 1943. Although the Manual for Courts-Martial states that 'Identity of names raises a presumption of identity of persons * * *' it appears that the cases in which such a presumption has been employed involved considerable more description than a surname only (Wigmore on Evidence, 3rd Ed. Sec. 2529 and cases therein cited). When the presumption is used its 'strength * * * will * * * depend upon how common the name is, and other circumstances' (MCM, 1928, par. 112a). In this particular instance we not only do not know how many Private Burdicks there may be in the Army, but we cannot narrow our inquiry as to identification to a Private Burdick of any one organization; for the Specification alleges that Private William F. Burdick belonged to one organization and the morning report declares 'Pvt. Burdick' to be absent without leave from an entirely different organization.

This rationale squarely applies to the issue herein presented.

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

Earle Hepburn, Judge Advocate.

[illegible], Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 298783 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Robert C. Morris (33443129), East Coast Processing Center, Camp Edwards, Massachusetts.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect these recommendations, should such action meet with your approval.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(Findings and sentence vacated. GCMO 82, 25 April 1946).

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

SPJGN-CM 302564

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	MacDill Field, Florida, 3
Second Lieutenant ROLAND A.	)	January 1946. Dismissal.
SMITH (0-830142), Air Corps.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Roland A. Smith, Squadron "J", 301st Army Air Forces Base Unit, Drew Field, Florida, did, without proper leave, absent himself from his organization on or about 4 December 1945 and did remain so absent until apprehended by military authorities in Tampa, Florida, on or about 8 December 1945.

The accused pleaded not guilty to, and was found guilty of, both the Charge and the Specification. After evidence was introduced of a previous conviction by general court-martial of absence without leave for thirteen days and of failure to obey the order of a superior officer, he was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but remitted the forfeitures and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: The accused on 4 December 1945 absented himself without leave from Squadron "J", 301st Army Air Forces Base Unit, Drew Field, Florida (R. 6; Pros. Ex. A). He was "apprehended by military authorities" in Tampa, Florida, on 8 December 1945 (R. 6).

4. The defense introduced into evidence a stipulation that, if State Patrolman Guy Bostick were present in court, he would testify that while on the highway between Bartow and Lakeland, Florida, at about 6:00 a.m., on 5 December 1945, he saw the accused and another officer standing near a car which was resting in a ditch. The accused was in an injured condition and was removed to the Polk County Hospital for treatment (R. 6).

With this testimony as a background and after being apprized of his rights as a witness, he took the stand on his own behalf. He had answered roll call on 4 December 1945; but on the following day, while returning to camp, he attempted to pass a semi-trailer truck on a narrow, slippery road, lost control of his car, "overturned several times," and received a severe blow on the head and multiple bruises about the body (R. 7, 9, 14). When found by the state patrolman some fifteen or twenty minutes later, he was in a "dazed condition." At the hospital to which he was conveyed he was given treatment only for a cut on his head, and no other examination was made. Still in "quite a dazed condition" he was taken to a hotel in Tampa, Florida, in which he shared a room with Mr. Kaupp, a "recently discharged lieutenant." There he remained until his apprehension (R. 7-8, 10, 12). Throughout this period he was, in his own words,

> "* * * in a very dazed condition, and at the same time I had a very numb feeling in my hands up to my elbows, no feeling whatsoever in my hands. I couldn't even pick up an object unless I looked at it, and my right eye was affected, too, and I had very severe pains from headaches from my right eye. I didn't lose the sight of it, but it was very painful" (R. 8).

He was in his room most of the time and had his meals brought to him, but on the last day of his absence he twice went downstairs to eat (R. 8, 12, 14). When apprehended he was still "dazed" but not to the same degree as before (R. 13). Although returned to military control on 8 December, he did not seek medical aid until 14 December (R. 9, 13). Thereafter he had to take sleeping powders and headache tablets (R. 9).

In conclusion the defense presented two stipulations. One

was to the effect that Flight Surgeon Williard W. Smith, who was formerly in "Number 1 Dispensary" at Drew Field, had since been transferred and was unavailable as a witness. The other was that,

> "* * * the accused * * * served as a staff sergeant crew chief for P-36's, P-40's, P-39's, P-26's, A-17's, B-18's, B-17's, and OA-9's. This was overseas from 17 September 1939 to 9 April 1943; then on DS to North Africa from 15 June to 23 July 1942 and was returned to the States to undertake pilot training; that the accused is entitled to the following decorations: American Defense Ribbon, Pre-Pearl Harbor Ribbon, EAME Theater Ribbon, Victory Medal, and overseas service bars" (R. 15).

5. In rebuttal the prosecution offered a stipulation that the accused "was treated at the Polk County General Hospital on 5 December 1945 for a very small scratch on the head, and that merthiolate was applied and he was discharged" (R. 16).

6. The Specification of the Charge alleges that the accused "did, without proper leave, absent himself from his organization on or about 4 December 1945 and did remain so absent until apprehended by military authorities * * * on or about 8 December 1945." This offense was laid under Article of War 61.

Although there is some controversy in the testimony as to whether the accused absented himself on 4 or on 5 December 1945, it is not disputed that he left his organization without permission on one of these two days and did not return to military control until his apprehension on 8 December 1945. The only defense urged is that the accused on 5 December 1945 received a severe head injury which so benumbed his mental faculties that he did not fully appreciate what he was doing. The court-martial, after hearing and viewing the witness, chose to give no credence to his testimony. There is nothing in the record to indicate that this decision was ill-considered or in any way erroneous. On the contrary, a meticulous analysis of the accused's own statements creates a strong impression that the temporary amnesia claimed was more convenient than real. The Specification has been sustained beyond a reasonable doubt.

7. The accused is about 24 years of age. After being graduated from high school, he served as an enlisted man from 10 August 1939 to 15 April 1944 when he was commissioned a second lieutenant. On 23 November 1944 he accepted a reprimand and a forfeiture of $50.00 as punishment under Article of War 104 for an unauthorized absence of approximately a day and a half. On 24 May 1945 he was sentenced by a general court-martial to be reprimanded and to forfeit $87.50 of his pay per month for twelve months for an absence without leave for

thirteen days and for failure to obey an order. According to the Staff Judge Advocate's review, a subsequent unauthorized absence from 2 to 4 July 1945 resulted in a third reprimand, apparently under Article of War 104. On 28 November 1945 he was again tried by general court-martial upon ten specifications but was acquitted of them all. Less than a week later he committed the offense described in paragraph 3 above.

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

(Sick in quarters), Judge Advocate.

Robert J. Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 302564 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War

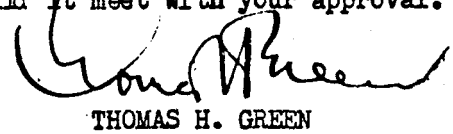
1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Roland A. Smith (0-830142), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from his organization for a period of four days, in violation of Article of War 61. After evidence was introduced of a previous conviction by general court-martial of absence without leave for thirteen days and of failure to obey the order of a superior officer, he was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but remitted the forfeitures and forwarded the record of trial for action under Article of War 48.

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

The uncontroverted evidence shows that the accused absented himself from his organization without authority for a period of four days. By way of defense the accused testified that he had received a head injury in an automobile accident at the time of his offense and that as a result he was suffering from a form of temporary amnesia. The court gave no credence to this contention, and the record contains nothing to indicate that the accused's story is entitled to any greater weight than was given it. Although the short absence without leave charged would not ordinarily justify the dismissal of an officer, the accused's past record conclusively demonstrates him to be unworthy of any clemency. He has been punished in the past twice under Article of War 104 and once by general court-martial. I accordingly recommend that the sentence as approved by the reviewing authority be confirmed and ordered executed.

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



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 76, 11 April 1946).

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

SPJGN-CM 302723

U N I T E D S T A T E S	)	UNITED STATES ARMY FORCES WESTERN PACIFIC
v.	)	Trial by G.C.M., convened at Headquarters, Base X, AFWESPAC, APO 75, 26 and 28 September 1945. Dismissal.
Second Lieutenant FRED S. EPPERSON (0-1176611), Field Artillery.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that 2nd Lieutenant Fred S. Epperson, 3539 Quartermaster Truck Company, did, at APO 75, wrongfully neglect his duties by failing to report for duty, as Pier Officer, at any time on the 19th, 20th and 21st days of June 1945.

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

Specification 1: (Motion for finding of not guilty sustained by the court, R. 38).

Specification 2: (Motion for finding of not guilty sustained by the court, R. 38).

Specification 3: In that Second Lieutenant Fred S. Epperson,

> 3539th Quartermaster Truck Company, did at APO 75, on or about 15 August 1945, attend the "Coconut Grove Nite Club", a public place, in the company of four enlisted men, and while there did drink intoxicating liquor with said enlisted men, all to the prejudice of good order and military discipline.

The accused pleaded not guilty to all Charges and Specifications. After a motion for a finding of not guilty of Specifications 1 and 2 of the Additional Charge had been sustained by the court, he was found guilty of the Charge and its Specification and of the Additional Charge and Specification 3 thereunder. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, but recommended commutation to a forfeiture of $100.00 per month for three months, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: The accused was assigned to duty as a pier officer in Manila and was in charge of a number of Quartermaster trucks (R. 7, 8, 12-13, 26). On 19 June 1945 he called the Charge of Quarters and "left word" for Captain Lawrence E. Arnold, the Battalion Executive Officer that "I wouldn't be at the dock" because of illness (R. 10, 14; Pros. Ex. A). Without availing himself of sick call or receiving official permission to absent himself the accused remained away from his work that day and the succeeding two days (R. 8, 24). Although the message was promptly delivered to Captain Arnold, he did not go to the accused's quarters, direct that he report for duty, or leave any message for him (R. 7, 10-13; Pros. Ex. A). Captain Arnold did, however, proceed to the accused's company that afternoon or evening, and, upon not finding him in the area, talked to his commanding officer. A second visit was paid by Captain Arnold to the company area the following evening, but the accused again was not present. According to the accused's own pre-trial statement, he was available in the area on 20 June until 11:00 o'clock and on 21 June until 1500 o'clock. His duty hours were then from 0700 to 1900 o'clock (R. 24; Pros. Ex. A). During most of 19, 20, and 21 June he was seen by his commanding officer "in his bunk sleeping or reading," but on the night of the 20th and on the afternoon and night of the 21st he engaged in some drinking (R. 24-25; Pros. Ex. B).

In the company of four enlisted men he entered the Coconut Grove Night Club on the night of 15 August 1945 (R. 28-29, 31). Proceeding to the bar, they each ordered and consumed two drinks (R. 36).

4. The accused, after being apprized of his rights as a witness, elected to take the stand on his own behalf. At about 5:30 p.m. on 18 June 1945 he had gone to Base X Dispensary to request treatment for a heat rash from which he was suffering. Although he did not place

his name on a sick book, he was examined by a lieutenant and told that it would be necessary "to stop sweating" to obtain relief. He accordingly called the Charge of Quarters and "asked him to take a message for Capt. Arnold to the effect that I wouldn't appear at work that day because" of the rash "and that I was going to stay in my company area until such time as it cleared up" (R. 40-41, 45). Having been assured that this information would be conveyed to Captain Arnold, the accused did not report for duty on 19 and 20 June and not until 1530 o'clock on 21 June 1945 (R. 42).

The accused admitted having had one drink at the Coconut Grove Night Club in the company of enlisted men. His reason for being there was that one of the men, who was under his command, had complained of being barred from the establishment because of his color (R. 41, 43, 46). The drinking incident was described by the accused as follows:

> "The men I came with were inside at the bar and I stopped in front of the office and they called me into the bar and asked me if I would have a drink. I asked what it would cost and they told me the price and I said it was too much and told them to give it back to the bar tender and they said they had drank some already. They said, 'We will pay for it,' and I said, 'You shouldn't pay for it.' The bar tender offered me a drink and I accepted it on the house and the other men paid for theirs." (R. 42, 44).

Two other witnesses were offered by the defense. Mr. Constantino Rodas, Jr., who was employed by the Coconut Grove Night Club, testified that one of the four men with the accused on 15 August 1945 had visited the establishment earlier the same night (R. 38-39). The other witness, Second Lieutenant Paul D. Dennis, Jr., had been excused from work at the pier because of illness and described the procedure employed by him as follows:

> "About two weeks ago I was feeling sick so called Lt. Jones, the company adjutant, and told him to get in touch with the battalion commander and tell him I was sick. That was at 8 o'clock and about at 9 o'clock I left after he called back and said he had notified the battalion, so I left and went to my area" (R. 47).

The same course had been followed by him on other occasions in the past (R. 47).

5. The Specification of the Charge alleges that the accused did "wrongfully neglect his duties by failing to report for duty, as Pier

Officer, at anytime on the 19th, 20th, and 21st day of June 1945." This offense was laid under Article of War 96.

Having been advised that his ailment was curable by rest and not by medication, the accused notified the Battalion Executive Officer through the Charge of Quarters of an intention to remain away from duty for a short period. This procedure had been followed by at least one other officer under similar circumstances. After receiving the message, the Executive Officer "contacted" the accused's commanding officer who had observed the accused lolling about in his bunk "sleeping or reading." Although an explanation could easily have been demanded and obtained, neither the Executive Officer nor the commanding officer made any direct inquiry of the accused. The commanding officer had, however, personally seen the accused and was familiar with his true condition. This information was undoubtedly passed on to the Executive Officer on the occasion of his two visits to the company area. Had the Executive Officer and the commanding officer not been satisfied that the accused's ailment was such as to warrant his absence it is inconceivable that they would not have promptly called him to account.

In the light of the experience of other officers, his message to the Executive Officer, and the full knowledge and apparent acquiescence of his commanding officer and the Executive Officer the accused had every reason to assume that he had authority to absent himself from his duty. It is true that the accused could have avoided trouble by enrolling his name in the sick book and that his drinking during the period of his abstention from work did not tend to dispell all doubt concerning his motives, but, be that as it may, his superiors must have been aware of the nature of his ailment, and he had the right to interpret their silence with knowledge of the facts as approval. We cannot accordingly say that the prosecution has established beyond a reasonable doubt that he did "wrongfully neglect his duties by failing to report for duty."

6. Specification 3 of the Additional Charge alleges that the accused did, on or about 15 August 1945, "drink intoxicating liquor with * * * enlisted men * * *." This was also set forth as a violation of Article of War 96.

Whatever his reason may have been for entering the Coconut Grove Night Club there is not the slightest doubt that the accused partook of one or two drinks in the company of four enlisted men. The offense was trivial, but, in the light of well-established authority, it unquestionably prejudiced good order and military discipline. The Specification has been proved beyond a reasonable doubt.

7. The accused, who is about 27 years of age, was graduated from Paul Quinn College with a B.A. degree in 1941. From February to June of

that year he was employed as a table waiter and from June to October as a life insurance salesman. From October, 1941, to January, 1942, he was a substitute teacher in a high school. He was inducted on 28 February 1942 and served as an enlisted man until 28 January 1943 when he was commissioned as a second lieutenant. On 27 December 1944 he was sentenced to be reprimanded and to forfeit $75.00 per month for two months for being drunk and for behaving in a disrespectful manner to a military policeman.

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

Parle Sephum, Judge Advocate.

Robert J. O'Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 302723 1st Ind
Hq ASF, JAGO, Washington 25, D. C. 20 FEB 1946
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Fred S. Epperson (O-1176611), Field Artillery.

2. Upon trial by general court-martial this officer was found guilty of wrongfully neglecting his duties (the Spec. of the Charge), and of drinking intoxicating liquor with enlisted men (Spec. 3 of Add. Chg.), in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally insufficient to support the finding of guilty of the Specification of the Charge and the Charge (Original Charge and Specification) but legally sufficient to support the other findings and the sentence (predicated on a finding of guilty of Specification 3, Add. Chg.) and to warrant confirmation thereof.

The accused, a colored officer, and four enlisted men, on the night of 15 August, entered a night club in Manila. Proceeding to the bar with them, he consumed two drinks in their company. Although the accused has one previous conviction by general court-martial for being drunk and for behaving in a disrespectful manner to a military policeman, his present offense is so trivial that it cannot reasonably warrant the drastic punishment imposed by the court. The reviewing authority has recommended commutation to a forfeiture of $100 per month for three months, but even this lesser punishment seems too severe, particularly in view of the fact that the Board of Review has held one of the two Specifications of which the accused was convicted not to be legally sustained by the record. I accordingly recommend that the sentence be confirmed but that it be commuted to a reprimand and a forfeiture of $50 of his pay per month for three months and that the sentence as thus modified be ordered executed.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 43, 6 March 1946).

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

SPJGK - CM 302766

22 APR 1946

UNITED STATES	ALASKAN AIR COMMAND
v.	Trial by G.C.M., convened at Fort Richardson, Alaska, 3 January 1945. EACH: Dismissal.
Captain JOHN H. DRAKE (0-571509), Air Corps, and Captain LEONARD A. SMITH (0-915635), Air Corps.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Captain John H. Drake, 24th Base Headquarters and Air Base Squadron (less detachments), and Captain Leonard A. Smith, 54th Fighter Squadron, acting jointly, and in pursuance of a common intent, did, at the Idle Hour Country Club, located at Lake Spenard, in the vicinity of Anchorage, Alaska, on or about 18 November 1945, wrongfully take and use without consent of the owner, a certain automobile; to wit, a Pontiac Sedan, property of J. E. McDonald, of a value of more than $50.00.

Each accused pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of any previous convictions of either accused was introduced. Each accused was sentenced to be dismissed the service. Seven of the nine members of the court thereafter recommended "that clemency be exercised by suspension of so much of the sentence as relates to dismissal from the service." The reviewing authority approved the sentence as to each accused and forwarded the record of trial for action under Article of War 48.

3. For the Prosecution.

The two accused, together with First Lieutenant Howard A. Wall were present at the Idle Hour Country Club, located at Lake Spenard near

Anchorage, Alaska, on the evening of 17 November 1945. They arrived together at about 10:30 o'clock in the evening and left the club building about 1 o'clock on the morning of 18 November when the hostess told them that all military personnel must leave (R. 9). Both the accused and Lieutenant Wall had visited about four bars in Anchorage, earlier in the evening, and had been drinking both there and at the Idle Hour Country Club (R. 15). They were "feeling darn good" but were not drunk (R. 9).

Mr. J. E. McDonald had arrived at the Idle Hour Country Club sometime after midnight. He parked his car, a green Pontiac torpedo sedan, two-door, at the side of the building 40 or 50 feet from the entrance and left the engine running. After having a few drinks someone asked him if he had left his car parked outside with the engine running and told him that the car was gone. He went to the window and recognized his car as it was leaving the parking lot. He had given no one permission to use it (R. 5).

After leaving the building about 1 o'clock, the accused and Lieutenant Wall walked around the parking area while waiting for a cab, and came to a car parked at the side of the building near a clump of trees. The engine of the car was running (R. 9). One of the accused said: "Why don't we take this car and go to town?" Lieutenant Wall remonstrated, stating to accused: "I won't have any part of it. *** Use your head fellows. You can get in trouble that way. I won't have any part of anything like that", and immediately walked away (R. 10). As he reached the front of the building he heard a noise or commotion and saw a car move out from the clump of trees where the car in question had been parked. It was without lights and started down the road leading to Anchorage (R. 11,12). He saw no one get into the car and could not identify the passengers in the car as it drove off (R. 17). After leaving accused by the car, Lieutenant Wall did not see accused at the club again that night (R. 12). At about the time Lieutenant Wall heard the noise and turned to go back to the side of the building, the club hostess came out the front door (R. 11). The hostess had seen the accused that night in the club, and had spoken to them "about transportation." After they left the building, one of the accused "rang the bell" at a "quarter after 1:00" to inquire about the "cab." "I said it was on the way, I had checked it. The Captains disappeared and I went out the door as a car was driving away" (R. 19,20) with the lights off (R. 21). She "could not see any body in the car" (R. 21). She immediately telephoned the Military Police (R. 20).

The Military Police at Anchorage received a call from the Idle Hour Country Club at approximately 1:50 A.M. on 18 November 1945. First Lieutenant Marshall, Military Police officer, proceeded immediately toward the club and about a mile from the club he met the accused walking on the

road in the direction of Anchorage. He stopped and asked them if they had seen a green Pontiac sedan and they answered that they had not. They declined an offer to ride to the club with the Military Police officer and then back to Anchorage (R. 23,24). The Military Police officer left accused on the road, proceeded toward the club three or four hundred yards further when he saw the car in question in a ditch plainly visible from the road. The front of the car faced in the direction of the Idle Hour Country Club. Its right rear wheel was in a ditch, and the remainder of the car was on the road, covering approximately three-fourths of the roadway (R. 23, 24, 25). As Lieutenant Marshall approached it, a cab passed by on its way toward town; he turned around, started back and on failing to see the accused on the road, he overtook and stopped the cab, found accused in and ordered them out of the cab and took them into custody (R. 24). The two captains thus removed by Lieutenant Marshall had been "picked up" that night by the driver of the cab as he was returning to Anchorage with a "party" that he had "picked up" at the Idle Hour Country Club. He had passed these officers, walking on the road, as he was proceeding toward the club and "a little further" had seen a car in the ditch (R. 21,22). When he "picked up" the officers they were about three or four hundred yards from the car (R. 22). Because of the darkness that night he could not identify the accused as the officers taken by the Military Police from his cab (R. 22). On the day following the incident, according to the testimony of Lieutenant Wall, Captain Drake, one of the accused, told him not to say anything about the "incident," and on another occasion, subsequent thereto, asked him about the possibility of his testifying that there were other people standing outside the club that night (R. 14). Mr. McDonald testified that he had telephoned Captain Drake about the damage to his car, had spoken to a person who gave his name as "Captain Drake," and that he had been told by this person that "he couldn't see me now, he had been confined; it would be two weeks before he could get to town, but would see me about it" (R. 6,7,8). Evidence of these three conversations was admitted only against Captain Drake (R. 26). The following conversation between the other accused, Captain Smith, and Lieutenant Wall (R. 14) was admitted only against Captain Smith:

> "Q. Did the other Captain say anything to you at any time?
> A. I saw him a day or two after that.
>
> "Q. Did he ask you any question?
> A. He asked me if anybody said anything to me.
>
> "Q. What did you say?
> A. Well I said 'No one said anything to me yet.'
>
> "Q. What was his response to that?
> A. I am not sure - 'Let's just hope they don't.'"

It was stipulated that the value of the car described in the Specification was at the time referred to therein greater than fifty dollars (Pros. Ex. 1).

4. For the Defense.

After having been advised of their rights as witnesses, the accused elected to remain silent. No evidence was presented by the defense.

5. While all elements of an offense must be proved, it is elementary that the proof may be by circumstantial evidence. It is also well established that while absolute certainty is not essential, circumstantial evidence which creates a mere conjecture or a mere probability of guilt is not sufficient. The guilt of an accused must be founded upon evidence, which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except that of a defendant's guilt. The circumstances must not only be consistent with guilt but inconsistent with innocence. (16 C.J. 766; CM 233766, Nicholl, 20 B.R. 123,124; CM 238435, Rideau, 24 B.R. 272; CM 258020, Palomera, 37 B.R. 299).

Applying these principles to the circumstances established in the present case, the Board of Review is of the opinion that the guilt of accused has been fully proved. It is true that no one saw the accused actually take the car described in the specification. However, the accused, who were impatient about procuring transportation from the Idle Hour Club to Anchorage, were standing by the car in front of the club when one of them suggested its unauthorized use. The owner gave no one authority to and did not himself take or use the car. Shortly after the suggestion had been made the car was driven away toward Anchorage with its lights off. The two accused were not seen at or in front of the club after the disappearance of the car. When they were next seen that night, they were walking on the road between the club and Anchorage and when questioned denied that they had seen the missing car, although it was plainly visible on the road, in a wrecked condition, three or four hundred yards away, between them and the club. Proof of these facts, which were neither controverted nor explained, clearly justifies the conclusion reached by the trial court, with which the Board of Review concurs.

6. War Department records show that the accused, Captain Drake, is 45 years and 5 months of age and is married. He attended but did not graduate from high school. He enlisted in the Army 18 February 1929, and served continuously as an enlisted man, attaining the rank of First Sergeant, until 19 January 1943, when he was discharged upon completion of the prescribed course of the Officer Candidate School, Army Air Forces Technical Training Command, to accept a commission as Second Lieutenant in the Army of the United States effective 20 January 1943. He was called into and entered upon active duty as Second Lieutenant on that date. He was promoted to First Lieutenant 27 September 1943 and to Captain 5 July 1944. As a civilian he was employed as an electrician and construction laborer from 1914 to 1929.

7. War Department records show that accused, Captain Smith, is 47 years and 11 months of age, is married and has two children. He was born in England, where he graduated from a "Public School," served from 28

October 1914 to 8 April 1919 as a private in the "Canadian Infantry" and subsequently became a naturalized citizen of the United States. He attended for five years and graduated from the San Francisco Institute of Accountancy, receiving the degree of "C.P.A." After working successively as a farm hand, boilermaker's helper, driver for a department store, and salesman for a creamery between 1919 and 1923, he entered the service of the Southern Pacific Company as a clerk in the accounting department and thereafter held positions as an accountant with the N. S. Pipe Bending Company, Haskins & Sells, and C.I.T. Corporation. He was serving as Assistant Treasurer and Accounting Manager of the San Francisco Office of the latter corporation at the time of his appointment as a Captain in the Army of the United States on 21 August 1942. On 25 June 1942 he requested "immediate active duty," and on 10 July 1942, after taking cognizance of the fact that he had a physical defect, namely "surgical immobilization of spine" again requested active duty. He was called to active duty effective 31 August 1942, and began his tour of duty on that date. On 30 August 1943 a Board of Medical Officers, convened at Kennedy General Hospital, Memphis, Tennessee, found him physically qualified for general service and overseas service.

8. Consideration has been given to the recommendation made by seven of the nine members of the court that "clemency be exercised by suspension of so much of the sentence as relates to dismissal from the service," based upon the "long and honorable previous service of accused and the fact that accused have already been in part punished for their offense by restriction since 18 November 1945."

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

Hermann Mayer, Judge Advocate

William S. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 302766 1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain John H. Drake (O-571509), Air Corps, and Captain Leonard A. Smith (O-915635), Air Corps.

2. Upon joint trial by general court-martial each of these officers was found guilty of wrongfully taking and using an automobile without the consent of the owner, in violation of Article of War 96. Each was sentenced to be dismissed the service. Seven of the nine members of the court thereafter recommended that clemency be exercised by "suspension of so much of the sentence as relates to dismissal from the service." The reviewing authority approved the sentence as to each accused and forwarded the record of trial for action under Article of War 48.

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

The two accused, who had had several drinks during the evening and who were described by their companion as "feeling darn good," like himself, were awaiting a taxi to take them back to Anchorage from a night club near that city, about one o'clock in the morning of 18 November 1945. The weather was cold and one of the accused suggested taking an automobile that was standing near. The two accused thereupon drove off in the car, which apparently skidded a short distance from the club and was left by them in the road, somewhat damaged.

Both accused are mature men with excellent civil and military records. Captain Drake is over 45 years of age and is married. He served as an enlisted man for fourteen years, attaining the rank of First Sergeant, and was commissioned a Second Lieutenant on 20 January 1943, after attending Officer Candidate School. Captain Smith is approximately 48 years of age, is married and has two children. He served as a private in the "Canadian Infantry," from October 1914 to April 1919. He has a degree of "C.P.A." and in civil life was an accountant. He was commissioned a Captain from civil life and called to active duty on 21 August 1942, after taking cognizance of the existence of a physical condition which temporarily classified him as qualified for limited service only. A year later he was found qualified for general and overseas service. While the conduct of accused cannot be condoned, it is apparent that their state of exhilaration, due to having indulged in intoxicants, caused them to forget themselves momentarily and

to act wrongfully and improperly. In view of all the circumstances, the recommendation by the members of the court, and the previous good reputation and honorable service of each officer, I recommend that the sentence as to each be confirmed but commuted to a reprimand and to forfeiture of $50 pay per month for three months.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 118, 10 May 1946).

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

(337)

SPJGH - CM 302787

5 MAR 1946

UNITED STATES v. First Lieutenant CHARLES H. McAFEE, SR. (0-1058067), Coast Artillery Corps.	PENINSULAR BASE SECTION APO 782 Trial by G.C.M., convened at Naples, Italy, 2 November 1945. Dismissal, total forfeitures and confinement for two (2) years.

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

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

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

CHARGE: Violation of the 93d Article of War.

Specification 1: In that First Lieutenant Charles H. McAfee, Sr., casually attached unassigned 541st Replacement Company, 31st Replacement Battalion, 7th Replacement Depot, did, at Terme, D'Agnano, Italy, on or about 5 October 1945, feloniously take, steal and carry away Allied Military Currency of a value of about $90.00, a five-hundred (500 mil Palestinean note of some value, a one-hundred (100) Greek drachma note of some value, and a one-thousand (1000) Greek Drachma note of some value, the property of Flight Officer Joseph R. Rodriguez.

Specification 2: In that First Lieutenant Charles H. McAfee, Sr., * * *, did, at Terme, D'Agnano, Italy, on or about 5 October 1945, feloniously take, steal and carry away one (1) German Luger Pistol, value about $20.00, the property of Second Lieutenant Herbert B. Chadwick.

Accused pleaded not guilty to the Charge and the two Specifications thereunder. He was found guilty of the Charge, guilty of Specification 1 and guilty of Specification 2, except the word and figures "about $20.00," substituting therefor the words "of some value." No evidence of previous convictions was introduced. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five (5) years. The reviewing authority approved the sentence, remitted three years of the confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 5 October 1945, the 541st Replacement Company, of which accused was a member, was billeted at the Terme Hotel, Terme, D'Agnano, Italy (R.7). The town of Terme is situated at a point just outside the city of Naples (R.8). Accused was the only assigned occupant of room No. 6 in Section B of the hotel (R.23,29). At about 6:00 a.m., on the above-mentioned date, Flight Officer Joseph Rodriguez, who with Flight Officer O'Connell, occupied room B-2 of the Terme Hotel awoke and saw the accused standing between the two beds occupied by Rodriguez and O'Connell. Accused "was just standing there" when observed by Rodriguez (R.14). It was early morning and the light was fair (R.9). Lieutenant McAfee stated that he was leaving that morning and inquired if either of them had a jacket to sell (R.8,14). Both Flight Officers replied in the negative and accused was requested to leave the room, which he did. Before retiring the previous night, Rodriguez had placed his trousers containing his wallet on a small box at the foot of his bed. At that time he checked his wallet and noted that he had nine 1000 lire in allied military currency, a 500 mil Palestinean note, a 1000 drachma note, a 100 drachma note, and one United States "yellow seal" dollar (R.9).

About a minute after accused departed from the room Rodriguez observed that his trousers and wallet were lying on the floor and he got up to investigate. Accused had been observed standing alongside the box when Rodriguez awakened. Upon picking up and examining the wallet, Rodriguez observed that all the afore-mentioned money was missing. He had given no one permission to take it (R.9).

Rodriguez and O'Connell dressed and searched through the halls for accused but being unable to find him, went to the hotel room of Lieutenant Cecchinelli, the billeting officer (R.10,15). There, about 6:30 a.m., Rodriguez complained that $90.00 in allied currency, a United States one dollar gold seal note, a 500 mil Palestinean note and "two other notes of foreign denomination" had been taken from his wallet (R.27), whereupon Lieutenant Cecchinelli dressed and accompanied them in the search for accused whom they encountered in one of the halls. Rodriguez accused McAfee of taking his (Rodriguez') money and demanded that he submit to a search. Accused "stalled off" stating that he desired to go to the latrine (R.9,10, 16). He went to the latrine, followed by Rodriguez and Lieutenant Cecchinelli and tried to close the latrine door. After he came back from the latrine, he removed his wallet and Rodriguez, noting a part of one of the bills showing, grabbed the wallet and exclaimed that the money was his - that it was "the Palestinean money." (R.10,16). Upon examination of the contents he observed that it contained the exact amount of money, and in the same denominations, which he had reported missing, except that the United States gold seal dollar was not in the wallet (R.10). At Cecchinelli's instruction, Rodriguez returned the wallet and money to accused. Rodriguez did not recall whether at that time he said to accused, "You must have overlooked this 20 or 30 dollars that was still left in my wallet" (R.12). Lieutenant Cecchinelli testified that he did not hear Rodriguez make any such statement (R.27). Thereupon McAfee, Cecchinelli and Rodriguez went to the hotel room of the provost marshal, Major Kaeser, and from there to the orderly room where

Major Kaeser informed the accused of his rights under the 24th Article of War and told him he was in "pretty deep trouble." Immediately following Major Kaeser's warning accused walked over to Rodriguez and said he could have the money "if that would settle him up or straighten him up" (R.24). Accused turned his wallet over to Major Kaeser and it was found to contain nine 1000 lire notes in the form of allied currency, one 500 mil Palestinean note, one 1000 drachma note and one 100 drachma note (R.11,17,18,19,22; Pros. Ex. 1). No other currency was found in accused's wallet. There were no distinguishing marks on the notes found and Rodriguez was unable to identify them other than by the number of bills which had disappeared, their denominations and the countries of issuance (R.13). McAfee's wallet did not contain a one-dollar United States gold seal note (R.11).

After McAfee had turned over his wallet to Major Kaeser and the aforementioned contents had been noted, the money was placed on a desk in the orderly room where accused remained with the Company First Sergeant. Lieutenant Cecchinelli, who was in an adjoining room with Major Kaeser, observed accused in the act of tearing up the money which had been lying on the desk. He ran toward accused, grabbed his hand and demanded that he release the money, which accused failed to do until Major Kaeser intervened and ordered him to do so (R.18). The money which accused was attempting to destroy was identified as that which had been removed from his wallet (R.21).

At about 10:30 a.m., Lieutenant Cecchinelli and Major Kaeser made a search of accused's room. Under the mattress of his bed they found a German Luger pistol bearing serial No. 3547. The room was assigned for the exclusive use of accused and there was only one bed in it. There was also found in his suitcase a P-38 pistol, which was subsequently identified as accused's property (R.23). Lieutenant Cecchinelli took the Luger pistol to the orderly room and as he entered was met by Lieutenant Chadwick who had gone there to report the loss of "some cigarettes" from his room, 11-A, in the Terme Hotel. Accused was present in the orderly room at the time Chadwick entered (R.31,32). Lieutenant Chadwick, observing Lieutenant Cecchinelli carrying the Luger pistol, questioned him concerning it and identified it as his by means of the serial number. Chadwick then returned to his room. He examined his "valpac" bag in which he had last seen his gun on 4 October 1945 and found it to be missing. He had given no one permission to take it (R.32,34). The Luger in question was identified at the time of trial as the one missing from Lieutenant Chadwick's room and was received in evidence (R.24,33; Pros. Ex.2).

On or about 4 or 5 October 1945 between 3 and 4 p.m., a hotel employee observed accused leave his room and go to room 11-A. This witness, Vargui Angelo, testified that accused opened the door of Lieutenant Chadwick's room, reached into "the baggage" which was hanging on the wall by the door and removed a carton of cigarettes (R.29,30).

4. Accused, upon being advised as to his rights with respect to becoming a witness, elected to be sworn and testified that on 5 October 1945 he was attached to the 541st Replacement Company, stationed at the Terme

Hotel. He was scheduled for shipment to the United States on that day. Having lost his combat jacket on the evening of 4 October 1945 through theft and having no other heavy clothing for the return trip, he tried without success to purchase a similar jacket from several officers on the night of October 4. He decided to try again and on the morning of October 5 went to several rooms in the hotel, talking to the occupants concerning the purchase of a combat jacket. Eventually he came to the room of Flight Officer Rodriguez (R.36). He knocked on the door before entering and when he walked in both occupants were awake (R.46). He did not recall whether Rodriguez or his roommate awakened first but he spoke to both and asked if they had a jacket to sell. When they replied that they did not, he left the room. He was in there only a few seconds (R.37). The room was so small that when he opened the door he found himself standing at the foot of the beds which reached to the door. He denied taking the money (R.42). Accused then went to several other rooms along the hall and made similar inquiry regarding a jacket, but to no avail. At about 6:30 a.m., he called at the room of Lieutenant Crawford and made arrangements to have breakfast with him at 7:00 a.m. (R.37).

When Flight Officer Rodriguez and Lieutenant Cecchinelli came to his room, Rodriguez accused him of the theft of Rodriguez's money and demanded to see his wallet. He refused to submit to a search because the accusation angered him. When Lieutenant Cecchinelli explained that he could "straighten things out" by showing Rodriguez the contents of the wallet he consented but as he removed the wallet from his pocket, Rodriguez grabbed it and examined the contents (R.37,46). He had $90 in allied military currency in it and also three foreign notes, two of which were "Greek", and the other "Egyptian," he thought. One of the Greek notes was for 1000 drachmas. He did not know the denominations of the other two foreign notes (R.47). He obtained the three foreign notes from an unknown infantry lieutenant on the night of October 4. He met this lieutenant in the hotel bar and had been shown a collection of foreign notes which the unknown lieutenant had obtained as souvenirs. Accused offered to purchase some of the notes but the lieutenant declined to sell. However, about an hour or two later, after drinking several beers together, the lieutenant went through his souvenir collection of notes and without charge gave the accused "duplicates," three in number, of his foreign note collection. Accused thought that two of them were Greek notes and that the third was an "Egyptian" note. He put them in his wallet (R.39).

When accused arrived at Terme, Italy, on 27 September 1945, he had about $5.00. He spent this amount and on the same day borrowed $30.00 from Lieutenant Kervian. He testified that on 30 September 1945 he borrowed $100 from a friend who was a chief warrant officer so "I could pay the boys I owed back." On October 2, he repaid the loan of $30 to Lieutenant Kervian and also one of $50 to Lieutenant Crawford. On the same day he also drew partial pay of $110. On the nights of October 2 and 3 he won $60 or $65 playing dice. The night of 3 October he entertained Lieutenant Kervian, Lieutenant Crawford, the battalion commander and the executive officer at dinner at a cost of about $10. On the afternoon of October 4 he had $108

on his person, after he had previously repaid the $100 loan to the chief warrant officer. He placed $18 in his wallet, consisting of $8 and one 1000 lire note, and put the balance of the money ($90) in the inside pocket of his jacket (the one worn at the time of trial), placing the jacket in his "valpac." He lost the $18 while playing dice that night, and upon returning to his room about midnight found that it had been entered during his absence and that his combat jacket and glasses had been removed. The "valpac" had been opened but the jacket containing the money had not been disturbed. He thereupon removed the $90, placed it in his wallet and started to call upon the officer occupants of the hotel to purchase another combat jacket (R.37, 38,43). Upon cross-examination, he explained the apparent discrepancy of $30 between the amount he stated he had on hand following the dice game on the night of October 4 and the amount the various transactions enumerated by him indicated he should have by stating that he had not spent any part of the $30 borrowed from Lieutenant Kervian (R.50,51).

In accounting for his gains and losses in the gambling transactions, he first stated that his net gain was about $40; that during his stay at the hotel he won $60 or $65 on the nights of October 2 and 3. He also testified that he lost on other occasions while there; that his total losses were approximately $35 or $40, although he gained some back (R.43,44). He also spent some money for drinks around the depot (R.51).

Accused further testified that while in the "office" Rodriguez opened his own wallet and showed accused either $20 or $30 stating, "You must have missed this in my pocket." Accused tore the currency "purely in a fit of anger." He had been drinking that morning and "wasn't exactly himself" (R.41). He had no intention of destroying the evidence for the money was his (R.49). While in the office Major Kaeser informed him that his name had been removed from the shipping list. He did not have a chance to look for the lieutenant who had given him the foreign currency the night before, although he stated in the orderly room that a lieutenant had given him the currency and that he could probably find him. Accused did not know to whom he made this statement although the provost marshal was present when it was made (R.45).

He admitted making the statement that the money found in his wallet might be given to Rodriguez, but contended that said statement was made out of anger and sheer desperation at the thought of his return home being delayed. He testified that his words on that occasion were, "You all can take the money and you can have the money and I have a watch and a camera also you can take. All I want is to go home" (R.40).

As concerned the alleged theft of the Luger pistol, accused denied ever having seen it prior to the time it was in the possession of the provost marshal. He did not know it was in his room of which he was the only occupant. He already possessed one firearm, the P-38 German pistol, which he had registered. Under existing regulations only one firearm could be taken home (R.40,50). He had seen the witness Vargui Angelo about the hotel. While accused admitted he might have been in Lieutenant Chadwick's room visiting

on other occasions, he was certain he did not enter it or the room of any other person in the absence of the occupant on 4 October 1945 (R.46).

Accused is a funeral director in civilian life. His business, located in Greenville, South Carolina, which has continued to operate during his absence on military duty, earned about $28,000 "last year" (R.41,42).

5. In rebuttal the prosecution recalled Lieutenant Cecchinelli who testified that accused at no time stated to him that he (accused) had received the foreign money from an officer. Nor did accused state to Lieutenant Cecchinelli that his field jacket was missing (R.53,54). Flight Officer Rodriguez, being recalled by the prosecution, testified that he heard no knocking on his door and was first aware of accused's presence when he awoke and saw accused standing in his room. The only time accused made any explanation as to where he got the money found in his wallet was in the orderly room when Rodriguez heard him tell Major Kaeser that he got the money in a dice game on the previous night. At no time did McAfee tell Rodriguez that he had received any of the money from a lieutenant as a souvenir. As Rodriguez was making out his statement, accused offered to return the money and asked Rodriguez not to make a statement (R.57). Rodriguez had obtained the drachma notes in Athens and the Palestinean currency in Palestine while on a flight to those places a week before the theft (R.58). Lieutenant Chadwick testified that accused asked him not to make a statement concerning the Luger, stating that as Chadwick had the gun back, that was all he wanted and that if Chadwick made a statement "it might disparage him (accused) or something" (R.59).

6. To establish the offenses of which the accused stands convicted it was necessary to prove by direct or circumstantial evidence (a) the taking by the accused of the property as alleged in the Specifications and (b) the carrying away by the accused of such property. It is well established that all elements of the offense may be proved by circumstantial evidence. (16 C.J. 766; CM 207591, Nash, et al). Under Specification 1 of the Charge, the prosecution established that within a very short time after accused appeared in the room of Flight Officer Rodriguez, he was found to have in his possession allied military currency in the exact amount of that stolen, and exactly similar to the currency involved, viz: nine 1000 lire bills, and three foreign notes of the exact amount and kind which Rodriguez discovered missing from his wallet almost immediately after accused left the room. The only discrepany shown was with respect to a $1.00 United States gold seal bill which Rodriguez claimed was taken with the other currency. No such bill was found in accused's wallet. It will be recalled, however, that accused did not turn his wallet over for examination until he returned from the latrine where he had the opportunity to dispose of the bill. The inference that he thus disposed of it was plausible, particularly in view of his subsequent attempt to destroy other of the money while in the orderly room.

Under Specification 2 of the Charge the prosecution established that Lieutenant Chadwick's pistol was found in the personal and exclusive

possession of accused within a day after it was last seen by Chadwick in the place where it was customarily kept. Evidence was also introduced showing that accused was seen entering the room of Lieutenant Chadwick and removing a carton of cigarettes on the day preceding discovery of the gun under accused's mattress. While the prosecution did not establish the value of the gun it was exhibited in court, Hence, the court could infer that the property had some value and properly found accordingly (MCM,1928, par.149g, p.173).

To refute the testimony of prosecution's witnesses, accused took the stand and testified that while he entered Rodriguez's room at or near the time alleged, he did so solely for the purpose of purchasing a combat jacket. He contended that the occupants of the room were awake when he entered and denied that he took Rodriguez's money. He further explained his reason for refusing to be searched when first accused of the theft and asserted that the money found in his wallet was his, describing his various transactions in an effort to account for the sum of $90, consisting of nine 1000 lire in allied military currency, found in his wallet. With respect to the three foreign bills, his explanation was that they were given to him as souvenirs by a lieutenant, whose name he did not know, on the night preceding the morning of the alleged theft. As concerned the theft of Lieutenant Chadwick's Luger pistol, while accused acknowledged that he was the sole occupant of the room in which the gun was found, he testified that he had no knowledge whatsoever of its presence there. He urged that since he already possessed one firearm which was registered, there was no reason for him to take Chadwick's gun inasmuch as regulations in force did not permit military personnel returning to the United States to have more than one firearm.

Thus, there was presented a conflict in the evidence, but the court, within its province, weighing the evidence and judging of the credibility of the witnesses, held against the accused. We think the court was amply justified in so doing.

Accused was found in possession of money in amount and kind identical with that which had just been lost, including the drachmas and the Palestinean note. The prosecution's testimony shows that the Greek and Palestinean currency had been obtained in the countries of issuance and even accused conceded that these notes possessed only souvenir value. Accordingly, irrespective of whether or not the court could judicially notice the rarity of such currency as a circulating medium in Italy, it was warranted in inferring from all this evidence that at the very least it was not a common medium of exchange in that country. It has been said:

> "The possession of money of the same denomination as that recently stolen is merely an evidentiary fact to be considered with other circumstances. It is usually of slight, if any, weight as evidence to prove the guilt of the person in whose possession it is found, if money of the kind is in general circulation at that place, at least

> where it is not concealed, but it is of much greater significance where money of the kind is rarely seen in circulation at such place, and its value as evidence is further increased when both the money found in the possession of the accused and that which was stolen consists of a certain combination of pieces of such money (32 Am. Jur. 1050).

The court, composed of members of a military command stationed in the area where these offenses were committed, was entitled judicially to notice the rate of exchange between allied military currency, a common medium of exchange, and United States currency, and accordingly, to determine the value of the 9000 lire in allied military currency to be of the value of $90 as alleged.

In addition to the foregoing, further compelling evidence of accused's guilt was the matter of accused's appearance in Rodriguez's room at 6:00 a.m., his reluctance thereafter to show the contents of his wallet when accused of the theft, his strange behavior in the orderly room when he tore the foreign notes, and his endeavor to persuade Rodriguez and Chadwick not to make statements in connection with the respective thefts.

As concerns his explanation of how he happened to have exactly $90 in his wallet, the amount lost by Rodriguez, accused gave a detailed itemization of his transactions from the time of his arrival on 27 September 1945 until the time of his arrest. Assuming for the moment that his figures were correct, they would show that he should have had $92 or $97 on hand at the time he turned over his wallet for examination, depending on whether he won $60 or $65 gambling October 2 and 3. His figures did not include expenditures for beverages which he testified he had purchased. However, when he was confronted with his testimony as to repaying the loan of $30 to Lieutenant Kervian on October 2 which would have left him with only $62 or $67 on October 5, he then testified that he had spent no part of the $30 loan. Inasmuch as accused was shown to have been without any funds when he borrowed the $30 on September 27 and to have borrowed $100 more on September 30 before repaying the loan of $30 on October 2, his story that he had spent no part of the $30 was incredible. Further, accused did not know the name of the lieutenant who, he said, gave him the foreign note. All he knew was that the officer was an infantry lieutenant. In the ordinary experience of man, it is unreasonable to believe that after spending some two hours in friendly social intercourse, during which time accused received these notes as a gift from his friend, he would not even inquire as to the donor's name.

> "It is so well established as to require no citation of authority that a jury is not obliged to accept the testimony of a witness simply because such testimony is not contradicted, if in the judgment of the jury in view of all the circumstances in the case, such testimony is not worthy of belief. This rule is as applicable to courts-martial as to juries in the civil courts" (CM 152797).

The Board of Review is of the opinion that the evidence and the inference arising therefrom show the accused guilty beyond a reasonable doubt of every element of the offense of larceny as alleged in the Charge and Specifications 1 and 2 thereunder.

7. On 26 February 1946, the Honorable Joseph R. Bryson, Congressman from the state of South Carolina, and Mr. C. G. Wycke of the firm of Wycke, Burgess and Wofford, attorneys at law, Greenville, South Carolina, appeared before the Board of Review in behalf of accused and were accorded a complete hearing. Full consideration has been given to the arguments presented orally and to a brief filed by Mr. Wycke prior to the hearing.

8. War Department records show that accused is 32 years of age and married. He completed the eleventh grade in high school and for ten years was employed by the Thomas McAfee Funeral Home of Greenville, South Carolina, as assistant manager. From January 1942 until August 1942 he was employed by the Fairfield Ship Yards of Baltimore, Maryland. He was voluntarily inducted into the service on 6 October 1942 for selection as an officer candidate and was commissioned a second lieutenant, CAC in the Army of the United States on 29 July 1943, after successful completion of the Officers' Candidate course of instruction at the Anti-aircraft Artillery School, Camp Davis, North Carolina. On 17 July 1945 he was promoted to the grade of first lieutenant while in the Mediterranean Theater of Operations.

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

Thomas N. Tappy, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert C. Trevethan, Judge Advocate.

SPJGH - CM 302787 1st Ind

Hq ASF, JAGO, Washington 25, D. C. APR 2 - 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Charles H. McAfee, Sr. (0-1058067), Coast Artillery Corps.

2. Upon trial by general court-martial this officer was found guilty of two separate offenses of larceny, one of which involved property of a value greater than $50, in violation of Article of War 93. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement at hard labor for five (5) years. The reviewing authority approved the sentence, remitted three (3) years of the confinement and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion. On 5 October 1945, at about 6:00 a.m., two flight officers awakened in their room in a Naples hotel used for billeting military personnel about to sail for the United States and found accused, an occupant of another room in the hotel, in their quarters. He asked the occupants if either had a combat jacket for sale. Upon being informed that they did not, accused left the room but almost immediately after that one of the flight officers noticed that his trousers, which he had placed at the foot of his bed before, were lying on the floor along with his wallet. Immediate examination disclosed that the contents of the wallet, consisting of $90 in allied military currency in the form of nine 1000 lire bills, three foreign notes, viz: a 100 drachma note, a 500 drachma note, and a 500 mil Palestinean note of some value, and a dollar gold seal bill were missing. The flight officers began a search for accused at once and, after reporting the theft to the billeting officer, were accompanied by him through the halls of the hotel until accused was encountered. When accused of the theft and asked to show the contents of his wallet, this officer at first refused, but after visiting the hotel latrine surrendered his wallet for examination. The contents were identical in amount, kind and denomination with that reported lost by the flight officer except that there was no gold seal dollar bill. Subsequently, in the orderly room accused attempted to destroy the foreign notes taken from him. He also stated that the flight officer, who had reported the loss, could have the money, although he did not state to whom it belonged.

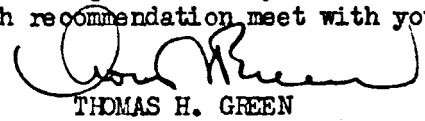
Within a short time thereafter a search was made of the room occupied solely by accused and a German Luger pistol was found under the mattress of his bed. In the orderly room an officer, who was present to report the loss of cigarettes from his room, observed the gun as it was brought in and identified it by the serial number as his. He had given no one permission to remove it from his room. The day preceding the discovered loss of the pistol, accused was seen to enter the room of this officer and to remove a carton of cigarettes from the luggage in which the pistol had been kept.

The accused elected to testify under oath and while admitting his presence in the flight officers' room at the time testified to, he denied that he took the money. He stated that his purpose in entering the room was to purchase a combat jacket to replace one which had been taken from his room the night before. He testified that the money found in his wallet was his and, in accounting for the sum, explained the various transactions he had made while at the hotel which resulted in a net balance of funds, identical in amount, kind and denomination with that claimed to have been lost by the flight officer. As concerned the three foreign bills, a 1000 drachma note, a 100 drachma note and a 500 mil Palestinean note, accused claimed they had been given to him as souvenirs on the night preceding the morning of the alleged theft. The donor was a lieutenant whose name accused did not know. His explanation for attempting to destroy the notes in the orderly room was that he was angered by the accusation made against him and was not entirely himself because he had been drinking that morning. As to his remark that the flight officer could have the money, he contended that this statement was made in desperation because his name had been removed from the sailing list and not as an admission that the money belonged to the flight officer.

On 26 February 1946 the Honorable Joseph R. Bryson, Congressman from the state of South Carolina, and Mr. C. G. Wyche of the firm of Wyche, Burgess and Wofford, attorneys at law, Greenville, South Carolina, appeared before the Board of Review in behalf of accused and were accorded a complete hearing. Full consideration has been given to the arguments presented orally and to a brief filed by Mr. Wyche prior to the hearing.

The offenses of which this officer stands convicted are of a serious nature involving moral turpitude. Immediately prior to the commission of these offenses accused had imbibed freely in alcoholic liquors. He is reputed to be a member of a family of excellent social standing in his home community and so far as is known has never before been in trouble with the law. His previous unblemished military record merits some consideration. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and the period of confinement be reduced to one year; that the sentence as thus modified be ordered executed, and that a United States Disciplinary Barracks be designated as the place of confinement.

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



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 78, 12 April 1946).

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

SPJGN-CM 302838

UNITED STATES	)	DELTA BASE SECTION COMMUNICATIONS ZONE
v.	)	Trial by G.C.M., convened at Marseille, France, 10 November 1945. Dismissal and total forfeitures.
First Lieutenant SIGMUND J. ZALESKI (0-1306354), Transportation Corps.	)	

OPINION of the BOARD OF REVIEW
BAUGHN, O'CONNOR and O'HARA, Judge Advocates

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

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

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

Specification: In that First Lieutenant Sigmund J. Zaleski, Headquarters 6th Port, Transportation Corps (then of the 3311th Quartermaster Car Company), being at the time custodian of the Negresco Officers' Transient Mess Fund of Headquarters, United States Riviera Recreational Area, did, at or near Nice, France, on or about 4 July 1945, feloniously embezzle by fraudulently converting to his own use approximately twenty-nine thousand seven hundred and fifty (29,750) French Francs, of the value of about five hundred ninety five dollars ($595.00), the property of the United States, intended for the military service thereof, entrusted to him, the said First Lieutenant Sigmund J. Zaleski, by virtue of his official position as custodian of said funds.

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

Specification: In that First Lieutenant Sigmund J. Zaleski, Headquarters 6th Port, Transportation Corps (then of the 3311th Quartermaster Car Company), then the Custodian of the Negresco Officers' Mess Fund of Headquarters, United States Riviera Recreational Area, did, at Nice, France, on or about 4 July 1945, wrongfully remove monies of the said funds from the station to which they pertained.

ADDITIONAL CHARGE: Violation of the 95th Article of War. (Finding of not guilty but guilty of a violation of Article of War 96).

Specification 1: In that First Lieutenant Sigmund J. Zaleski, Headquarters 6th Port, Transportation Corps, did, at or near Marseille, France, on or about 18 August 1945, wrongfully borrow the sum of 32,500 French francs, of a value of about $650.00, from Private First Class Tony Marano, an enlisted member of the United States Army.

Specification 2: (Finding of not guilty).

FURTHER ADDITIONAL CHARGE I: Violation of the 69th Article of War. (Disapproved by reviewing authority).

Specification: (Disapproved by reviewing authority).

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

Specification 1: (Disapproved by reviewing authority).

Specification 2: In that First Lieutenant Sigmund J. Zaleski, Headquarters 6th Port, Transportation Corps, then on temporary duty with 386th Port Battalion, did, at Marseille, France, on or about 21 October 1945, wrongfully enter an off-limits place, to wit, a house of prostitution.

He pleaded not guilty to the Charges and Specifications. He was found not guilty of Specification 2 of Additional Charge and not guilty of Additional Charge but guilty of a violation of Article of War 96, and guilty of the remaining Charges and Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Further Additional Charge I and its Specification and Specification 1 of Further Additional Charge II, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. On 27 February 1945 the accused was detailed as "Mess Officer of Officers', and transient Enlisted Men's Messes" at the United States Riviera Recreational Area (R. 14; Pros. Ex. 1). As such, accused was custodian of the "Negresco Transient Officers' Mess Fund," a fund that was derived from the monies paid by persons who ate at the various military messes (R. 37). This fund, together with a list of the persons who had paid and the amount that they had paid, was transmitted to the Mess Officer daily and then paid by him to the Finance Officer at Nice at the end of the month (R. 37, 38). Apparently, however, there was some laxity at some of the messes in making these daily returns (R. 38). In the months of March and April accused, as custodian of the mess fund, received 23,000 francs (approximately $460) and about $344, respectively (R. 16).

On 10 April 1945 accused was relieved as "Officer's Mess Officer," assigned as train commander on the Aachen-Nice railway run, and Captain James B. Cobb was appointed in his stead (R. 25; Def. Ex. A). Between that date and 3 July accused made several trips between Aachen and Nice, the round trip taking about five days (R. 25, 26). On the other hand, it was stipulated by and between the trial judge advocate, the defense counsel, and the accused that Captain Cobb never acted as custodian of the officers mess fund because he was transferred to another station before he received the funds from accused (R. 27). On 27 June 1945 Captain Alba S. Heywood was appointed "Mess Officer of the USRRA Officers' Messes," the order appointing him not stating whom he was relieving (R. 28; Pros. Ex. B). It was stipulated by and between the prosecution, defense, and accused that the order appointing Captain Heywood was revoked "shortly after being put out" (R. 29). According to Major John H. Olin, administrative officer of the United States Riviera Recreational Area, Captain Kicey succeeded Captain Heywood when the latter was transferred and, in turn, was succeeded by Captain Heywood on his return (R. 29). Major Olin was unable, however, to specify the date of Captain Kicey's appointment. The witness was unable to account for the gap between 10 April 1945 - when accused was relieved - and 27 June 1945 when Captain Heywood was appointed (R. 29), although the latter testified that he succeeded accused and that Captain Kicey succeeded him (R. 37).

On 1 July 1945 accused was transferred from the United States Riviera Recreational Area (R. 15; Pros. Ex. 2). On 3 July Major Olin delivered the orders to accused and told him to account for the mess funds if they were still in his possession (R. 21, 26). Accused replied that he did not have the money at the time, was not aware of what had happened to it, and made a reference - otherwise unclarified by the record - to having been hit on the head with a rock and to finding sleeping pills beside his bed on awakening and not being aware of where he had obtained them (R. 22). Major Olin then told him to turn the money over to Captain Kicey who, he believed, was accused's successor, by 4:00 p.m. that day and accused stated that he would comply. Major Olin disclaimed

any intention of issuing an order to accused to account for the money and insisted that it was merely a recommendation (R. 22, 26). The next day Major Olin took steps to prevent accused from leaving for his new assignment (R. 23).

On 6 July 1945 accused turned over to Agent Sidney Barr, Criminal Investigation Division, $603.00 together with the mess council books of the Negresco Mess Fund. An audit revealed that accused had made an overpayment of $8.00 and that otherwise the account was in order (R. 32, 34). For reasons not at all apparent in the record accused on 19 July 1945 made another settlement with respect to the Negresco Mess Fund. On that day he turned over $755.60 to Captain Alba S. Heywood, the "mess custodian," after an audit, which required "considerable time", revealed that this was the sum due (R. 37-39).

On 10 September 1945 accused made an extra-judicial statement, properly admitted in evidence, wherein he said that when he was relieved as mess officer on 10 April 1945 he retained the mess fund pending the appointment of his successor; that when he was transferred to Marseille he left without remembering that he still had the fund in his possession and did not realize it until an agent of the Criminal Investigation Division brought it to his attention (R. 36; Pros. Ex. 3).

On 16 October 1945 accused made another extra-judicial statement which was likewise properly admitted in evidence, and which we quote in its entirety.

> "He told me he had been custodian or mess officer in Nice and that he had left Nice on sudden orders. That there had been no audit of the mess funds for some time and that he had not had time to account for the mess funds, and for that reason he had been keeping them in his custody. He left Nice and came to Marseille. He was returned to Nice, or returned to Nice, with Lieutenant Carlucci of the CID, and that he borrowed approximately $650.00 from the CID Agent to pay over the mess funds for which he was responsible. He told me that Lieutenant Carlucci had been an old friend of his - that he knew him in Africa - and that he used the money borrowed, along with some other funds, to make this amount he needed. He told me that he turned over the money and the mess books or council books to Agents Barr and Kallemyn, then stationed at Nice, and so far as he knew they had turned the money over to the responsible officer at Nice, for which he received a receipt.
> Q Did he mention anything about what opportunity he had to turn over the mess funds to anybody?
> A He said he had no opportunity to do so, and had never been asked to do it" (R. 72).

On 21 October 1945, the accused, in company with an enlisted driver, left St. Victoret in a jeep and drove to Marseille, France. On their way back they stopped at a house (R. 49-50). The night was dark, it was raining, and there were no street lights (R. 50, 52, 56, 58, 59). They entered the house where there was a bar and five girls (R. 50) but left when one of the girls stated that the military police were there (R. 50, 51). The military police had stopped before the house at 0200 hours (R. 56), to investigate an empty jeep parked outside (R. 52, 54, 56, 60, 68). Shortly thereafter the accused approached them from somewhere behind the house (R. 54, 57) and drove the jeep away (R. 57). This house was located at 148 Rue L'Estac, "on the outskirts of" Marseille, France (R. 60), and had been placed off limits on 17 September 1945 (R. 53, 60). It was a house of prostitution (R. 54) and "off-limits" signs appeared on both sides of the door to the establishment (R. 55, 56). The accused had visited Marseille on the strength of a duty pass to see the trial judge advocate (R. 63; Pros. Ex. 5) but did not visit that party before returning to camp (R. 51, 69).

Private First Class Tony Marano testified that on 18 August 1945 he loaned to the accused 32,500 francs to pay off a loan of the same amount that the accused had made from a CID Agent. Accused gave Marano a note. The loan is still unpaid. It was made in the presence of their commanding officer, Major Brown (R. 42-44; Pros. Ex. 4) and had his approval. Accused was not Marano's commanding officer but was a friend (R. 45).

4. Defense evidence: The night of 21 October 1945 was very dark. There were no street lights. It would have been possible for a person to have entered the off-limits establishment at 148 Rue L'Estac without noticing the off-limits sign (R. 73, 74).

In the accused's behalf it was shown by a fellow officer that the accused had handled large amounts of money in connection with company funds and payrolls. The amounts handled had reached between $25,000 and $30,000. During this period the general reputation of the accused and his reputation for truth and veracity were excellent (R. 75-76).

The rights of the accused as a witness were explained to him (R. 79, 80), and he elected to make an unsworn statement. Therein he disclosed that he entered the service in January 1941 and was graduated from Officer Candidate School in September 1942. He landed in Casablanca in July 1943, and soon saw service with SOS, COMZONE, ETOUSA and SOLOC as personnel officer and Class "A" agent. In Italy he had charge of between 800 and 1,000 civilians and at SOLOC he was in charge of 1,400 men and handled payrolls of $75,000 to $80,000. In Nice he set up a system for the employment of civilians; had custody of "the fund" and was later made defense counsel for all Special Courts-Martial;

was also responsible for several messes; and was made train commander, riding trains in and out of Nice. Thereafter he was sent to Marseille where he had charge of four detachments, took care of them and had them shipped out. Since that time he has been unassigned attached to the 386th Port Battalion. He has no previous convictions by court-martial, and has never had any previous trouble (R. 80, 81).

5a. The Specification of Charge I. In this Specification accused is charged with embezzling 29,750 French francs ($595.00), property of the United States, intended for the military service, in violation of the 94th Article of War. The evidence shows that accused, on 27 February 1945, was appointed Mess Officer of "Officers' and transient Enlisted Men's Messes" of the United States Riviera Recreational Area and that one of his duties as such was to assume custody of the "Negresco Transient Officers Mess Fund"; that as custodian of the fund he actually received some $804 in the months of March and April; that the money so received was property of the United States; and that on two separate occasions he settled his accounts as mess officer. It is thus established that accused occupied a fiduciary capacity and received United States Government property by virtue of the position of trust he occupied. The remaining element of the offense which the prosecution was bound to establish was that accused fraudulently converted these funds to his own use (MCM, 1928, par. 149h).

A careful examination of the record reveals, however, that proof of this element comes solely from admissions made by accused. The evidence is undisputed that accused was relieved as mess officer on 10 April 1945 and that the officer appointed to succeed him, Captain Cobb, never assumed the post. The position thus remained unfilled until 27 June 1945 when Captain Heywood was appointed. Clearly then during the interval between 10 April 1945 and 27 June 1945, so far as this record is concerned, there was no person acting as mess officer and as custodian of the mess funds. Moreover, within ten days after the appointment of a mess officer, on 6 July to be specific, accused had settled his accounts.

Assuming that accused's failure to settle promptly with Captain Kicey after the conversation with Major Olin would be enough to establish a fraudulent conversion, the record is so confused that it is impossible to conclude that Captain Kicey was the proper person to whom he should account. Major Olin believed that Captain Kicey was the mess officer at that time and further stated that he acted for a time when Captain Heywood was absent. The latter's testimony, while not inconsistent with this view, certainly lends it little support. No order appears in the record to show that Captain Kicey served at any critical time and the general laxity in appointing and relieving mess officers which is therein revealed leave us far from satisfied that he was the proper person to whom accused was obligated to account. Moreover, even if it had been established that Captain Kicey was the officer properly designated to relieve the accused, in the circumstances we cannot assume that accused's

delay in settling with Captain Kicey was so unreasonable as to indicate a fraudulent conversion. There was an interval of only three days between Major Olin's conversation with accused and the first settlement. In connection with the second settlement there was evidence that a proper audit required considerable time and it was not suggested that accused was responsible for this. The record of monies received was contained in daily sheets and it is not improbable that a correct accounting could not have been made within any shorter period.

A word should be said about the confusion in the record arising from the testimony as to the second settlement made on 19 July 1945. It should be remembered that accused is charged with embezzling $595 and that he accounted for this sum (plus an $8.00 overpayment) on 6 July 1945. He then, on 19 July 1945, paid Captain Heywood $755.60. The record contains no explanation as to the necessity for this payment, whether it was in addition to the $595 previously paid to the agents of the Criminal Investigation Division, and, if so, why this additional payment was necessary in view of the satisfactory state of accused's accounts on 6 July 1945, or whether the $595 was included in the $755.60.

The proof thus far adduced fails to show that accused embezzled the money as alleged and to establish this element of the case we must, perforce, rely on accused's extra-judicial admissions. These have been detailed above and no useful purpose will be served by going into them again. It is elementary that a conviction cannot be supported unless there is evidence of the corpus delicti apart from accused's admissions. 2 Wharton's Criminal Law (12th Ed.) sec. 1279, p. 1595; MCM, 1928, par. 114a.

It may be urged that the facts that Major Olin took steps to prevent accused from leaving the base, that an agent of the Criminal Investigation Division was involved in the settlement of accused's accounts; and that accused borrowed a large sum of money from an enlisted man supply the corpus delicti. The action of Major Olin, however, is not shown to have been based on anything other than accused's own statement to him, and the involvement of the Criminal Investigation Division does nothing more than cast an aura of suspicion on accused without showing with any definiteness that there was a defalcation. As far as the loan is concerned, it was made one month, lacking a day, after the second settlement and is meaningless to show a shortage in accused's accounts unless we have recourse to accused's own statements to the lender. We conclude, then, that there is no evidence, apart from accused's admissions, that would justify a finding that he embezzled the money, as alleged, and, accordingly, the conviction on that Specification must be disapproved.

5b. The Specification of Charge II. This Specification charges accused with wrongfully removing the fund from the station to which it

pertained (AR 210-50, par. 15a(2)). The only evidence of this charge was contained by implication in the accused's alleged confession made to the investigating officer on 16 October 1945. There is similarly as to this Specification no proof of the corpus delicti apart from the confession and therefore the record is not legally sufficient to support a finding of guilty.

5c. Specification 1 of the Additional Charge. This Specification charges accused with wrongfully borrowing money from an enlisted man. The uncontradicted evidence for the prosecution showed that at the time and place alleged in the Specification the accused did borrow $650 from an enlisted man. Although the enlisted man was not under his command and was a close personal friend of the accused and the transaction was approved by the enlisted man's commanding officer, an officer who outranked the accused, nevertheless the accused, a commissioned officer, has technically violated the 96th Article of War by borrowing money from an enlisted man. Such an act has consistently been held to constitute a violation of that Article and we do not feel justified in making an exception to that principle notwithstanding the extenuating circumstances of this case (CM 233817, 20 BR 149; CM 272462, Ezell; CM 276755, Morris).

5d. Specification 2 of Further Additional Charge II. This Specification charges accused with wrongfully entering an "off-limits" place, a house of prostitution. The evidence clearly established that the accused did, at the time and place alleged in the Specification, enter a place that had been ordered to be and was marked "off-limits." It is immaterial whether or not the accused knew the house of prostitution was so designated. This act was a violation of standing orders of the command of which accused was a member and therefore constituted a technical violation of Article of War 96 (CM 241385, 26 BR 283; CM 241620, 26 BR 313).

6. War Department records show that the accused was born 18 January 1913 in the United States of Polish parents and is married. He attended high school for two years. He was employed as a baker for six years, as a foreman of operating machines in a leather finishing plant for six years, and as a pipe fitter in shipbuilding yard for three years. He was inducted into the service on 13 January 1941, commissioned second lieutenant, Army of the United States, in Infantry on 31 December 1942, and promoted to first lieutenant 7 May 1944.

7. The court was legally constituted and had jurisdiction of the accused and of the offenses. Except as herein noted no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of Charge I and Charge II and their respective Specifications, but is

legally sufficient to support the findings of guilty of the remaining Charges and Specifications as approved, and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Wilmot T. Baughn, Judge Advocate.

Robert J. Clemer, Judge Advocate.

Joseph T. O'Hara, Judge Advocate.

JAGN-CM 302838 1st Ind
WD, JAGO, Washington 25, D. C.
TO: The Under Secretary of War AUG 29 1946

1. In the case of First Lieutenant Sigmund Zaleski (0-1306354), Transportation Corps, attention is invited to the foregoing opinion by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Charge I and Charge II and their respective Specifications, but is legally sufficient to support the findings of guilty of the remaining Charges and Specifications as approved, and the sentence, and to warrant confirmation thereof. I concur in the opinion with the exception of that part which expresses the view that the record of trial is not legally sufficient to support the findings of guilty of Charge I and its Specification. I do not concur in the excepted part of the opinion.

2. Upon trial by general court-martial this officer was found guilty of embezzling $595, property of the United States entrusted to him as Mess Officer, in violation of Article of War 94 (Chg. I); wrongfully removing mess funds from the station to which they pertained (Chg. II); borrowing $650 from an enlisted man (Add. Chg.); wrongfully entering the City of Marseille in violation of standing orders; wrongfully entering a house of prostitution marked "off limits" (Further Add. Chg. II, Spec. 1, 2), in violation of Article of War 96; and breach of arrest in violation of Article of War 69 (Further Add. Chg. I). He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Further Additional Charge I and its Specification (breach of arrest) and Specification 1 of Further Additional Charge II (wrongfully entering City of Marseille), approved the sentence and forwarded the record of trial for action under Article of War 48.

3. As stated in the opinion, the evidence shows that on 27 February 1945 the accused was detailed as "Mess Officer of Officers' and transient Enlisted Men's Messes" at the United States Riviera Recreational Area (R. 14; Pros. Ex. 1). As such, accused was custodian of the "Negresco Transient Officers' Mess Fund," a fund that was derived from the moneys paid by persons who ate at the various military messes (R. 37). In the months of March and April accused, as custodian of the mess fund, received 23,000 francs (approximately $460) and about $344, respectively (R. 16).

On 10 April 1945 accused was relieved as "Officers' Mess Officer" and assigned as train commander on the Aachen-Nice railway run. On 27 June 1945 Captain Alba S. Heywood was appointed "Mess Officer of the USRRA Officers' Messes," the order appointing him not stating whom he was relieving (R. 28; Pros. Ex. B). The evidence does not make clear who occupied the position of mess officer of the mess in question

between 10 April 1945, when the accused was relieved, and 27 June 1945 when Captain Heywood was appointed (R. 29).

On 1 July 1945 accused was transferred from the United States Recreational Area (R. 15; Pros. Ex. 2). On 3 July Major John H. Clin delivered the orders to the accused and told him to account for the mess funds if they were still in his possession (R. 21, 26). Accused replied that he was not going to pull any punches about it - that he did not have the money at that time, was not aware of what had happened to it, and made a reference - otherwise unclarified by the record - to having been hurt by being hit on the head with a rock or piece of concrete thrown from an upper story and to finding sleeping pills beside his bed and not being aware where he had obtained them (R. 22).

On 6 July 1945 accused turned over to Agent Sidney Barr, Criminal Investigation Division, $603.00 together with the mess council books of the Negresco Mess Fund. An audit revealed that accused had made an overpayment of $8.00 and that otherwise the account was in order (R. 32, 34). For reasons not apparent in the record accused on 19 July 1945 made another settlement with respect to the Negresco Mess Fund. On that day he turned over $755.60 to Captain Alba S. Heywood, the "mess custodian," after an audit revealed that this was the sum due (R. 37-39).

On 10 September 1945 accused made an extra-judicial statement, properly admitted in evidence, wherein he said that when he was relieved as mess officer on 10 April 1945 he retained the mess fund pending the appointment of his successor; that when he was transferred to Marseille he left without remembering that he still had the fund in his possession and did not realize it until an agent of the Criminal Investigation Division brought it to his attention (R. 36; Pros. Ex. 3).

On 16 October 1945 accused made another extra-judicial statement which was likewise properly admitted in evidence, as follows:

> "He [the accused] told me he had been custodian or mess officer in Nice and that he had left Nice on sudden orders. That there had been no audit of the mess funds for some time and that he had not had time to account for the mess funds, and for that reason he had been keeping them in his custody. He left Nice and came to Marseille. He was returned to Nice, or returned to Nice, with Lieutenant Carlucci of the CID, and that he borrowed approximately $650.00 from the CID Agent to pay over the mess funds for which he was responsible. He told me that Lieutenant Carlucci had been an old friend of his - that he knew him in Africa - and that he used the money borrowed, along with some other funds, to make this amount he needed. He told me that he turned over the money and the mess books or council books to Agents Barr and Kallemyn, then stationed at Nice, and so far as he knew they had turned the money over to the responsible officer at Nice, for which he received a receipt." (R. 72)

Private First Class Tony Marano testified that on 18 August 1945 he loaned to the accused 32,500 francs to pay off a loan of the same amount that the accused had made from a CID Agent (R. 45).

4. The record of trial clearly shows that accused was detailed as "Mess Officer of Officers' and transient Enlisted Men's Messes" at the United States Riviera Recreational Area, that as such he was custodian of the "Negresco Transient Officers' Mess Fund," and that in the months of March and April he received, as custodian of the Mess fund, 23,000 francs (approximately $460) and about $344. The fund was derived from the moneys paid by persons who ate at the various military messes and was property of the United States, intended for the military service thereof. When directed by Major Olin, on 3 July 1945 to account for the mess funds accused admitted that he did not have the money at that time. On 16 October 1945 the accused admitted that he borrowed approximately $650.00 "to pay over the mess funds for which he was responsible" and "that he used the money borrowed, along with some other funds, to make this amount he needed." The accused's unsupported statement with reference to having been hit on the head with a rock or piece of cement and having sleeping pills alongside his bed, the source of which he did not know, is of little or no value in explaining the absence of the money from his possession.

The Board of Review takes the position that in view of the general laxity and confusion in appointing and relieving mess officers the accused's delay in accounting for the mess fund was not so unreasonable as to indicate a fraudulent conversion; that, aside from accused's extra-judicial admissions, proof of fraudulent conversion of the funds to accused's own use was lacking, and that, since proof of this element rests solely on admissions made by the accused, the findings of guilty of Charge I and its Specification are improper.

5. The competency and admissibility in evidence of the statements by the accused mentioned in paragraph 2 above are not challenged by the defense (R. 22, 36, 71), and neither is the fact that the accused has been intrusted with the Negresco Officers' Transient Mess Fund, USRRA, property of the United States in the amount alleged. The sole material question respecting the legal adequacy of proof of the Specification of Charge I is whether or not support for accused's admissions is furnished by the record. With respect to the technical legal requirements in this connection it has been stated:

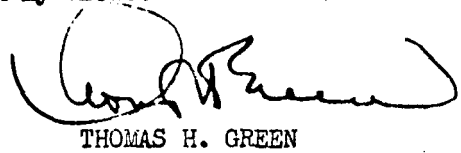
> "An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself." MCM, 1928, par. 114a.

"* * * all that is required by way of proof of the corpus delicti is some evidence corroborative of the confession touching the commission of the offense (CM 202213, Mallon) * * *." CM 202601, Sperti (1934) 6 BR 171.

"While some corroborative evidence is prerequisite to the introduction of a confession, full proof of the corpus delicti, independent of the confession is not required. All that is required is some corroborative evidence. Dig. Ops. JAG, 1912-40, sec. 395 (11), CM 210693 (1938)." CM 257802, Stiehl (1944), 37 BR 243, 251.

There is evidence, independent of accused's admissions, tending to establish the corpus delicti. Captain Alba S. Heywood was appointed "Mess Officer of the USRRA Officers' Messes" on 27 June 1945 (R. 29; Def. Ex. B). On 1 July 1945 accused was ordered transferred from the United States Riviera Recreational Area (R. 15; Pros. Ex. 2). On 3 July 1945 Major Olin instructed accused to clear himself before leaving, including the turning over of mess funds. Accused said he did not have the funds. The next day Major Olin cancelled transportation which would have carried accused away from the area. On 6 July 1945, ten days after appointment of accused's successor as mess officer and three days after accused had been instructed by Major Olin to clear the mess accounts, Agent Sidney Barr, Criminal Investigation Division, had occasion to interview the accused relative to the Negresco Officers' Mess Fund. At that time accused turned over to Barr a mess council book and approximately $600 in francs (R. 32, 34). Subsequently, on 18 August 1945, accused borrowed 32,500 francs (approximately $525.00) from Private First Class Tony Marano (R. 45). The evidence mentioned is sufficient to establish the corpus delicti and, together with the accused's admissions, justified the court in finding him guilty of Charge I and its Specification.

6. Drafts of action for your signature are inclosed, Form A for use in the event you concur in the opinion by the Board of Review, and Form B in the event you concur in my views.



THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 - Record of trial
2 - Form of Action - Form A
3 - Form of Action - Form B

(GCMO 269, 9 Sept 1946).

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

SPJGH - CM 302839

21 FEB 1946

UNITED STATES	)	DELTA BASE SECTION COMMUNICATIONS ZONE EUROPEAN THEATER OF OPERATIONS
v.	)	
Captain MICHAEL TURSI (O-1283343), Infantry.	)	Trial by G.C.M., convened at Nice, France, 25, 26, 27 October 1945. Dismissal, total forfeitures, confinement for three (3) years, fine of $2000 and confinement until fine paid but not to exceed two (2) years.

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

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

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

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

Specification 1: In that Captain Michael TURSI, 222nd Infantry, did, without proper leave, absent himself from his station, at or near Nice, France, from about 14 September 1945 to about 16 September 1945.

Specification 2: In that Captain Michael TURSI, ***, did, without proper leave, absent himself from his station, at or near Nice, France, from about 22 September 1945 to about 24 September 1945.

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

Specification 1: In that Captain Michael TURSI, ***, did, at or near CONI, Italy, on or about 3 September 1945, knowingly and willfully apply to his own use and benefit one 2½ ton truck, of a value in excess of $50.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Captain Michael TURSI, ***, did, at or near Nice, France, on or about 15 September 1945, knowingly

and willfully apply to his own use and benefit one 2½ ton truck of a value in excess of $50.00, property of the United States, furnished and intended for the military service thereof.

Specification 3: In that Captain Michael TURSI, ***, did, at or near Nice, France, on or about 22 September 1945, knowingly and willfully apply to his own use and benefit one 2½ ton truck, of a value in excess of $50.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: (Findings of guilty disapproved by reviewing authority).

Specification 2: (Findings of not guilty).

Specification 3: In that Captain Michael TURSI, ***, did, during the period from about 2 September 1945 to about 4 September 1945, wrongfully and without authority transport a civilian, to-wit, Leonard FARINOTTI, in a United States Army vehicle from Nice, France into Italy and return.

Specification 4: In that Captain Michael TURSI, ***, did, during the period from about 14 September 1945 to about 16 September 1945, wrongfully and without authority transport a civilian, to-wit, Leonard FARINOTTI, in a United States Army vehicle from Nice, France into Italy and return.

Specification 5: In that Captain Michael TURSI, ***, did, during the period from about 22 September 1945 to about 24 September 1945 wrongfully and without authority transport a civilian, to-wit, Leonard FARINOTTI, in a United States Army vehicle from Nice, France to Italy and return.

Specification 6: In that Captain Michael TURSI, ***, did, on or about 14 September 1945, wrongfully and without proper authority proceed from the European Theater to the Mediterranean Theater of Operations.

Specification 7: In that Captain Michael TURSI, ***, did, on or about 22 September 1945, wrongfully and without proper authority, proceed from the European Theater to the Mediterranean Theater of Operations.

Specification 8: In that Captain Michael TURSI, ***, did, at or near Nice, France, during the period from about 3 September 1945 to about 22 September 1945, wrongfully engage in commercial trans-

actions for personal gain to-wit, reselling to consumers in France some part of approximately 1212 bottles of liquor purchased in Italy.

Accused pleaded not guilty to all Charges and Specifications, was found not guilty of Specification 2 of Charge III and guilty of all other Specifications and of all Charges. No evidence of previous convictions was introduced. Accused was sentenced to dismissal, total forfeitures, confinement for three (3) years, a fine of $2000 and to be confined until fine paid but not to exceed two (2) years in addition to the three years confinement hereinbefore adjudged. The reviewing authority disapproved the findings of guilty of Specification 1 of Charge III, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence introduced by the prosecution to establish commission of the alleged offenses is hereinafter summarized for the most part in chronological order.

a. Charge II, Specification 1; Charge III, Specification 3.

Sometime the latter part of August 1945, Leonard Farinotti, an Italian who had served in the French army, was introduced to accused at Nice, France, by one Gaston Magnin after Farinotti had asked Magnin whether or not he knew any officers who intended soon to visit Italy. Farinotti, who was working as a fisherman at the time, had no connection with the United States Army either as a member or civilian employee thereof (R. 9,10,97). During the ensuing conversation accused spoke of Italy and mentioned the fact that he wished to obtain some vermouth for a club. Thereafter, around 1 September 1945, accused and Farinotti made a trip by United States Army truck from Nice, France, to Mandove, Italy, where accused purchased about twenty cases of liquor, each containing 6 or 12 bottles, with 200,000 lira loaned to him by Farinotti and brought the liquor back to France in the truck. Accused had not repaid Farinotti the 200,000 lira by the time of trial. On that same trip Farinotti obtained 5000 kilos of rice which was also brought back to France aboard the truck (R. 10-13, 33-35). This trip took about "a day or two" (R. 33). According to Standing Operating Procedure, Pamphlet #65, Section II, paragraph 4f(2), of which the court took judicial notice, Army vehicles were not to be used to transport civilians "except uniformed civilian personnel on duty with the United States forces, civilians on official business which requires such transportation, and civilians who have been required to work past the hour when public transportation or other transportation normally furnished by the United States forces to employees has ceased" (R. 35).

Accused's immediate superior officer, Major John H. Olin, and Captain Harold Hutchins, Administrative Officer, testified that accused was head of a section and that it was the "policy" of his headquarters to permit field grade officers and heads of sections to carry civilians in Army vehicles

for recreational purposes. A form of pass existed which permitted civilians to ride in Government vehicles for such purposes. Furthermore, there had been "cases" in the past of officers going to Italy to purchase liquor for themselves apparently without any unpleasant consequences resulting (R. 54-57, 68,69,73). However, around 28 or 30 August 1945, a directive from General Eisenhower had been received which stated that personnel from the European Theater of Operations would not enter Northern Italy without prior clearance through his headquarters and accused, who returned on 30 August 1945 from a two-day leave spent in Italy, was notified by Captain Hutchins that military personnel could no longer enter Italy from France without obtaining such clearance. Captain Hutchins was concerned with the matter of leaves for officers and signed the majority of the orders authorizing such leaves. His files contained no leave orders issued to accused and authorizing him to visit Italy subsequent to the two-day leave granted accused which expired on 30 August 1945 (R. 61-65, 75; Pros. Ex. 3).

b. Charge I, Specification 1; Charge II, Specification 2; Charge III, Specifications 4,6.

On 9 September 1945, all heads of sections in accused's organization were informed that they could authorize military personnel to be absent for not more than 24 hours in the vicinity of Nice or Cannes but that written permission would be required for any absence over 24 hours (R. 203). Accused was absent from his station and was in Italy from 14 to 16 September 1945, inclusive (R. 51,52,71). However, the morning report did not show accused absent for that period and when he returned Major John H. Olin, accused's immediate superior officer, did not take any official action because he thought none was necessary. Apparently accused was not considered absent without leave within his own organization (R. 52,67). As stated above, the files of Captain Hutchins contained no leave orders issued to accused authorizing him to go to Italy subsequent to the two day leave granted accused on 28 August 1945 (R. 48,61,62).

On or about 14 September 1945 accused and Farinotti went from France to a place near Torino, Italy, in a two and a half ton Army truck driven by Private John A. Adams. Farinotti asked accused for permission to carry a load of salt on the truck and, although he first objected, accused later consented. Near Mandove, Italy, Farinotti exchanged the salt for rice which was placed aboard the truck and returned to France along with about 20 cases of liquor, each containing 6 or 12 bottles, purchased in Italy by accused. This trip took about three days (R. 13-18, 33-35, 124-128). On the return trip the truck developed tire trouble and remained at a place about 15 or 20 miles from the Italian frontier until tires and gasoline were obtained from military authorities and brought to it by Farinotti (R. 44-46, 109-112,128,129). The truck was stopped by the border patrol both times it crossed the border but no inspection was made of its contents (R. 129,130).

The court took judicial notice of Daily Bulletin 238, Headquarters, Delta Base Section, APO 772, 30 August 1945, paragraph V, which stated that it was violative of Theater directives for military personnel to enter Northern Italy "on unit tours and other missions without prior clearance" and provided that "all proposed travel into the Mediterranean Theater of Operations, except travel on previously established leave quotas, will be cleared through this headquarters" (R. 206,207).

c. Charge I, Specification 2; Charge II, Specification 3; Charge III, Specifications 5,7.

With respect to the alleged absence without leave from 22 to 24 September 1945, Major Olin testified he was not aware that accused was absent over that weekend. He also testified that accused reported for work on the following Monday, that no official action was taken by him and that accused was "authorized to be away on Sunday and Saturday afternoons provided his work is covered" (R. 53). Captain Hutchins, the Administrative Officer, did not know accused was absent over that two-day period and the morning report did not reflect any such absence (R. 67).

However, on 22 September 1945, Farinotti and accused made a third trip to Italy. They traveled in a two and a half ton Army truck driven by Technician Fifth Grade James W. Settle and two days were consumed in making this trip (R. 136,138). In Italy Farinotti obtained about 4000 kilos of rice and accused purchased five large cases and one small case of liquor which were placed in the truck and brought back to France. Accused at first objected to transporting the rice but finally consented when Farinotti told him it was merely barter transaction to benefit the French people (R. 18,19, 24,26,33-35). At the French-Italian border, accused's truck was stopped by the border patrol on the way to and from Italy but no inspection of the contents of the truck was made nor were they prevented from continuing on their way (R. 138-142).

As stated above, written leave orders were essential to authorize an absence in excess of 24 hours and the Administrative Officer, customary custodian of such orders, had none such in his files authorizing accused's absence on these days (R. 48,61,62). As is also shown above, a specific directive required clearance with Headquarters, Delta Base Section, before any military personnel from that Section were entitled to visit Italy (R. 206,207).

d. Charge III, Specification 8.

Sometime around the first part of September 1945, accused visited the Cafe de Paris and conversed with a Monsieur Defour, the brother-in-law of the director of the Cafe. Thereafter Monsieur Defour told Madama Luciene Misset, cashier, to give accused 18,600 francs which she proceeded to do (R. 165-168). In a voluntary statement made by accused on 27 September 1945,

among other things, he admitted that a portion of the liquor brought by him from Italy was sold to the Cafe de Paris for approximately 20,000 francs and he sold other of it to two brother officers (R. 192,193,197; Pros. Ex. 7). The court took judicial notice of a letter from Headquarters, European Theater of Operations, United States Army, which prohibited all personnel subject to military law from engaging in business in that Theater and defined "engaging in business" to include buying, selling or dealing in any kind of property in that Theater "for present or future personel profit or investment" (R. 206,207).

e. Accused's Statements.

In addition to the foregoing testimony two voluntary statements made by accused were admitted in evidence as prosecution's testimony (R. 173,174,180-184,192,193,197; Pros. Exs. 6,7). In their material parts these statements recited that accused and Farinotti made three trips across the border into Italy, transporting salt to Italy on the first two trips and bringing back about 5000 kilos of rice on each of the three trips. On the first trip accused purchased liquor paying for a portion of it and on the third trip the liquor purchased was paid for by Farinotti and was given to accused for transporting Farinotti across the border. On all three trips accused brought back liquor from Italy. The last trip commenced on 22 September 1945 and terminated on 24 September 1945. Although accused was stopped by the border patrol on that trip he was not detained nor were the contents of his truck examined.

The rice brought back to France on these trips was turned over to a Monsieur Francois Barucco (R. 13,15,116,117). All dealings in rice and salt were between Barucco and Farinotti, the former having acquired 4500 kilos of salt to be exchanged in Italy for rice (R. 119-122). On 24 September 1945, 20 bags of rice and six cases of liquor were found in Barucco's yard by civil authorities and were confiscated despite accused's claim that he owned the liquor (R. 148,149,152,153).

4. The defense introduced testimony to show that for some indeterminate time prior to 29 September, British orders prevented military personnel and cargo from crossing the border between France and Italy at points subject to British control unless such personnel possessed a work ticket, trip ticket or leave pass (R. 77-79,88). First Lieutenant Murray R. Desmond had seen military vehicles that were permitted to cross the Franco-Italian frontier upon exhibition of a trip ticket (R. 216).

Evidence was also introduced to show that accused was reputed to be honest, loyal, conscientious and a good soldier (R. 222). By letter dated 19 October 1945, Major General Harry J. Collins, Commanding General of the 42nd Division, stated that accused was a member of that division from 7 July 1943 until 10 April 1945 when he was placed on temporary duty with USRRA, that during that period accused's battalion engaged in combat

in the Hagenan-Strasbourg Area, and that accused's battalion commander had reported accused to be an honest, loyal and conscientious officer while serving as S-3 of his battalion (R. 226; Def. Ex. D).

According to accused's AGO Form 66-1, he had received nine efficiency ratings of "excellent" and one numerical rating of 4.6. He also had two bronze campaign stars for the Rhineland and Central European campaigns (R. 230,231).

5. Considering first the two periods of absence without leave (Charge I, Specifications 1,2), charged against accused, it is clear from the evidence that accused was absent in Italy over the two weekends, September 14-16, inclusive, and September 22-24, inclusive. For an absence in excess of 24 hours it was required that military personnel have written leave orders and, according to the officer concerned with the issuance of such orders, none had been issued accused subsequent to 30 August 1945. Such evidence is sufficient to establish that accused's two absences were without leave. The fact that accused was not carried as absent without leave on his organization's morning report and that his immediate superior, Major Olin, did not consider him to be in such status over these two weekends does not suffice to justify his unauthorized absences. It is clear from the record that Major Olin was primarily concerned with accused's presence during week-day duty hours. Most conclusive of all, Major Olin's opinion is of little probative value in the face of the existing order of higher authority that all absences in excess of 24 hours must be upon written leave orders and such had not been issued accused. The evidence sustains the findings of guilty of Specifications 1 and 2 of Charge I.

Under the three Specifications of Charge II, accused is alleged to have willfully applied United States Army trucks to his own use and benefit on 3, 15 and 22 September 1945, respectively. The evidence shows that on each of those days accused used such a truck to travel from France to Italy where accused obtained a substantial amount of liquor for himself, i.e., 20 cases on each of two trips and five large cases and a small one on the third trip. That no portion of any of these trips had any relation to the performance of official military duties is further evidenced by the fact that, after purchasing such liquor, the balance of each of the trips was devoted to Farinotti's acquisition of rice.

The court took judicial notice of a document identified in the record only as Standing Operating Procedure Pamphlet #65, Section II, paragraph 4f(2), which prohibited such private use of military vehicles. The headquarters or other authority issuing this pamphlet was not identified. Irrespective of whether or not the court was warranted in taking judicial notice of such an insufficiently described document, the error was of no moment inasmuch as Army Regulations promulgated by the War Department prohibit such personal use of these Army vehicles as accused here made (pars. 28,29, AR 850-15, 1 Aug 1945). There was testimony in the record that it was not uncommon for military personnel to use Army vehicles to visit Italy to obtain liquor. That lax local practice

may have countenanced unauthorized activities does not affect the illegality of accused's conduct. Furthermore, even if we gave full effect to the testimony respecting such practice, it nowhere appears in the record that the local military authorities countenanced the use of Army vehicles for such personal activities by military personnel while absent without leave. Had local tacit permission existed which permitted such personal use of Army vehicles by military personnel while in a status of absence without leave, clearly such permission would be of no legal force or effect. In our opinion, the evidence sustains the findings of guilty of Specifications 1, 2 and 3 of Charge II.

Specifications 3, 4 and 5 of Charge II allege, respectively, that from 2-4 September, 14-16 September and 22-24 September 1945, accused transported Farinotti, a civilian, in an Army vehicle from France to Italy and return without authority. The proof clearly shows that Farinotti was so transported to permit him to barter French salt for Italian rice and to return the latter commodity to France. This was a purely private enterprise unrelated to military activities. Such use of military vehicles was not authorized by Army Regulations (par. 28,29, AR 850-15, 1 August 1945). Even if local "policy" permitted military personnel to transport civilians in military vehicles for recreational purposes, such practice would have no application here. Clearly, Farinotti's passage to Italy and return had no connection whatsoever with any pursuit of a recreational nature. The evidence sustains the findings of guilty of Specifications 3, 4 and 5 of Charge III.

Specifications 6 and 7 of Charge III allege that accused wrongfully and without proper authority proceeded from the European Theater to the Mediterranean Theater of Operations on 14 and 22 September 1945, respectively. The proof shows that on 30 August 1945 the convening authority directed that all proposed travel into the Mediterranean Theater be cleared through Headquarters, Delta Base Section. When accused visited Italy on 14 and 22 September he had no authority so to do, being absent without leave. Clearly his visits had not been authorized by appropriate headquarters. The evidence sustains the findings of guilty of Specifications 6 and 7 of Charge III.

Specification 8 of Charge III alleges that accused wrongfully engaged in commercial transactions for personal gain over the period from 3 September to 22 September 1945 by reselling to consumers in France some part of the liquor purchased in Italy. The proof shows that on his three trips to Italy accused acquired a total of 40 cases of liquor, each containing 6 or 12 bottles, plus five large cases and a small case thereof. Such a substantial acquisition of liquor over the period of one month could hardly have been for personal consumption. Furthermore, the evidence shows that accused had informed Farinotti that he wished to purchase liquor in Italy for a "club." Sometime in September 1945 after engaging in a conversation with an individual associated with the Cafe de Paris accused was paid 18,600 francs by that establishment. Such evidence was sufficient to establish the corpus delicti and warrant

admission in evidence of accused's confession relative to the disposition made of a portion of his purchases. He there admitted that he sold part of this liquor to the Cafe de Paris for about 20,000 francs and sold other of it to brother officers.

According to a directive issued by Headquarters, European Theater of Operations, all military personnel in that theater were prohibited from buying or selling any kind of property "for present or future personal profit or investment." We do not construe that directive to mean that buying or selling property was prohibited only if the transaction produced a profit. We construe the purport of the order to be that such transactions were prohibited when the intention of the participant or the purpose of the transaction was to produce a personal profit whether or not in fact such profit resulted. In other words, it seems obvious that the directive was intended to prevent military personnel from engaging in any business transaction, motivated by the desire for profit, even though the venture proved unsuccessful. The same evil existed whether the venture ultimately proved to be a success or a failure. Accordingly, accused violated that directive if in fact he sold any of his Italian liquor in France with the intention of profiting by the transaction whether or not he did so.

The proof does not establish that in fact accused made a profit, but the court was warranted in inferring from the evidence before it that accused's commercial transaction with the Cafe de Paris was impelled by profit motive on his part. Accused bought a substantial quantity of liquor in Italy and he disposed of a portion of it to a commercial purveyor of alcoholic beverages for what was the equivalent of some severel hundreds of dollars. This sale had all the earmarks of a commercial transaction. Within the ordinary experience of mankind, such a commercial transaction could have been intended by accused only to produce personal profit for himself and the court properly so concluded. The evidence sustains the findings of guilty of Specification 8 of Charge III.

6. Accused is 34 years of age. He completed his secondary schooling in 1930. During the year 1933 he was employed as a gasoline pump mechanic. In 1935 he enlisted in the Regular Army and by August 1941 had risen to the grade of First Sergeant. After successfully completing the course of instruction at The Infantry School, Fort Benning, Georgia, he was commissioned a second lieutenant on 5 May 1942. On 17 September 1942 he was promoted to first lieutenant. On 15 June 1943 he was promoted to captain.

7. Five of the nine members of the court adjudicating this case recommended that clemency be shown accused because there "existed much evidence to the fact that the custom in the area of Nice has been such to invite many actions as were shown in this case, and that it would be very easy for the accused to become a victim of circumstances."

8. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Articles of War 61, 94, or 96.

Thomas N. Jaffy, Judge Advocate

Joseph J. Stern, Judge Advocate

Robert E. Trewethan, Judge Advocate

SPJGH - CM 302839 1st Ind

Hq ASF, JAGO, Washington 25, D. C. AUG 2 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Michael Tursi (0-1283343), Infantry.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from 14 to 16 September 1945 and from 22 to 24 September 1945 (Chg. I, Specs. 1,2), in violation of Article of War 61; guilty of applying a United States Army truck to his own use and benefit on three occasions, viz: 3, 15 and 22 September 1945 (Chg. II, Specs. 1,2,3), in violation of Article of War 94; guilty of conspiring to evade the tariff laws of France (Chg. III, Spec. 1), guilty of transporting a civilian in a United States Army truck without authority from France to Italy and return on three different occasions, viz: 2-4 September, 14-16 September and 22-24 September 1945 (Chg. III, Specs. 3,4,5), guilty of proceeding without authority from the European Theater to the Mediterranean Theater of Operations on two occasions, viz: 14 and 22 September 1945 (Chg. III, Specs. 6,7), and guilty of wrongfully engaging in a commercial transaction for personal gain during the period from 3 to 22 September 1945 (Chg. III, Spec. 8), all in violation of Article of War 96. He was sentenced to dismissal, total forfeitures, confinement for three (3) years, a fine of $2000 and to be confined until fine paid but not to exceed two (2) years in addition to the three years' confinement initially imposed. The reviewing authority disapproved the findings of guilty of Specification 1 of Charge III (conspiracy to evade tariff laws), approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. I concur in that opinion. Around 1 September 1945, accused and an Italian civilian drove from Nice, France, into Northern Italy in a United States Army truck where accused acquired some twenty cases of liquor and the civilian obtained 5000 kilos of rice which were brought back to France aboard the truck. The acquisition of the liquor and rice were purely personal ventures unconnected with the performance of any of accused's official duties. The transportation of civilians aboard Army vehicles for such personal activities was prohibited by applicable Army directives.

Accused absented himself without leave from his station during the period from 14 to 16 September 1945 and again made a trip from Nice, France, to Italy in an Army truck accompanied by the same civilian. With accused's

permission the civilian transported a load of salt aboard the truck and exchanged it in Italy for rice. Accused again purchased about twenty cases of liquor. The liquor and rice were transported back to France aboard the truck. On 30 August 1945 there had been promulgated a directive by accused's headquarters which required military personnel of accused's organization to obtain approval of that headquarters before travelling to the Mediterranean Theater of Operations.

Accused again absented himself without leave over the period from 22 to 24 September 1945 and made a third trip to Italy with the same Italian civilian in an Army truck. There accused purchased five large cases and one small case of liquor while the civilian acquired 4000 kilos of rice. The liquor and rice were brought back to France aboard the truck.

Sometime over the period from 3 September to 22 September 1945, accused sold a quantity of this liquor obtained in Italy to a French cafe for the sum of 18,600 francs and also disposed of other of the liquor to brother officers contrary to applicable Army directives which prohibited military personnel from engaging in such commercial transactions.

Prior to promulgation of the directives of 30 August 1945, the record of trial indicates it had not been uncommon, although improper, for military personnel to use Army vehicles to cross the Franco-Italian border to obtain Italian liquor for personal consumption and because of that fact, five of the nine members of the court adjudicating this case recommended clemency for accused. Accused had served commendably as S-3 of his battalion in the Rhineland and Central European campaigns for which he had been awarded two bronze campaign stars. I recommend that the sentence be confirmed but that the fine, the forfeitures and confinement be remitted and that the sentence as thus modified be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 98, 1 May 1946).

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

SPJGK - CM 302840

19 MAR 1946

UNITED STATES	)	SEVENTH ARMY
v.	)	Trial by G.C.M., convened at Heidelberg, Germany, 19 and 20 November 1945. Dismissal.
Colonel CHARLES M. WOLFF (O-12424), Coast Artillery Corps.	)	

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

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

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

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

Specifications 1, 2, 4, 5, 6, 7: (Finding of not guilty).

Specification 3: In that Colonel Charles M. Wolff, 113th Anti-aircraft Artillery Group, was at Les Bulles, Belgium, on or about 19 December 1944, found drunk on duty as a Commanding Officer.

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

Specifications 1, 2, 3 and 4: (Finding of not guilty).

He pleaded not guilty to both Charges and all Specifications, was found guilty of Specification 3 of Charge I and of Charge I, and was found not guilty of Charge II and of all other Specifications of both Charges. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, but recommended that the execution thereof be suspended "because of the superior service of the accused during the past fourteen years and because of the condition of his health," and forwarded the record of trial to the Commanding General, United States Forces, European Theater, for action under Article of War 48. Prior to action by the Commanding General, United States Forces, European Theater, his powers, statutory or otherwise, in so far as they pertain to courts-martial, including the power of confirmation of sentences of general courts-martial and including powers conferred in time of war by Articles of

War 48, 49, 50, 50½ and 51, were terminated 19 January 1946 by direction of the President, and in accordance with instructions contained in a cable from the War Department, dated 19 January 1946, as clarified by a cable from the War Department, dated 21 January 1946, the Commanding General, United States Forces, European Theater, forwarded the record of trial to The Judge Advocate General for action by the confirming authority or other appropriate action. All members of the court recommended "to the confirming authority" that the sentence be suspended.

3. Evidence for the prosecution.

On 19 December 1944 the 113th Anti-Aircraft Artillery Group was in the process of retreating following the German break-through in the Ardennes. Completing its second move in less than twenty-four hours, it arrived at Les Bulles, Belgium, between 1500 and 1700 hours (R. 15,40). The accused was in command of this Group and was present (R. 15,25,40,85). After the Group set up for operations in a chateau, the accused called his officers together and told them that they had accumulated some liquor for a Christmas party and this was the time he would like to give it to the men. The officers had some drinks upstairs, and then went to supper (R. 15,25). After supper, the personnel of the headquarters assembled in the operations room. The accused stated that it was an ideal time to do some drinking, and began giving liquor to the men (R. 15,25). He told them the unit was out of communication with higher headquarters (R. 25,47,84,89), that they were going to have a party, and that he did not "want to see anyone able to walk up the stairs tonight" (R. 89). The accused and a number of officers and enlisted men drank together (R. 25,43). The accused started the men singing (R. 15,25,40,46,89). He was talking in a loud voice (R. 15), was drinking, others were drinking, and there was "a good deal of *** hilarity in the entire organization" (R. 71). By 2230 hours the accused was incoherent (R. 25,40), and was unsteady on his feet (R. 25,46). The party began to break up around midnight (R. 71). The accused then called on the operations sergeant and told him he wanted to go to St. Malo, and to "get the maps." On being informed later that such maps were not available, he seemed to have forgotten he had asked for them. He again called to the operations sergeant, telling him he wanted to go "some place in southern Germany," and to "get the maps." When the desired maps were produced, the accused had apparently forgotten his request (R. 84). At about 0200 hours only the accused and First Lieutenant O'Brien remained in the room (R. 71). They sat together on a divan facing the fireplace. Lieutenant O'Brien was forced to hold the accused to prevent his falling into the fireplace (R. 71). The accused could not walk when he finally agreed to go to bed (R. 71,85). Lieutenant O'Brien, who was sober at the time (R. 87), picked him up in his arms, and carried him from the room and half-way up the stairs (R. 71,85). Lieutenant O'Brien then put the accused "down and had one of his arms around my shoulder and I carried him that way the rest of the way into his room" (R. 71). The accused was drunk during this evening (R. 25,40,46,72,85,90).

On 19 December 1944 enemy troops were known to be at Martelange.

and Sibret, roughly ten to fifteen kilometers from the Group headquarters (R. 140). On this date the 635th Antiaircraft Battalion was directly under the command of the accused as commanding officer of the 113th Antiaircraft Group (R. 142). The accused did not command, but was responsible for making recommendations to the Corps Commander concerning the use of, five other antiaircraft battalions of the Group which were under the immediate control of the divisions to which they were attached (R. 139,140).

4. Evidence for the defense.

Having been advised of his rights as a witness, accused elected to make an unsworn statement (R. 128). He said he had an "unblemished" record of twenty-seven years in the Army since his graduation from West Point, with "superior" ratings during the past fourteen years. He had been ill from a duodenal ulcer since 1925, requiring considerable hospitalization and medical attention, and also suffered from a nervous condition "due solely to my stomach and back ailments, which, augmented by migraine headaches, have tormented me not only through this war but long prior thereto" (R. 130). He has been awarded the Legion of Merit and Oak Leaf Cluster thereto (Def. Ex. 3), the Bronze Star Medal, the French Legion of Honor, and the Croix de Guerre with Palm. He has also been recommended for the Distinguished Service Medal and "another cluster" to his Legion of Merit. His Group has been awarded five campaign stars (R. 129). He recalled only one occasion of any drinking at Les Bulles, Belgium, and that was when he saw it was going to be impossible for the men to have any kind of a Christmas dinner or party. Each officer contributed some liquor to a party for the men. Most of the officers and men knew Mrs. Wolff, who had sent the group a Christmas greeting card which he showed to them. He told the personnel of the group how sorry he was that they could not have the Christmas party they had planned at Esch-Sur-La-Sure. Thereafter, accused went upstairs and took several drinks with the other officers and then returned downstairs. There were about forty-five soldiers present. Each had such a small share of liquor that there was "no fun, no leader, no Christmas spirit or atmosphere in any of them." He then began to lead them in songs, and he took a drink while singing (R. 132). The only battalion then under his command was the 635th Antiaircraft Artillery Battalion. He, personally, had given orders to the battalion commander for its location and employment to cover the Corps. Both the Corps and Group were far behind friendly lines. The Group position was not only known by Corps and the Battalions but was approved by the Corps Commander before the Group moved to Les Bulles. He, as Group Commander, exercised no command over battalions attached to divisions. Accused had been informed by Corps that there would be no moves. By stating that they were "out of communication" accused merely meant that Corps had not strung the telephone lines to them and that radio contacts had not been established. There were no tactical involvements that night (R. 132,133).

Major Robert L. Gilbert, Medical Corps, Chief of Medicine at the 130th Station Hospital, testified that accused was suffering from a chronic duodenal ulcer and a chronic anxiety state manifested by emotional instability and irritability. He also had a chronic "lumbo sacral" strain (R. 126). There

was no evidence of any psychosis (R. 127).

Officers and enlisted men in accused's headquarters who were witnesses for the prosecution, testified on cross-examination that he was in poor physical condition (R. 18,33,66,78) and that he was not an habitual drunkard (R. 17,33,67,87). One officer testified that as a commander he was superior (R. 86), and another officer testified that he was very considerate of his officers and men (R. 34).

Brigadier General Edward W. Timberlake, Colonel Frederick R. Chamberlain, Jr., and Colonel Charles W. Gettys testified that they had known accused more than fifteen years, had served with him, and had occasion to observe him in the performance of his military duties. He was a superior commander, and an outstanding combat leader (R. 108, 111,114).

It was stipulated that if Brigadier General James H. Cunningham, Major General William E. Shedd, Colonel Loyd B. Magruder, Major General Fulton Q. C. Gardner, Major General Thomas A. Terry, Major General Joseph A. Green, Major General Henry T. Burgin, Brigadier General Edward A. Stockton, Jr., Brigadier General Edgar B. Calloday, Major General James L. Bradley, Colonel John G. Murphy, Major General Henry B. Lewis, Brigadier General Harvey C. Allen, Brigadier General James R. Towsend, Brigadier General Robert W. Crichlow, Major General George R. Meyer, Lieutenant General Troy H. Middleton, Brigadier General Claude M. Thiele, Brigadier General Samuel L. McCroskey, Brigadier General Frank C. McConnell, Colonel Milo G. Carey, Colonel John P. Evans, Colonel C. G. Patterson, Brigadier General Joseph S. Robinson and Brigadier General Clare H. Armstrong were present in court they would testify that during the periods they had known accused he had been an outstanding officer and had performed his duties in a superior manner. Several of these officers had recommended accused for various awards and had commended him for his service (R. 124, Def. Ex. 4-1 through 4-25).

A certified true copy of War Department Adjutant General's Office Form No. 66-4, Officer's and Warrant Officer's Qualification Card, pertaining to accused, was admitted in evidence without objection (R. 123; Def. Ex. 2). The card shows that between 19 November 1941 and 20 July 1945 accused received nineteen efficiency ratings of "Superior," and one "Unknown."

5. Accused was found guilty of being drunk on duty as Commanding Officer of the 113th Antiaircraft Artillery Group at Les Bulles, Belgium, 19 December 1944, in violation of Article of War 85. To establish this offense it is necessary to prove, (a) that accused was on a certain duty, as alleged, and (b) that he was found drunk while on such duty (MCM 1928, par. 145, p. 160). The Commanding Officer of a command or detachment in the field in the actual exercise of command is constantly on duty (id., p. 159). The fact that accused was Commanding Officer of the Antiaircraft Group was fully established at the trial. The evidence showed that at the time of the alleged offense accused's unit was retreating from the enemy and that the move to Les Bulles

was the second one for the organization within a twenty-four hour period. It was known that enemy troops were some ten to fifteen kilometers away from Group Headquarters. Accused was in immediate command of one Antiaircraft Battalion, was antiaircraft advisor to the Corps Commander, and had the responsibility of insuring proper employment of group battalions then attached to divisions. Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of Article of War 85 (MCM 1928, par. 145, p. 160; CM 234711, Sandlin, 21 BR 137). During the evening accused became incoherent and he was unsteady on his feet. Lieutenant O'Brien had to hold him in orderto prevent him from falling into the fireplace, and he became unable to walk. Lieutenant O'Brien finally carried him upstairs to his quarters. Several witnesses testified that accused was drunk. The record of trial is convincing that accused was drunk on duty in violation of Article of War 85 (CM NATO 1045, III Bull JAG, Sec 443 (1), p. 284).

6. Accused is 48 years of age, and a graduate of the United States Military Academy. The Army Register shows his service as follows:

> "Lt. col. A.U.S. 15 Sept 41; accepted 18 Sept 41; col. A.U.S. 1 Feb. 42. - Cadet M.A. 14 June 17; 2 Lt. C.A.C. 1 Nov. 18; 1 lt. 23 Nov. 19; (a) 2 lt. (Dec.15,22); 1 lt. 17 Mar. 24; capt. 1 Aug.35; maj. 1 July 40; lt. col. 11 Dec. 42. (PL-3198) "

During his service as an officer 63 efficiency reports upon him have been rendered. One report, covering a period of six months, shows a rating of 6.4. Twenty-one reports, covering aggregate periods of seven years and five months, show ratings of superior. Eleven reports, covering aggregate periods of four years, show ratings of excellent. Five reports, covering aggregate periods of one year and two months, show ratings of above average. Twenty-two reports, covering aggregate periods of six years and four months, show ratings of average. Three reports, covering aggregate periods of eight months, show ratings of satisfactory. He graduated from the Command and General Staff School after completion of the "Regular" course of five months' duration. There he was rated "proficient in theoretical training for high command and general staff duty," but not suitable for further training therein, because of "Low academic standing." The efficiency reports contain numerous remarks attesting to accused's conscientious performance of duty, his force, ability to inspire confidence in senior and junior officers, and his high military attainments. He has been awarded the Legion of Merit and Oak Leaf Cluster thereto, the Bronze Star Medal, the French Legion of Honor (Chevalier), and the Croix de Guerre with Palm. He has been especially commended on nine occasions.

7. The court was legally constituted and had jurisdiction over accused and of the offense. No errors injuriously affecting the substantial rights of accused were committed by the court during the trial. In the opinion of

the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 85.

Thomas W. Mayer, Judge Advocate

William B. Kudes, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 302840 1st Ind

Hq ASF, JAGO, Washington 25, D. C. APR 11 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Colonel Charles M. Wolff (O-12424), Coast Artillery Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk on duty in violation of Article of War 85 (Specification 3 of Charge I). No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, but recommended that the execution thereof be suspended "because of the superior service of the accused during the past fourteen years and because of the condition of his health," and forwarded the record of trial to the Commanding General, United States Forces, European Theater, for action under Article of War 48. Prior to action that officer, in accordance with instructions from the War Department, forwarded the record of trial to The Judge Advocate General for action by the appropriate confirming authority.

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

The accused was commanding officer of the 113th Antiaircraft Artillery Group on 19 December 1944, when it retreated to Les Bulles, Belgium, during the "Battle of the Bulge," followed by the enemy at a distance of ten to fifteen kilometers. One battalion of the group was under the direct command of accused, and he was responsible for advising the Corps Commander concerning proper employment of five other group battalions then attached to divisions. In the evening accused organized and participated in a "Christmas Party" for officers and enlisted men of his headquarters. During the evening he became so drunk he could hardly stand, and was taken to his room by one of his lieutenants. At the trial accused in an unsworn statement said that he had suffered from a duodenal ulcer, back ailments and migraine headaches for many years. A brigadier general and two colonels testified that they had known accused for more than fifteen years, had served with him, and believed him to be a superior commander and an outstanding combat leader. It was stipulated that a lieutenant general, eight major generals, nine brigadier generals, and five colonels would testify that the accused was an outstanding officer and had performed his duties in a superior manner.

The accused is a graduate of the United States Military Academy, has served as a Regular Army officer for nearly twenty-eight years, and is forty-eight years of age. Prior to 1933 the majority of his efficiency ratings were "average"; since 1933 the majority of his ratings have been "superior." He has been awarded the Legion of Merit with Oak Leaf Cluster, the Bronze Star Medal, the French Legion of Honor (Chevalier), and the Croix de Guerre with Palm.

Accused's drunkenness at Les Bulles, while in command of an Antiaircraft Artillery Group at one of the most critical periods of the war, cannot be condoned even though by good fortune no loss resulted from his misconduct. In view, however, of his outstanding service as an officer and leader in peace and in war, rendered in spite of apparently serious physical infirmities, it is believed that justice does not require his dismissal, and it is therefore recommended that the sentence be confirmed but suspended during good behavior.

4. Consideration has been given to a recommendation "to the confirming authority," attached to the record of trial, signed by all members of the court, that execution of the sentence be suspended, "due to the superior service of the accused, the long time which elapsed in the preferring of the greater number of alleged offenses, and the condition of accused's health." Consideration has also been given to a similar recommendation signed by defense counsel and assistant defense counsel.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

((GCMO 100, 1 may 1946).

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

SPJGN-CM 302841

UNITED STATES	)	TASK FORCE "A"
	)	
v.	)	Trial by G.C.M., convened at
	)	Oslo, Norway, 3 October 1945.
Second Lieutenant ROY J.	)	Dismissal, total forfeitures,
TALLMAN (0-1010533),	)	and confinement for one (1)
Infantry.	)	year.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Roy J. Tallman, Headquarters and Headquarters Company, 474th Infantry Regiment, then of First Company, Third Regiment, First Special Service Force, did near Mount Ours, France, on or about 9 October 1944, with intent to deceive Captain Thomas Zabski, his commanding officer, officially report to the said Captain Zabski that the patrol that he commanded on 9 October 1944 had checked and cleared of the enemy the Cole-Sagra trail on the north side of Mount Ours, France, and a definitely defined house near the foot of said trail, which report was known by the said Second Lieutenant Tallman to be untrue.

Specification 2: In that, Second Lieutenant Roy J. Tallman, Headquarters and Headquarters Company, 474th Infantry

Regiment, then of First Company, Third Regiment, First Special Service Force, did near Mount Ours, France, on or about 9 October 1944, knowingly and willfully advise the enlisted men of the patrol that he was commanding to make a false report concerning the actions of said patrol if they were questioned concerning the activities of the patrol and of the accomplishment of its assigned mission.

Specification 3: In that, Second Lieutenant Roy J. Tallman, Headquarters and Headquarters Company, 474th Infantry Regiment, then of First Company, Third Regiment, First Special Service Force, having received a lawful order from Captain Thomas Zabski, his commanding officer, to take a patrol and check and clear of enemy the Cole-Sagra Trail on the north side of Mount Ours, France, and a definitely defined house near the foot of said trail, the said Captain Zabski being in the execution of his office, did, near Mount Ours, France, on or about 9 October 1944, fail to obey the same.

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

3. Evidence for the prosecution: The First Company, Third Regiment, First Special Service Force, to which accused was assigned, was located, on 9 October 1944, on Mount Ours in Southern France (R. 6). In the evening on that date Captain Thomas Zabski, the Company Commander, ordered accused to take a ten man patrol and to "check" a mule trail known as the Cole-Sagra trail to ascertain whether it could be used for a "push" and also to "check" a certain house to determine whether it was being used by the enemy (R. 6-7). The Cole-Sagra trail was a one-way vehicle road for about 100 yards from the American lines and, from that point, was an ordinary mule trail (R. 8). The accused was given the order in person, and he signified that he clearly understood the mission (R. 7). He had seen the house previously, and its location was pointed out on the map (R. 8).

About 10:30 p.m. he briefed the patrol on the nature of the mission (R. 10, 15). According to Staff Sergeant John P. Gergely, who acted as the leader or scout, accused stated they would "clear the trail down as far as that house and clear it if anything was in it." To clear a house meant that all doors, windows, and exits would be

covered and the interior searched for enemy soldiers or telephones (R. 10, 14). The patrol left the American position and proceeded down the trail some 250 yards (R. 10, 12). Sergeant Gergely, who was a few yards in front, paused at a turn in the trail about 50 yards from the house. When accused came up, he stated that the patrol would not go any further (R. 10-11). He and Sergeant Gergely made a reconnaissance 20 or 30 yards down the trail and, after vainly watching and listening for any signs of activity in the house, returned to the patrol. The farthest point to which they had gone was 20 or 30 yards from the house. Because of the darkness they were unable to see the house clearly (R. 11-13).

Technician Fourth Grade Norman E. Figgins, who was with the main body of the patrol, estimated they were 400 yards from the house when accused commanded a halt and went on to join Sergeant Gergely. Accused returned with Sergeant Gergely in ten minutes and said that he thought it unsafe to go any further. The patrol remained in the vicinity for another thirty minutes then went back to camp. Accused instructed the patrol to tell Captain Zabski, if he inquired, that they entered the house (R. 15-16).

Back in their command post, about midnight, accused called Captain Zabski on the phone and reported "that he had carried out the mission and didn't run into any enemy and that the house had been cleared and that there was no sign that the house had been used by the enemy" (R. 7, 12). Having been directed by the accused to make the same report, Sergeant Gergely, in the presence of accused, called Captain Zabski on the phone and carried out the instructions given (R. 11).

Accused, after being warned of his rights, gave a statement on 8 November 1944 to "Major Mastran," the investigating officer. The stenographer who was present during the entire interrogation of accused testified that no promises were made and no duress was exercised (R. 18-21, 28-30, 31; Pros. Ex. 1). Accused's statement narrated the events connected with his Cole-Sagra mission substantially as set out herein and concluded as follows:

> "* * * I knew that my report and the sergeant's report were false. I gave my report because I was absolutely certain that there was nothing in the house and we did clear the trail.
>
> "My reason for not taking the patrol down to the house was that the hill was very steep and rocky. We would have made much noise going down. The enemy-held Castillon Fort was right over close to this house and I think that we would have drawn small arms, mortar, and

artillery fire from the Fort. I could see no reason why I should risk the safety and lives of my men, when I knew that there was nothing in the house. I realize now that I used very poor judgment, but I felt at the time that the actions I took were justified" (Pros. Ex. 1).

4. Evidence for the defense: Accused took the witness stand to testify solely on the question of the voluntary character of his confession (R. 22). He asserted that he was taken from a hospital, where he had been confined as a result of malaria, to battalion headquarters in a nearby town and there, for the first time, was told of the charges against him (R. 22-23). Because this was the first occasion on which he had ever been involved in such an experience and was very much frightened, he asked Major Mastran for advice and was told to "make a statement, it will only cost you a couple of hundred bucks" (R. 24-26). Accused had heard of similar cases, one almost identical with his own, where only fines were imposed, and, in view of Major Mastran's advice, he proceeded to give a statement (R. 24).

In addition to testifying concerning his confession accused made an unsworn statement which related entirely to his physical condition (R. 32; Def. Ex. A). He stated that he had an attack of malaria in Africa in August, 1943, with recurrences in December, 1943, near Naples; in April, 1944, near Anzio; in August, 1944, prior to and in a boat during the initial French invasion; in September, 1944, near Nice; from October, 1944, to January, 1945, near Cannes; in February, 1945, in Paris; and from April to June, 1945, in Belgium and England. These attacks, which lasted for periods from one week to two months, incapacitated him for duty. The night before the French invasion he had a fever of 102 degrees and a medical officer wanted to hospitalize him but accused "begged off" because he wished to be in on the invasion. The accused led his platoon in the first wave. On the date of the offenses alleged against him he had only been out of the hospital a week (Def. Ex. A).

Stipulated medical testimony discloses that on 4 May 1945 a medical disposition board found accused unfit for further duty in the European Theater of Operations because of hepatitis [inflammation of the liver], malaria, and hernia. The board recommended his return to the Zone of the Interior for further hospitalization (R. 32).

The trial judge advocate testified to the effect that the charges were referred to him on 27 September 1945 (R. 32).

5. Specification 1 of the Charge alleges that accused made a false official statement to his commanding officer, Captain Thomas Zabski, that accused's patrol had checked, and cleared of the enemy, the Cole-Sagra trail and a house on the trail. Specification 2 alleges that accused advised the enlisted men of the patrol to make a

false report of its actions if they were questioned concerning its accomplishment of an assigned mission. Specification 3 alleges that accused failed to obey Captain Zabski's order to take a patrol and check and clear of the enemy the Cole-Sagra trail and a house on the trail. The Specifications are laid under Article of War 96.

The evidence for the prosecution establishes that during operations in Southern France accused was given an order by his commanding officer, Captain Zabski, to take a patrol and to "check" a mule trail extending toward the enemy lines to ascertain whether it could be used for a "push" and to "check" a certain house on the trail to determine whether it was being used by the enemy. From the nature of the mission it is clear that actual entry into the house was necessary. Accused apparently understood this requirement because in briefing the patrol he stated they would "clear" the trail and the house of the enemy.

Accused failed to carry out his orders. After reaching a point 20 or 30 yards from the house, and after watching and listening for a time, they turned back to their own lines. It may well be, as accused later said, that he felt certain that there was nothing in the house, but the fact remains that his mission required that he enter the house and search it. Although the record does not show that his dereliction had any injurious consequences, the serious possibilities are obvious.

Further evidence that accused knew that he was not carrying out his orders is shown by his instructions to the members of his patrol to state, if questioned by Captain Zabski, that they had been in the house. Two members of the patrol testified that accused issued such instructions and Sergeant Gergely carried them out by making a false report to Captain Zabski as to what the patrol had done. Finally accused himself reported that the house had been cleared and that there was no sign that it was being used by the enemy. The circumstances clearly show that in making this false report he intended to deceive Captain Zabski.

The evidence for the prosecution is uncontradicted. The defense offered no testimony concerning the offenses alleged. The only explanation pertaining to them offered by the defense is accused's statement that on 8 October 1944 he was just recovering from an attack of malaria for which he had been hospitalized. The Specifications are accordingly sustained. Each offense involves conduct prejudicial to good order and military discipline and is violative of Article of War 96.

6. The only substantial legal question involved concerns the question of the admissibility of accused's statement, which, since it admits all of the elements of the offenses charged, was a confession

and subject to the rules governing their admissibility. His testimony that the confession was induced by what amounted to a promise by the investigating officer that he would be let off with a small fine was contradicted by a stenographer present who testified that no promises of any kind were given. An issue of fact was thus presented for the court's determination and no error is perceived in their resolving the question against accused and admitting the document. It may be noted that the evidence, exclusive of the confession, is compelling in its demonstration of accused's guilt.

7. The accused is about 24 years old, having been born 29 October 1921. War Department records disclose that he is a native of Iowa where he was graduated from high school and attended college for one year. From 1937 to 1939 he was employed as a swimming instructor and from 1939 to 1941 as an "experimental farmer" for a farm implement house. After entering the military service as an enlisted man, he attended the Armored Force Officer Candidate School at Fort Knox, Kentucky, where he was commissioned a second lieutenant on 19 May 1942, entering upon active duty four days later.

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

Charles Stephens, Judge Advocate.

Robert J. O'Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 302841 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Roy J. Tallman (0-1010533), Infantry.

2. Upon trial by general court-martial this officer was found guilty of failing to obey the order of Captain Thomas Zabski, his commanding officer, to take a patrol and check a certain trail and house and to clear it of the enemy; making a false official statement to Captain Zabski that the patrol had checked and cleared of the enemy, the trail and house; and of advising the enlisted men of the patrol to make a false report of their activities if questioned concerning the accomplishment of their mission; all in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at such place as the reviewing authority might direct for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

During operations in Southern France in October 1944, accused was ordered to take a patrol and "check" a certain mule trail to determine whether it was suitable for a "push" and to "check" a house on the trail to ascertain whether it was being used by the enemy. The mission contemplated an actual search of the house. Accused and a scout proceeded to a point 20 or 30 yards from the house while the balance of his patrol remained further back. Not detecting any signs of activity about the house accused ordered the patrol to return to the American lines where he reported that the house had been cleared and that there were no signs of its use by the enemy. He ordered the men to give the same report if questioned and one of the men followed this instruction.

Accused defended his action on the grounds that he was close enough to the house to assure himself that it was not occupied by the enemy and if he proceeded any further he probably would have drawn enemy fire. Under these circumstances he felt justified in reporting that the house had been cleared and that it gave no signs of enemy occupation.

Accused was a member of the national guard unit which entered

into federal service in January 1941. Commissioned a second lieutenant upon being graduated from Officer Candidate School in May, 1942, he went overseas a year later. Although handicapped by many recurring attacks of malaria, he served in the North African, Italian, and French theaters of operation. The Staff Judge Advocate's review states that the accused was a platoon commander with the 4th Ranger Battalion which suffered severe losses on the Anzio Beachhead. Later he led a platoon in the invasion of Southern France. It should be noted that for reasons undisclosed accused was not tried until a year after the offenses. However, in the interim, on 18 July 1945, he was tried and acquitted by a general court-martial on charges of neglect in his duties as commander of a train carrying German prisoners of war which resulted in the death of twenty-three of the latter. I recommend that the sentence be confirmed but that all forfeitures in excess of $50.00 pay per month for three months, and the confinement, be remitted; that the sentence as thus modified be ordered executed, but that execution of that portion adjudging dismissal be suspended during good behavior.

4. Consideration has been given to a letter from Honorable Paul Cunningham, Member of Congress, in behalf of accused; and to a letter from Doctor John W. Studebaker, Commissioner of Education, forwarding a letter from the step-mother of accused and other correspondence.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls

1 - Record of trial
2 - Form of action
3 - Ltr. fr. Hon. Cunningham
4 - Ltr. fr. Dr. Studebaker w/incls.

(GCMO 228, 18 July 1946).

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

SPJGN-CM 302846

UNITED STATES v. First Lieutenant LAURENCE DAYTON (0-1945780), Transportation Corps.	UNITED KINGDOM BASE THEATER SERVICE FORCES EUROPEAN THEATER Trial by G.C.M., convened at Southampton, England, 27 and 30 November 1945. Dismissal and confinement for one (1) year.

OPINION of the BOARD OF REVIEW
BAUGHN, O'CONNOR and O'HARA, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant Laurence Dayton, 552nd Port Company, Transportation Corps, did, at Southampton, Hampshire, England, on or about 6 October 1945, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with a male person unknown.

He pleaded not guilty to, and was found guilty of, the Charge and its Specification. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to be confined at such place as the reviewing authority might direct for a period of one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution: Privates First Class William F. Thornton and Samuel T. Swain, members of a Military Police Battalion

stationed at Southampton, England, instituted a search for an Army lieutenant as the result of a report received about 11:00 p.m. on the evening of 6 October 1945, and found the accused in a bombed-out building, some feet back from High Street. The accused was squatting down facing an English sailor, who was standing, with his hands on the sailor's hips. The two were about twelve feet away from the street in the midst of debris, dirt and refuse (R. 16). Private First Class Thornton stated on direct examination that the sailor's penis was in accused's mouth (R. 6). On cross-examination he admitted that when he was interviewed by the defense counsel he told the latter that he could not swear to that fact. His explanation of the inconsistency was that one of the defense counsel had spoken of the shame that would follow accused and his family through life if he were convicted of such a crime, although he conceded that counsel had told him they wanted him to tell the truth (R. 14). Moreover, he now reaffirmed the testimony which he had given on this crucial point on direct examination (R. 11). Private First Class Swain testified that he did not see the sailor's penis in accused's mouth but he did see accused with his hands on the sailor's hips and "his face right at the sailors (sic) privates" (R. 17). When accosted by Private First Class Thornton the sailor "put his penis back in his fly" and ran away (R. 7, 11, 18). Accused was placed under arrest and taken to Military Police Headquarters. Enroute he said, "If I did something wrong, I am sorry, I will apologize" (R. 15).

With respect to accused's sobriety, Private First Class Thornton testified that "he had some liquor in him but not enough to be intoxicated". Except for one instance he was able to walk unaided to Military Police Headquarters. He seemed to get a lot drunker "when the warm air hit him" (R. 16). Private First Class Swain also was of the opinion that accused was not drunk (R. 18).

4. For the defense it was shown that the accused was examined psychiatrically by a board of officers whichconcluded that he was not a true homosexual but was reclaimable under the provisions of par. 2b, WD Cir. #3, 3 Jan. 1944 (R. 22; Def. Ex. A). Another board of officers met on 10 October 1945 to determine the mental condition of the accused and concluded that he was sane at that time but that at the time of the alleged offense "he apparently did not know the difference between right and wrong, apparently did not have the capacity to keep from doing wrong, nor the capacity to properly govern his actions" (R. 24; Def. Ex. B). The latter conclusion was based solely upon information supplied by the accused that he was under the influence of alcohol (R. 25).

First Lieutenant John Chodacki saw the accused on the evening of 6 October 1945 at Military Police Headquarters and was of the opinion that accused was drunk. The accused's clothes were mussed and soiled. He was unable to understand simple questions relative to his identity and could not talk intelligently (R. 26-27).

Having been fully advised concerning his rights as a witness, accused elected to testify in his own behalf (R. 27-28). He is the sole support of his mother and father. He entered the service in April of 1942; was commissioned 23 June 1943; and had served overseas since 7 March 1944 in Scotland and France, having landed at "Omaha Beach" on D-plus-19 day (R. 28). He arrived at Southampton on 6 October 1945 and that evening consumed considerable intoxicating liquor (R. 30). He recalled drinking at several "pubs" shortly after 8:00 p.m., one of which was on High Street, and from that time until he found himself at the MP Headquarters he could not remember anything (R. 31-32). The following day after a night of illness he was told the nature of the charge. He has never in the past participated in any sexual acts with a male (R. 32). Six officers testified as to the previous good conduct of the accused and his good character and reputation (R. 34, 35, 36, 37, 38, 39).

5. Inasmuch as this case involves a sentence of dismissal of an officer we have, under the 48th Article of War, the power to weigh the evidence and judge of the credibility of witnesses, although the findings of the court-martial which had the opportunity to see and hear the witnesses are entitled to considerable weight. CM 243466, Calder; 27 BR 365,382. Accused was charged with, and found guilty of, sodomy, which is defined as the act of effecting a sexual connection with any brute animal, or by rectum or by mouth, by a man with a human being. Manual for Courts-Martial (1928) paragraph 149k, page 177. The testimony of one eyewitness definitely established that accused committed the crime as alleged and this testimony was corroborated to a large extent by the statement of another eyewitness. It is true that the witness who testified to the vital element of penetration was somewhat impeached. The court, however, in evaluating the testimony of this witness could consider that he was a private first class and that the impeaching statement was made at a private session with defense counsel, both of whom were officers, after some remarks relative to the shame that accused and his family would incur if he was convicted. In addition, they could consider the uncontradicted and unimpeached testimony relative to the circumstances in which accused was apprehended, including the position of accused and the sailor, the abrupt flight of the latter, and the apologetic attitude of accused. For these reasons, applying the principles stated above, relative to our power, we are not inclined to disturb the findings of the court.

The defense contended that accused was too drunk to know what he was doing and, that if he did commit the act complained of, he was too drunk to know right from wrong and to adhere to the right. It is evident that the board of officers appointed to determine the sanity of the accused confused the question of sanity with that of drunkenness or intoxication. The inability of an accused to adhere to the right constitutes a defense to misconduct, for "a person is not mentally responsible for an offense unless he was at the time so far free from mental defects, disease or derangement as to be able concerning the particular acts charged, both to distinguish right from wrong and to adhere to the right" (MCM, 1928, par. 78a, p. 63). Voluntary drunkenness however is not a mental disease or derangement in the law of defense (CM ETO 16887, Chaddock). See also "Mental Accountability under Military Law" by Lipscomb, The Judge Advocate Journal, Vol. II, No. 2, page 14.

> "Drunkenness - It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense.
>
> "Such evidence should be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act.
>
> "In courts-martial, however, evidence of drunkenness of the accused, as indicating his state of mind at the time of the alleged offense, whether it may be considered as properly affecting the issue to be tried, or only the measure of punishment to be awarded in the event of conviction, is generally admitted in evidence" (MCM, 1928, par. 126a, p. 136).

The crime of sodomy requires no specific intent. Some authorities have maintained that drunkenness of a degree so severe as to produce stupefaction "may be a defense to a prosecution for any offense with the commission of which stupefaction is inconsistent": Wharton, Criminal Law, section 65; but the condition of the accused in this case when apprehended in the act of sodomy was plainly not of such an aggravated nature. The opinion of the

Board of Officers was not binding upon the court, nor does it bind us, particularly where, as here, it was based on the ex parte, self-serving statements of accused. CM 204790, Hayes; 8 BR 57,73. We think that the court's findings, implicit in their finding of guilty, that accused was not so intoxicated, that he was incapable of a mens rea must stand. CM 242536, Kappes; 27 BR 87.

6. War Department records show that the accused is 40 years and 7 months of age and unmarried. He was graduated from high school and for three years was employed by the United States Post Office. He was schooled as a designer in Illinois and subsequently followed that vocation for ten years, being employed by several different tile manufacturers in New York City. From October 1940 to February 1941 he was a typewriter salesman in New York City. He was inducted into the service 10 April 1942 and was commissioned a second lieutenant AUS 23 June 1943 and assigned to duty with the Transportation Corps.

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

Wilmot T. Baughn, Judge Advocate.

Robert J. Lamin, Judge Advocate.

Gerard O'Hara, Judge Advocate.

SPJGN-CM 302846 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War JUN 1 0 1946

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Laurence Dayton (0-1945780), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of sodomy, in violation of Article of War 93. He was sentenced to be dismissed the service and to be confined at such place as the reviewing authority might direct for a period of one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The accused was apprehended in the act of committing sodomy per os upon an unknown English sailor at night among the debris of a bombed-out building in Southampton, England. He had been drinking. The evidence was conflicting as to the extent of his intoxication. A Psychiatric Board found that he was not a true homosexual but was reclaimable. I recommend that the sentence be confirmed and ordered executed.

4. Consideration has been given to a brief in accused's behalf submitted by General Fred W. Llewellyn. General Llewellyn also presented an oral argument before the Board of Review.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 201, 28 June 1946).

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

SPJGH - CM 302847

28 FEB 1946

UNITED STATES v. Second Lieutenant THOMAS H. KEATING (0-1309069), Infantry.	UNITED STATES HEADQUARTERS BERLIN DISTRICT Trial by G.C.M., convened at Berlin, Germany, 23 November 1945. Dismissal, total forfeitures and confinement for three (3) years.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Second Lieutenant THOMAS H. KEATING, Headquarters Command, First Airborne Army, did, at Berlin, Germany, on or about 21 July 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 12 October 1945.

Accused pleaded not guilty to the Charge and Specification. He was found not guilty thereof, but by appropriate exceptions and substitutions, was found guilty of absenting himself without leave from his station for the period alleged, in violation of Article of War 61. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for three (3) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to show that on 20 July 1945 an appropriate request was made by accused's organization for travel orders to be issued accused directing him to proceed on 21 July 1945 from Templehof, Germany, to Paris, France, to obtain vehicle parts (R.5; Pros. Ex.2). Pursuant to this request, orders were issued by United States Headquarters, Berlin District on 20 July 1945, directing accused to proceed to Paris, France, on or about 21 July 1945 for a period of three days in connection with matters pertaining to the issuing Headquarters and upon completion of

his duties to return to his station (R.5; Pros. Ex.1). On the morning report of accused's organization, Headquarters Company, First Airborne Army, submitted at Berlin, Germany, on 7 August 1945, the following entry appears relative to accused: "TDY to Paris, France to AWOL 25 July 1945" (R.6,7; Pros. Ex. 3). It was stipulated by the prosecution, defense and accused that if Private First Class Henry A. Muller were present he would testify that on 12 October 1945 he took accused into custody in a bar on Rue Frochat, Paris, France (R.9; Pros. Ex.4).

In a voluntary statement made by accused after full explanation of his rights, he stated that after arriving in Paris he endeavored unsuccessfully to locate the ranking officer of the Ordnance Depot to which he had been sent and that thereafter he remained in Paris until apprehended. During his absence he drank excessively and drew two or three partial payments from the Finance Officer in Paris (R.8).

4. After his rights had been explained accused elected to give sworn testimony in his own defense. He testified that he was 35 years of age, had attended college for one year and in civilian life had been employed as an electric welder. He was inducted into military service on 13 June 1942, attended The Infantry School at Fort Benning, Georgia, and received a commission as a second lieutenant on 23 January 1943. After serving for a year and a half in the United States he volunteered for overseas duty, received parachute training in England and was assigned to the 82d Division. As a member of that organization he participated with it in a mission in Holland and also in the Battle of the Bulge, receiving the Bronze Star for his combat activities in neutralizing enemy machine gun positions. He was thereafter hospitalized, suffering from a slight wound and battle exhaustion (R.9,10,12,18). Upon release from the hospital he was returned to his organization but was promptly transferred to a base camp and there admitted to a hospital because of his nervous condition. His condition was diagnosed as psychoneurotic, he was placed on limited service and assigned as assistant transportation officer at the Potsdam Conference. While serving in such capacity he was ordered to Paris to obtain automotive parts (R.12).

Arriving in Paris around 22 July 1945 and finding that the ranking officer of the Ordnance Depot would be away for several days, accused then commenced drinking and continued thereafter to drink heavily. He did not return to the Paris Ordnance Depot although on 25 July 1945 he did inquire about air transportation back to Berlin. He continued his drinking because he felt nervous and upset and seemed to obtain some relief from intoxicants. During his stay in Paris accused drew a total of $350 in partial payments (R.12,13). He stayed at various hotels and with various women until 12 October 1945 when he was taken into custody by the military police (R.14,16).

Prior to this absence and while assigned to the Potsdam Conference, accused suffered from headaches and received only aspirin from the medical

authorities which failed to relieve his distress (R.15,17). After his apprehension he was returned to Berlin, Germany, and confined in the 101st Hospital for five days (R.16).

5. In rebuttal the prosecution introduced the report of a board of medical officers which convened at the 101st General Hospital, Berlin, on 3 November 1945 after the members thereof had observed accused daily over the period from 31 October to 3 November 1945. The board found that on 3 November 1945 and also at the time he committed the instant offenses accused was "sane and responsible and capable of realizing right from wrong and of the normal control of his actions" (R.18; Pros. Ex.5). The court requested accused's WD AGO Form No. 66-1 which revealed that he had received six military efficiency ratings of Satisfactory, two of Very Satisfactory and two of Excellent (R.19; Court's Ex.A).

6. The prosecution's evidence establishes that accused failed to report back to his organization in Berlin, Germany, on 25 July 1945, as ordered, after completion of three days duty in Paris, France. Subsequently, on 12 October 1945 he was apprehended in Paris, France. He had no authority to be absent over this period of time. Accused, in his sworn testimony given at the trial, admitted that he visited the Ordnance Depot in Paris on or about 22 July 1945 as ordered but failed to return to it thereafter and remained in Paris drinking and associating with women until he was taken into custody on 12 October 1945. Although accused had previously suffered from some degree of nervous exhaustion, the evidence reveals that he was mentally responsible for his conduct in absenting himself without leave. Such evidence is sufficient to establish that sometime on 22 July 1945, after his visit to the Ordnance Depot, accused abandoned his mission in Paris and absented himself without leave. The evidence fully sustains the court's findings of guilty.

7. Accused is 35 years of age, married and has one child. War Department records reveal that after graduating from high school he attended Ferris Institute, Big Rapids, Michigan, for two years. He was thereafter employed as an electric welder. He was inducted into military service on 13 June 1942 and on 23 January 1943 was commissioned a second lieutenant after successfully completing the course of instruction at The Infantry School, Fort Benning, Georgia. On 20 December 1944 he was awarded the Purple Heart.

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

Thomas N. Tobey, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert C. Trevethan, Judge Advocate.

(400)

SPJGH - CM 302847 1st Ind

Hq ASF, JAGO, Washington 25, D. C. 6 March 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Thomas H. Keating (O-1309069), Infantry.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from his station from on or about 21 July 1945 until he was apprehended on or about 12 October 1945. He was sentenced to dismissal, total forfeitures and confinement for three (3) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. On 21 July 1945 accused departed from Berlin, Germany, for three days of temporary duty in Paris, France. After commencing to perform his prescribed duty in Paris on 22 July 1945, he absented himself without leave, failed to return to his organization in Berlin, Germany, as ordered, and until he was apprehended in a bar in Paris on 12 October 1945 he spent the period of his unauthorized absence drinking and living in hotels and with various women.

Accused had previously been a member of the 82d Division and had participated with it in its missions in Holland and during the Battle of the Bulge, receiving the Purple Heart and the Bronze Star for his combat activities. In addition to his wound, his combat experience produced a nervous exhaustion which resulted in his transfer from the 82d Division and his eventual transfer to the Potsdam Conference. In view of accused's combat record I recommend that the sentence be confirmed but that the period of confinement be reduced to one (1) year, that the sentence as thus modified be carried into execution, and that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General.

(GCMO 897, 12 April 1946).

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

(401)

SPJGH - CM 302848

5 MAR 1946

UNITED STATES	)	CHANOR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Lucky Strike, France,
Captain IRVING BERSOFF (0-1113578)	)	26 October 1945, Dismissal
Corps of Engineers.	)	and fine of $200.00.

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

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

2. The only question requiring consideration in this case is whether the officer appointing the court was the accuser or prosecutor (Article of War 8). Accused was found guilty of the Charge and two Specifications thereunder, in violation of Article of War 96. Specification 1 alleges that accused made certain false statements in official correspondence addressed to the Commanding General of Chanor Base section with intent to deceive said Commanding General. Specification 2 charges that accused made a false official statement to an officer of the Inspector General's Department with similar intent. A brief discussion of the evidence as it pertains to the jurisdictional question of the convening authority's power to appoint the court is necessary to an understanding of the problem involved.

On 17 May 1945 Major Charles D. McKenrick, an Assistant Inspector General attached to Headquarters, Channel Base Section, APO 228, in the course of an official inspection interviewed accused in connection with a reported violation of regulations pertaining to the wearing of decorations. On 19 May 1945 Major McKenrick submitted an official report in writing to the Commanding General of Channel Base Section concerning his interview with accused. Said report, received in evidence as part of prosecution's exhibit A is titled "Subject: Improper wearing of Decorations by Captain Irving Bersoff, 0-1113578, 1408 Engineer Base Depot, APO 228, U.S. Army," and after setting out the various violations noted and the explanations given by accused, concludes that "he (accused) knowingly offended against the provisions of AR 600-90, 26 June 1943 and the statutes of the U. S. therein cited, in that he has worn the following decorations and badges to which he knew he was not entitled, to wit,

three overseas service stripes, the American Defense Ribbon, and the Purple Heart Cluster." Under paragraph 6 of the letter, the reporting officer made the following recommendation:

> "b. That disciplinary action be taken against this officer. In this connection it is recommended that he be fined one-half of one month's pay and be given a reprimand under the 104th Article of War, because of the impracticability of dealing with the matter by a General Courts-Martial. The organization, including witnesses, will depart this Theater in the near future."

Thereafter and pursuant to acceptable procedure accused was informed by letter signed by Brigadier General Fenton S. Jacobs, then commanding Headquarters, Channel Base Section, that it had been reported to said headquarters that on or about 17 May 1945 accused was wearing unauthorized decorations in the vicinity of Brussels, Belgium, and of the intention of General Jacobs to impose punishment under Article of War 104 unless accused demanded trial by court-martial. Accused replied by indorsement indicating his willingness to accept punishment as indicated in the basic communication. On 30 June 1945 by sixth indorsement signed by Brigadier General E. F. Koenig, as Commanding General of Channel Base Section, accused was notified of his punishment in the form of an official reprimand and forfeiture of $100 of his pay. This letter sets forth that accused violated Army Regulations 600-90, 26 June 1943 and the statutes of the United States therein cited by the unauthorized wearing of the American Defense Ribbon, the Purple Heart with cluster and three overseas stripes on the date and at the place mentioned in previous correspondence. Presumably General Koenig was the successor in command to General Jacobs or was then commanding Channel Base Section for the time being. By ninth indorsement dated 11 July 1945 accused appealed from the punishment imposed on the ground that he was guilty only of wearing the three overseas stripes and that the statements contained in the sixth indorsement charging him with wearing the American Defense Ribbon and the Purple Heart with cluster were incorrect. He contended therein that he construed the basic communication notifyihg him of intention to impose punishment under Article of War 104 for "wearing unauthorized decorations" to refer only to the overseas stripes. In said indorsement addressed to the Commanding General, Chanor Base Section, accused explained his wearing of three overseas stripes instead of one, stating that the tailor had inadvertently sewed that number of stripes on his jacket and that the garment had been received immediately before the violation was noted by the Inspector General. As concerned the other reported violations, he said, among other things, in the indorsement, "I am not authorized the cluster and have never worn it. Although I am authorized to wear the Purple Heart I was not wearing it on the date of the offense as charged. I am not authorized the American Defense Ribbon, have never possessed one, and have never worn one."

The record of trial does not show what action was taken on this appeal but on 4 September 1945, the Charges in the case before us were preferred by Chief Warrant Officer R. M. Dunlop, Administrative Officer of Headquarters, Chanor Base Section. On 8 September 1945, by command of Brigadier General Koenig, Commanding General of Chanor Base Section, Major Burton A. Koffler was designated the investigating officer to investigate the charges against accused and, on 18 October 1945 the charges were referred for trial to a general court-martial by command of General Koenig. The orders appointing said court show that General Koenig was the appointing authority. Apparently between 30 June 1945 and 18 October 1945, General Koenig had succeeded to command of Chanor Base Section from Channel Base Section for on 30 June 1945 the same General Koenig, as commanding general of Channel Base Section, had imposed the punishment upon accused under Article of War 104. Subsequent to trial, General Koenig, as reviewing authority, took action as commanding general of Chanor Base Section, approving the sentence of the court which he had appointed and forwarding the record of trial for action under Article of War 48. At the trial of this case the defense raised no objection to the power of the convening authority to appoint the court, nor was any objection raised as to the court's jurisdiction to try and determine the case.

4. One of the three indispensable requisites to the jurisdiction of a court-martial, i.e., its power to try and determine a case, is that the court must be appointed by an official empowered to appoint it (MCM, 1928, par. 7). If it be shown by the record of trial that the appointing official was without authority to appoint the court which tried and determined the case, then its proceedings are a nullity. . .

Article of War 8 provides that ". . . when any such commander (referring to those empowered to appoint general courts-martial) is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority . . .".

Paragraph 5a of the Manual for Courts-Martial (1928) defines the term "accuser or prosecutor" as used in Article of War 8. It provides:

> "Whether the commander who convened the court is the accuser or the prosecutor is mainly to be determined by his personal feeling or interest in the matter. An accuser either originates the charge or adopts and becomes responsible for it; a prosecutor proposes or undertakes to have it tried and proved . . . Action by a commander which is merely official and in the strict line of his duty cannot be regarded as sufficient to disqualify him. Thus a division commander may, without becoming the accuser or prosecutor in the case, direct a subordinate to investigate an alleged offense with a view to formulating and preferring such charges as the facts may warrant, and may refer such charges for trial as in other cases."

A further definition of the term "accuser" is found in paragraph 60 of the Manual.

> " . . . But while prima facie the person who signs and swears to the charges is the only accuser in the case, that is not always true. There may be another or others who are real accusers."

General Koenig, as commanding general of Chanor Base Section, had authority to convene the general court-martial which tried accused unless he was disqualified by reason of the prohibition contained within Article of War 8, supra. Before charges were preferred in this case, General Koenig had imposed punishment on accused under Article of War 104 for an alleged offense out of which the instant charges grew, for it was accused's reply appealing from the punishment imposed which contained statements upon which the instant charges were based. While General Koenig did not sign the charges, he caused them to be investigated and referred them for trial. The circumstances here present reveal that General Koenig had a direct personal relationship to and personal knowledge of the matter out of which the charges grew and that he was personally identified with the charges. It follows therefrom that General Koenig had such connection with the transaction that a reasonable person might well impute to him a personal feeling or a personal interest in the matter. Such personal connection rendered him incompetent to appoint the court which tried the accused (CM 280656, Messer).

In the Messer case the Board of Review said:

> ". . . The purpose of Article of War 8 is not only to protect the accused from trial by a court appointed by a person actually prejudiced against him, but also to make certain that the appointing authority is so entirely unconnected with the transactions giving rise to the charges that reasonable persons will not impute to him any personal feeling or interest in the matter, but may rely with confidence upon an impartial trial by an unprejudiced court."

The appointing authority was without power to appoint a court to try this accused upon the instant charges and, accordingly, these proceedings were null and void.

5. In view of our decision, we refrain from commenting upon other questions of law contained in the record.

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

Thomas N. Jaffy, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert E. Trevethan, Judge Advocate.

SPJGH - CM 302848 1st Ind

Hq ASF, JAGO, Washington 25, D. C. APR 1 8 1946

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Irving Bersoff (0-1113578), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of making a false statement to an officer of the Inspector General's Department and also of making another false statement to the commanding general who referred this case for trial, both offenses in violation of Article of War 96. He was sentenced to dismissal and to pay a fine of $200 to the United States. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the pertinent evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence because the appointing authority was the accuser. I concur in that opinion and recommend that the findings of guilty and the sentence be disapproved.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 101, 1 May 1946).

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DATE	BORROWER'S NAME	EXT.