THE DEVELOPMENT OF THE CONCEPT OF MILITARY DESERTION IN ANGLO-AMERICAN LAW

By ALFRED AVINS*

A. *Introduction*

The offence of military desertion has been defined as 'the extreme failure to fulfill the duty of military service'.[1] A deserter has traditionally been thought of by military men as the most flagrant type of shirker, just as a mutineer has been thought of as the most flagrant breaker of military discipline. Indeed, the two offences have since early times been classified as 'the two greatest crimes a soldier can be guilty of'.[2]

Desertion was a crime under Roman military law, but the punishment varied according to time, place, and circumstances. In time of peace, desertion was not a capital offence, but in time of war, desertion was made punishable with death, especially if the deserter went over to the enemy.[3] In all other nations, too, ancient and modern, it has always been regarded as an offence of the greatest magnitude.[4] But it would not be profitable to minutely examine all of the species of punishments imposed by different countries for this crime, as they have varied widely, both in kind and in severity, according to the policy of particular governments, and the sentiments and customs of the people.[5] Indeed, as Samuel noted over a century and a half ago, 'some of those punishments have been more remarkable for their caprice, or singularity, than any apparent wisdom'.[6]

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[1] Lewis, *Australian Military Law* (1936) 137. For a useful discussion of certain aspects of the history of desertion see Nichols, 'A Further History of Short Desertion' (1962) 17 *Military Law Review* 135.

[2] Adye, 'Essay on Punishments and Rewards' in *A Treatise on Courts-Martial* (4th ed. 1797) 236. These are the two offences specifically made punishable in the first Mutiny Act of 1688 (1 Wm & Mary c. 5).

[3] Bruce, *Institutions of Military Law* (1717) 237.

[4] Adye, *op. cit.* 253.

[5] *Ibid.* where the author declares: 'Charondas, the famous lawgiver, of the Thurians, instituted a whimsical punishment for this crime, not unlike that of the Lacedemonians for cowardice: he enacted that deserters should be compelled to sit three days in the market place, in female dresses; and this law, says Diordorus Siculus, excelled the provisions of other lawgivers on the same object, both in humanity and wisdom. It was anciently the custom in France to cut off the ears, or slit the nose of a deserter; and Montesquieu thinks that it was absurd to relinquish this practice, for the punishment of death. For soldiers, argues he, are habituated to the contempt of death and the dread of shame, so that the terrors of the penalty were diminished, whilst they were intended to be increased.'

[6] Samuel, *Military Law* (1816) 325.

The object of this article will be to examine the development of desertion as a concept in the Anglo-American military law. In doing so, this author will build on, but not duplicate, his prior work on absence without leave.[7] Such an inquiry will be of assistance in evaluating present-day problems in the legal application of the concept of desertion.

B. *Early English Development*

The roots of the concept of military desertion lie buried in the obscure recesses of the Middle Ages, a time when the method of raising soldiers was gradually changing from reliance on feudal tenure to use of the proprietary system, whereby the king contracted with experienced military officers or gentlemen, who raised the soldiers themselves through contract with them and who served as their officers in the war.[8] In the earliest articles of war made by royal prerogative, desertion is not mentioned. Rather, these articles punish specific forms of unauthorized absence, and are quite detailed as to situation meant to be covered.[9]

The earliest statute covering the subject makes a more generalized form of unauthorized absence felony. It states:

> That every man so mustering and receiving the King's wages, which departeth from his captain within his term, in any manner aforesaid, except that notorious sickness or impediment by the visitation of God (which may reasonably be known) suffer him not to go, and which he shall certify presently to his captain, and shall repay his money, so that he may provide him for another Soldier in his place, he shall be punished as a felon; and . . . That no soldier, man of arms, or archer, so mustered of record, and going with his captain beyond the sea, shall return to England, within the term for which his captain hath retained him, nor leave his captain there in the King's service, and in adventure of the war, except that he hath reasonable cause showed by his captain, and by him to the chief in the country having royal power, and thereupon shall have licence of the said captain, witnessed under his seal, and the cause of his licence, . . . and if it be . . . proved that they have so mustered of record, and departed from their captains, aforesaid without licence, . . . that then they shall be punished as felons.[10]

[7] Avins, *The Law of AWOL* (1957).

[8] See Avins, 'Historical Origins of Desertion Through Fraudulent Enlistment' (1961) 77 *Law Quarterly Review* 501.

[9] Avins, *The Law of AWOL* (1957) 35-36.

[10] 18 Hen. VI c. 19 (1439). In *Cobbett's Parliamentary History of England* (1811) xv, 251 the Earl of Egmont described the origin of the statute as follows: 'Which law became necessary to be made at that time, because we were engaged in a heavy and unfortunate war in France, for the prosecution whereof many soldiers were daily listed here at home, and many of them, after having received the listing money, either refused to go, or afterwards deserted from the Army in France and returned home, for neither of which offences could they be punished in any other way than by a civil action for breach of covenant; therefore a new law for the purpose became necessary; but the legislature took care that the trial and punishment should be according to the course of the common law.'

This statute was several times re-enacted and confirmed, and benefit of clergy was taken away.[11] In the middle of the sixteenth century, it was extended to mariners and gunners serving in the navy.[12] Yet, as late as the *Soldier's Case*,[13] in 1628, these statutes were still not referred to as enactments punishing desertion, but rather as laws designed to punish a soldier who 'did afterward withdraw himself, and ran away without licence'. It is clear that until after the English Civil War no special concept of desertion had been formed which would differentiate it from absence without leave, and the term 'desertion' itself does not seem to have been applied to unauthorized absences by soldiers or sailors.[14] Indeed, some articles of war as late as 1688 make no reference to desertion.[15]

The earliest articles of war to use the term 'desertion' found were those of Thomas, Earl of Arundel, in 1639. He provided:

> No souldier or officer being once placed in array, either in march or battell, shall refuse to guard or defend unto his utmost the standard royall, or other coronet, ensigne, or colours, of the Armie, or shall desert, abandon, or run away from any of them, upon paine of death.[16]

In the context in which the term 'desertion' is used, it seems clear that the draftsman did not contemplate a permanent absence as the only form of departure which would be a 'desertion'. Rather, it would seem that a temporary absence to avoid combat necessary to protect the standard or colours was also contemplated by the word. Accordingly, the word would include any absence or departure, and seems to fit more nearly the present-day definition of 'short desertion' or absence without leave to avoid hazardous duty, than it does traditional desertion with intent to remain absent permanently.

The next major development in the adoption of the word 'desertion' as denoting a military offence comes in the navy. In the naval articles of Charles II, article 17 provided that

> all sea-captains, officers, or mariners, that shall desert the services or

[11] 7 Hen. VII c. 1 (1491); 3 Hen. VIII c. 5 (1511); 2 & 3 Edw. VI c. 2 (1548); 4 & 5 Phil. & Mary c. 3 s. 9 (1557).

[12] 5 Eliz. I c. 5 s. 27 (1562). A much milder provision punishing sailors guilty of absence without leave by fine and imprisonment is found in 2 Rich. II c. 4 (1378). The later provision was necessary because of the doubts as to whether unauthorized absence by sailors was made a felony by 18 Hen. VI c. 19 (1439) and its successors.

[13] (1628) Cro. Car. 71. See to the same effect *The Case of Soldiers* (1601) 6 Co. Rep. 27a.

[14] But the term does seem to have been applied to unauthorized departures by ships. See Selden Society, *Select Pleas in the Court of Admiralty* (1897) ii, (*Heaven v. Whyte*, breach of a 'consortium'—deserting consort during a fight, in 1544, p. lxvi; and *The Mary* arrested for desertion in 1599, p. lxxiv).

[15] See Prince Rupert's Articles of War (1673) art. 19, reprinted in Davis, *Military Law* (3rd ed. 1915) 570-571, and see also the Articles of War of James II (1688) art. 20, reprinted in Winthrop, *Military Law and Precedents* (2nd ed. 1920) 922.

[16] 'Lawes and Ordinances of Warre by Thomas, Earl of Arundel' (1639) art. 13, reprinted in Clode, *Military Forces of the Crown* (1869) i, 434.

> their employment in the ships, or shall run away, . . . shall be punished with death.[17]

Here we find the word 'desert' used in a context which would seem to denote a more or less permanent absence. Gradually, therefore, at least in the navy, the word was coming to have its modern connotation.[18]

Notwithstanding this naval development, the concept of desertion still appears to have been in its formative stages at the time of the passage of the first Mutiny Act, punishing with death or such other punishment as a court-martial inflicted soldiers who 'shall desert Their Majestyes Service in the Army'.[19] Early the previous year James II had the Court of King's Bench order a soldier attainted of felony for violation of the old absence statutes hanged in front of his garrison at Plymouth as a terror to them, and the reports show that the attorney-general referred to his action as 'deserting of his colours', 'running from their colours',[20] and 'leaving the King's service',[21] indiscriminately. And while it might only have been for political reasons, as late as 1718 a protest was entered against the passage of the Mutiny Act 'because it is not ascertained, either by this Bill, or by any other known law or rule, what words or facts amount to . . . Desertion'.[22]

During the first half of the eighteenth century, the concept of desertion gained rapid acceptance in the military law. Spurred by the frequency of the offence,[23] articles of war made pursuant to the mutiny acts,[24] which were annually re-enacted,[25] made the offence a capital one. An early example is to be found in Article 23 of Queen Anne's articles, which provided

> That all Officers or Soldiers that shall desert, either in the Field, upon a March, in Quarters, or in Garrison, shall dy for it, and that all Soldiers shall be reputed and suffer as Deserters, who shall be found a Mile from their Garison, or Camp, without leave from the Officer commanding in Chief.[26]

In point of practice, not all soldiers found guilty of desertion even

[17] Articles for the Government of the Navy 1661 (13 Char. II c. 9). See also Articles for the Government of the Navy 1749 (22 Geo. II c. 33), art. 16.

[18] A century later, in *Broadfoot's Case* (1743) Fost. 154, 169, the recorder said that the ancient statutes were laws 'against mariners deserting the service'. To the same effect, see *Cobbett's Parliamentary History of England* (1811) xv, 251.

[19] Mutiny Act 1688 (1 Wm & Mary c. 5).

[20] *Rex v. Beal* (1687) 3 Mod. 124.

[21] *Rex v. Dale* (1687) 2 Show. K.B. 511.

[22] *Cobbett's Parliamentary History of England* (1811) vii, 543.

[23] Hannay, *Naval Courts-Martial* (1914) 23. 'Desertion was common at an age when men were driven to serve, were paid only at the end of a commission, and were then forced to recover their wages by tiresome waiting at a central office.'

[24] *Cobbett's Parliamentary History of England* (1811) vii, 548, and xv, 261-262.

[25] There were several early lapses, in 1691, 1692, 1698-1702, 1713 and 1714. See *Cobbett's Parliamentary History of England* (1811) xv, 252, 254, 255, 282.

[26] Bruce, *op. cit.* 263.

at that early period were executed, but a lesser punishment, such as branding on the forehead, was used for the first offence, unless the number of deserters was so great as to require an example as a deterrent to others, in which case the offenders would throw lots for the punishment.[27] Moreover, although capital punishment was approved of for desertion in time of war, especially when a soldier deserted to the enemy, protests were registered even then on account of executions for desertion in time of peace.[28]

By the latter half of the eighteenth century, a firm distinction begins to appear between desertion and absence without leave. Sulivan tells us that:

> if in the course of the prosecution it shall appear, the prisoner is innocent of the capital offence exhibited against him, he yet is liable to be found guilty in a lesser degree [as] . . . instead of desertion, being absent without leave.[29]

As Adye said:

> Punish not a man in the same manner for perhaps a few hours absence from his quarters, as if he had been a deserter from his country, and a violator of his sacred promise.[30]

It was also during this period that capital punishment for peacetime desertion gradually fell into disuse.[31]

By the time of the Napoleonic Wars, the modern concept of desertion had become fixed in the law. Samuel describes the offence as a wilful departure by an officer or soldier from his station or unit without leave and without the intention to return, and declares that it is the latter circumstance which constitutes the difference between desertion and absence without leave.[32]

[27] *Ibid.* 262.

[28] See remarks of the Earl of Stafford in *Cobbett's Parliamentary History of England* (1811) viii, 1009: 'How many poor countryfellows, either out of a frolic, or because they have been disobliged or slighted by their mistress, go and list themselves for soldiers? When such a fellow begins to cool, he perhaps repents of what he has done, and deserts without any other view or design but that of returning home, and following some industrious and laborious way of living in his own country. Is it not hard, that such a poor fellow should be shot for such a trifling crime?'

[29] Sulivan, *Thoughts on Martial Law* (1784) 75. To the same effect is Adye, *Courts-Martial* (1769) 103. But see *A Military Dictionary* (1778) which defines a deserter as a 'soldier that runs away to the enemy, or that quits the service without leave', without further distinction from absence without leave.

[30] Adye, *A Treatise on Courts-Martial* (4th ed. 1797) 260.

[31] Capital punishment for peacetime desertion was not inflicted after 1803. Clode, *op. cit.* ii, 42. Also, earlier, Clode says: 'The power to inflict the sentence of death for the crime of desertion is one that has been frequently exercised even in times comparatively recent. Few would be found now to contend that, in time of peace, a breach of contract for service with the Crown should be so punished.' Clode, *op. cit.* i, 154.

[32] Samuel, *Military Law* (1816) 323. He also said at p. 324: 'It has been observed that the *animus revertendi*, or the mind to return, is the strong feature or the line of demarcation, between the primary and secondary offence, described in this section.

With attention focused on the intent, all sorts of guides were laid down for the purpose of enabling courts-martial to discover the intent of the accused. Samuel, one of the earliest commentators on this problem, mentions a long absence, going on board a ship as a passenger or sailor bound for a distant country, engaging transportation to a remote spot, entering into a contract incompatible with attendance to military duties, or having writings showing an intent not to return, as evidence of the intent to desert. On the other hand, he declared that retaining the uniform, staying near his post, leaving behind articles of value which could easily be taken, or engaging in only a temporary, if illicit, activity, would be evidence of intent not to desert.[33] Other authors were likewise unable to lay down any fixed rules, but one does mention, as showing an intent to desert, going to a place distant from one's station, and wearing civilian clothes,[34] while another mentions a clandestine departure from one's post, or a departure after the commission of a crime.[35] All of the textwriters did agree, however, that a soldier could be guilty of desertion although his absence was initially legal, as where he remained absent after the expiration of his leave or furlough, or had commenced his absence through no fault of his own, as by being taken prisoner, or otherwise prevented from rejoining his unit.[36] Accordingly, a soldier would be guilty of desertion although his intent not to return had been formed after he first became absent.

C. *Later English Development*

Notwithstanding the several provisions in the Mutiny Acts and Articles of War punishing desertion, the offence remained prevalent for a long time.[37] In the eight years between 1873 and 1881, the total loss occasioned by desertion was estimated at £2,800,000.[38] During that period, according to one member of Parliament,

> there disappeared from the Army 12½% in the first three months, 25% in the first 12 months, and 30% within the first two years after enlistment, going on thus until before the end of the six years' enlistment there had been a waste of no less than 387 per 1,000.[39]

Indeed, it was even said 'that one half of the Army was employed in trying to catch the other which had run away'.[40]

And this mind is in all cases to be collected from the acts of the party, and the construction which the court-martial may put on them, and not from the accounts which the accused may choose to give; his motives being known only to himself.'

[33] *Ibid.* 323. In accord with this is Hough, *Precedents in Military Law* (1855) 131-132.

[34] Pipon, *Manual of Military Law* (1863) 149.

[35] Simmons, *Courts-Martial* (7th ed. 1875) 84-85.

[36] *Ibid.* 83. To the same effect, Griffiths, *Notes on Military Law* (1841) 22.

[37] In 1874, 7,939 soldiers deserted from the British Army; in 1875, the figure was 5,629. Wilson, *Digest of Laws* (1882) 7.

[38] 262 *Parliamentary Debates* (3rd Series) (1881) 821.

[39] *Ibid.* 818.

[40] 246 *Parliamentary Debates* (3rd Series) (1879) 456. The same speaker stated that

The Army Discipline and Regulation Act 1879[41] continued the provision punishing desertion, with a penalty of death if the offence was committed on active service or while under orders for active service, and with a penalty of imprisonment if committed under other conditions. The *Manual of Military Law* likewise made no change in substance from the prior discussions of textwriters as to the indicia of intent to remain away permanently.[42] However, a useful recognition of the ambivalent nature of evidence that the accused wore civilian clothes is set forth in a contemporary textbook by O'Dowd, who stated:

> The disuse of military clothing, or the obliteration of identifying marks thereon, are among the circumstances to be considered as leading to the inference necessary to justify conviction. The wearing of plain clothes, although perhaps sometimes a strong element in the case, would not necessarily justify the inference, inasmuch as it might appear that they were worn for a temporary purpose, or in consequence of the uniform having been stolen; while in the case of a soldier-servant whose ordinary clothing would be civilian, it would be valueless as a proof of an intention of remaining away permanently.[43]

Two new provisions introduced at the time are of interest in an examination of the development of the concept of desertion. One of them punished an attempt to desert.[44] The insertion of this provision caused some controversy when first introduced. One member of the House of Commons moved to strike out this crime on the ground that it was 'most difficult to prove'. He declared that it was impossible to tell whether a man intended to desert unless he actually did so, and further stated that no such crime was known in the navy. However, the Secretary of State for War controverted this, and gave as an example of proof of an intent to desert a case where a soldier had moved all of his clothing from his barracks to a private house, contending that an intention to desert would be clearly shown in such a case.[45] The insertion of the provision punishing attempts to desert

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each deserter cost the country £35 for the expense of catching him, bringing him back to his regiment, and trying him by court-martial.

[41] 42 & 43 Vict. c. 33 s. 12. [42] *Manual of Military Law* (1888) 5-6, paras 14-15.

[43] O'Dowd, *Practical Hints to Courts-Martial* (1882) 53. The reverse of this is found in two American cases decided during World War II. In *Allison* (1945) 24 ETO (Reports of the Board of Review of the Army, European Theater of Operations, 1943-1945) 408, 410 it was stated: 'The fact that he was probably in uniform throughout his unauthorized absence is without significance as it is common knowledge that at the present time in England an American of military age is safer from inquiry by the police if in uniform than he would be if in civilian clothes.' In *Sohn* (1945) 28 ETO 339, 347, it was likewise stated: 'The fact that he wore his uniform during his absence and mingled freely with military personnel carried very little probative weight in his favor. In a foreign country under the circumstances of this case he was safer from inquiry by the police if in uniform rather than in civilian clothes and could thereby escape detection more easily.' And see in accord *Fowler* (1945) 28 ETO 1; *Miller* (1945) 29 ETO 189.

[44] Army Discipline and Regulation Act 1879 (42 & 43 Vict. c. 33).

[45] 247 *Parliamentary Debates* (3rd Series) (1879) 515-516.

represents the ultimate evolution of the concept of the crime of desertion, for here the intent necessary for the offence has been so clearly defined that punishment is imposed for the intent coupled with an overt act even though the absence without leave has not been completed.

The other new development is found in the *Manual of Military Law,* which stated:

> A man may be a deserter though his absence was in the first instance legal (e.g. being authorized by leave or furlough), the criterion being the same in all cases, namely, the intention of not returning. It is clearly shown by the King's Regulations, and by the explanation on the furlough itself, that a soldier on furlough is still under orders, and that, if without leave, he quits the place to which he has permission to go, or if he disguises or conceals himself so that orders cannot reach him, or if he goes on board a ship about to sail for a distant port, he is liable to be tried and convicted of desertion though on furlough at the time. A soldier, for example, at Ipswich, who obtains a pass to Bristol, and during his leave when without permission to go to Liverpool is found there in civilian costume on board a ship about to sail for New York, may be tried for desertion. It would be for him to show that the absence without leave from Bristol proved against him was innocent, and had nothing to do with desertion.[46]

Here we have a case where, because of an intent to desert, leave or furlough previously given becomes, upon the doing of appropriate acts to effectuate the desertion, cancelled *ipso facto,* and the absentee with leave becomes an absentee without leave who, entertaining an intention to remain away permanently, is guilty of desertion. The doctrine of constructive termination of leave is not unknown in the military law,[47] but the above provision does not make clear when the leave commences to lapse. This difficulty is recognized by one author, who suggested that if the stage of departure has not advanced far enough, but overt acts have been committed to abandon the authority of the leave, the soldier may be convicted of attempting to desert.[48] This suggestion would seem an appropriate one.[49]

No change was made in the 1914 *Manual,*[50] but in that of 1929 the

[46] *Manual of Military Law* (1888) 6, para. 17.

[47] Avins, *The Law of AWOL* (1957) 88-89, 167-168.

[48] Pratt, *Military Law* (19th ed. 1915) 163. He declares: 'Discussion has more than once taken place as to the possibility of a man deserting while on furlough. It is clear that a man is still under orders when on furlough, and is liable to be called on to rejoin at any moment. Hence, if he commits any act, such as disguising himself or going where orders cannot reach him, he shows an intention of quitting the service; and if a man acts so that orders cannot reach him, he illegally absents himself from the place in which he ought to be.' The common example given is that of a soldier on furlough who is found on board an outward-bound ship with a passenger ticket. According to the above reasoning he might be tried for desertion, but it will always be in the power of the court if they hold an opposite view, to convict the accused of the military offence of attempting to desert.

[49] *Cf.* Avins, *The Law of AWOL* (1957) 129-134, 263-264.

[50] *Manual of Military Law* (1914) 19.

discussion of intention in desertion is almost wholly eliminated.[51] This discussion was restored in the 1951 *Manual,*[52] and it is of interest to note that there the four major factors mentioned as most significant in showing intent to desert are lengthy absence, wearing of disguise, distance from duty station, and termination of absence by apprehension.

In 1955 the entire Army Act was revised, and in the Army Act of 1955, desertion is no longer made a capital offence at any time, even on active service.[53] Ordinary desertion is defined in the act as being committed by a person who

> leaves Her Majesty's service or, when it is his duty to do so, fails to join or rejoin Her Majesty's service, with (in either case) the intention, subsisting at the time of the leaving or failure or formed thereafter, of remaining permanently absent from his duty.[54]

This enactment merely constitutes a codification of the common-law definition of military desertion. The 1956 *Manual of Military Law,* in discussing proof of intent to desert, sets forth similar indicia, namely, that the accused has been absent a very long time although he had opportunities to return, that he threw away his uniform and was wearing civilian clothes, that he endeavoured to disguise his identity, or that he resisted arrest when arrested.[55]

The military codes of most of the Commonwealth countries do not define desertion,[56] but the Canadian code definition appears at first glance to be broader than the English code, and defines desertion with great particularity.[57] When, however, it is compared with

[51] *Manual of Military Law* (1929) 437. But the rules were not changed. See Wilkins and Charney, *Handbook of Military Law* (1930) 67-68.

[52] *Manual of Military Law* (1951) 211-212.

[53] Army Act 1955 (3 & 4 Eliz. II c. 18) s. 37 (1). The same provision is found in the Air Force Act 1955 (3 & 4 Eliz. II c. 19) s. 37 (1). It might be noted that imprisonment is limited to two years unless the offence is committed on active service or under orders for active service.

[54] *Ibid.* s. 37 (2) (a).

[55] *Manual of Military Law* (1956) 251.

[56] See Army Act 1950 s. 38 (1) (India); Defence Act 1957 First Schedule s. 13 (South Africa); Army Act 1950 s. 32 (1) (N.Z.).

[57] The National Defence Act 1950 s. 79 (2) (Can.) provides as follows: 'A person deserts who:

(a) . . .

(b) having been warned that his vessel is under sailing orders, is absent without authority, with the intention of missing that vessel;

(c) absents himself without authority from his unit or formation or from the place where his duty requires him to be, with the intention of not returning to that unit, formation, or place;

(d) is absent without authority from his unit or formation or from the place where his duty requires him to be, and at any time during such absence forms the intention of not returning to that unit, formation or place; or

(e) while absent with authority from his unit or formation or from the place where his duty requires him to be, with the intention of not returning to that unit, formation, or place, does any act, or omits to do anything the natural and probable consequence of which act or omission is to preclude his return to that unit, formation, or place at the time required.'

the interpretative sections of the *Manuals of Military Law,* the definitions of desertion appear to be substantially the same.

D. *Early American Development*

Almost twenty years before the American Revolution, the Mutiny Act had been extended by Parliament to American provincial troops acting in conjunction with British troops,[58] and it is accordingly not surprising that American familiarity with the British military code should have led the colonists to adopt it as their own at the time of the Declaration of Independence.[59] Among the provisions taken over without change was the article punishing desertion.[60] The early provisions prescribed the death penalty for desertion,[61]but there was much opposition to this,[62] and in 1830 the penalty of death for desertion in time of peace was abolished.[63]

From the earliest period in American military law, absence without leave was considered a lesser offence included in desertion.[64] One textwriter in 1813 declared that

> there have been trials for desertion, but on examination, it appeared the soldier was absent without leave, and of course, punishment less severe was inflicted.[65]

Of interest, along this line, is an early general order in the United States Army, which reads as follows:

> From the frequency of *desertion* in the Army, the Major General Commanding has been led to an attentive examination of the subject, and is induced to believe that *absence without leave* in the U.S.A. commissioned officers and private soldiers, has been too frequently charged against the delinquent as desertion, and that the indiscriminate confirmation of such charges, has done much toward inducing the commission of the very evil it was intended to deter.
>
> The Soldier, who under the influence of liquor, or any of those temptations which may be imagined to have prompted him to pass beyond the regulation bounds of his Station and has unlawfully absented himself from his duty, naturally on recovery of his senses, applies the reasoning of Courts-Martial in past cases to his own, and finding no hope of ever passing for anything else in the eyes of his Superior Officer, becomes a deserter in the strict sense of the term.
>
> To check any impression which seems to have become too common among the rank and file, and so injurious to the interest of the service, the General in Chief exhorts the officers of the Army to be cautious

[58] See for a typical provision the Mutiny Act 1760 (1 Geo. III c. 6) s. 74. A debate on this proposal is set forth in *Cobbett's Parliamentary History of England* (1811) XV, 375. [59] Winthrop, *op. cit.* 21-22. [60] Davis, *op. cit.* 419.

[61] Articles of War 1806 Art. 20; 2 Stat. 359, 362. Such penalties were occasionally executed. See *Papers of the Continental Congress* No. 151, 203 (*Major Willy's case*). Note also Jacobs, *The Beginning of the U.S. Army,* 1783-1812 (1947) 138.

[62] 'Death was too severe a punishment for desertion in time of peace.' *Memoirs of John Quincy Adams* (C. F. Adams ed. 1874) vii, 29.

[63] Act of 29 May 1830; 4 Stat. 418. [64] Avins, *The Law of AWOL* (1957) 40.

[65] Maltby, *Courts-Martial* (1813) 72.

> in preferring the charge of *desertion,* and doubly so when called desertion from that which resembles it so closely in the overt act as *absence without leave,* is a task of such difficulty as often to require the undivided attention and judgment of the most intelligent officer while sitting as a member of a Court-Martial. Yet where doubts arise in making the discrimination, after a patient and earnest inquiry into the facts, let mercy plead for the prisoner, and the milder sentence, when punishment is to be awarded, characterize the decision of the Court.[66]

Desertion was rife during the nineteenth century in the United States Army. Large numbers deserted during the war with Mexico,[67] and with the discovery of gold in California in 1848, whole garrisons there were largely decimated.[68] An entire book has been written about desertion during the American Civil War,[69] and the evil continued after the advent of peace.[70]

The earliest American textwriter to discuss the intent requisite for desertion describes it as an absence of the intention to return.[71] As tests for this state of mind, he gives as examples the indicia mentioned by Samuel.[72] By the end of the Civil War, however, the intent necessary was one to abandon the military service altogether, or to terminate the existing military status and obligation, the pending contract of enlistment or the obligations imposed by the draft or commission.[73]

[66] *General Orders* (1829) 19.

[67] Smith, *War With Mexico* (1919) i, 160 and ii, 316.

[68] H.R. Exec. Doc. vol. v No. 17 31st Cong., 1st Sess. 533 (1845-1850) where appears the following extract from 'Letter, Col R. B. Mason, 1st Dragoons, Commanding, to Adjutant General of the Army' dated 17 August 1848 at Monterey, California: 'Many desertions, too, have taken place from the garrison within the influence of the mines; 26 soldiers have deserted from the post at Sonoma, 24 from that of San Francisco, and 24 from Monterey. For a few days the evil appeared so threatening that great danger existed that the garrisons would leave in a body; and I refer you to my orders of the 25th of July to show the steps adopted to meet this contingency. I shall spare no exertions to apprehend and punish deserters; but I believe no time in the history of our country has presented such temptations to desert as now exist in California. The danger of apprehension is small, and the prospect of higher wages certain; pay and bounties are trifles, as laboring men at the mines can now earn in one day more than double a soldier's pay and allowances for a month, and even the pay of a lieutenant or captain cannot hire a servant. . . . A soldier of the artillery company returned here a few days ago from the mines, having been absent on furlough twenty days; he made by trading and working during that time $1,500. During these twenty days he was travelling ten or eleven days, leaving but a week, in which he made a sum of money greater than he receives in pay, clothes, and rations during a whole enlistment of five years. These statements appear incredible, but they are true.'

[69] Lonn, *Desertion During the Civil War* (1928).

[70] Wilson, *op. cit.* 8: 'Since the war the Regular Army has suffered severely from this degrading feature of military life. Thus, in 1868, the percentage of desertions to the aggregate strength was nearly 12; in 1869, 7.1; in 1870, 10; in 1873, when the largest percentage was reached, 21.8, falling in 1874 to 15.3, and in 1875 to 10.4; in 1876 it was 8.75; in 1877, 10.25; in 1878, 7.35, and in 1879, 8.27. During the twelve months ending June 30, 1880, at which time our military establishment aggregated 27,655, of which number 2,155 were commissioned officers, the number of desertions reached 2,198, or 8 *per cent.* of the enlisted strength. The aggregate of enlistments and re-enlistments during the same period was 5,620, showing a percentage of desertions to enlistments, of more than 40 *per cent.*'

[71] O'Brien, *American Military Laws* (1846) 95. [72] *Ibid.* 95-96.

[73] Winthrop, *op. cit.* 637.

This '*animus non revertendi*' Winthrop describes as the 'gist and essential quality of the offense'.[74]

Winthrop approved of the British rule that a soldier could desert while on a pass or brief leave of absence, apparently on the theory that such leave was thus abandoned.[75] He also concurred in the *indicia* of intent to desert set forth by prior English writers, such as a lengthy absence, disposing of personal effects before departure, especially in secret, procuring or wearing civilian clothes or disguise, taking property that might facilitate his rapid departure and defence against arrest, such as arms and ammunition, assuming a false name, status, or identity, especially when arrested, declaring a dislike for the service, or his unit, committing a serious crime before or during absence which would subject him to severe punishment upon return, escaping from confinement to leave, and going or trying to go to a distant point.[76]

E. *World Wars I and II Changes*

The advent of World War I quickened America's interest in national defence generally, and in a revision of the military law in particular, and in 1916 a new military code was passed,[77] the first major revision of the articles of war since 1874, and the first revision to make substantial changes in substantive military offences since the country was founded.[78] By this time, the common-law definition of desertion was universally understood, even by civilians,[79] and Congress re-enacted, in Article of War 58, the old provision punishing desertion, adding thereto a phrase prohibiting attempts to desert,

[74] *Ibid.* [75] *Ibid.*

[76] *Ibid.* 638-639. See also Howland, *Digest of the Opinions of the Judge Advocates General of the Army 1862-1912*, 399-400. [77] Articles of War 1916; 39 Stat. 619.

[78] *Manual for Courts-Martial* (U.S. Army 1916) Introduction ix-x.

[79] *Hearing on S. 64 Before a Subcommittee of the Senate Committee on Military Affairs* 66th Cong., 1st Sess. 1162 (1919), where the following exchange between a United States Senator and Judge Advocate General Enoch H. Crowder is recorded:

'Senator Lenroot: Where is the line drawn between absence without leave and desertion?

Gen. Crowder: The distinguishing element is the intention not to return, or to permanently abandon the service.

Senator Lenroot: I knew that.'

And note also *Hearings on S. 3191 Before a Subcommittee of the Senate Committee on Military Affairs* 64th Cong., 1st Sess. 72 (1916), on absence without leave:

'The Chairman: Ought there not be an exception of physical disability?

Gen. Crowder: No; because that is always a matter of defense.'

The same thing was adverted to in the *Minutes of Evidence in the Report of the Select Committee of the House of Commons, on the Army and Air Force Acts* (1954) 279, where Assistant Judge Advocate General C. M. Cahn said: 'A man goes on leave, and while on leave he gets sick and cannot return. He would, if it were asked for, get his leave extended, but if he did not do that he still ought to get his pay during that period. On the other hand, you get the man who goes on leave and unfortunately gets into a drunken brawl and gets hit on the head. One might say in those circumstances it was his own fault and he ought not to receive his pay. But he would not be guilty of absence without leave because he was physically unable to return.'

without defining the term. The provision making the offence capital in time of war only was retained, a proposal that this be broadened to include situations where the accused deserted when under orders for active service when war was imminent, in conformity with British practice, not having been adopted.[80]

The 1916 *Manual for Courts-Martial* contains two interesting interpretative provisions respecting desertion. One is that an intent to report at another post coupled with an intent not to return to the post where the soldier was stationed is an intent to desert. The other is that an intent to return only on a contingency is an intent to desert.[81] These interpretative provisions were retained in the 1920 *Manual,*[82] and were the subject of several commentaries by text-writers of the period.[83]

Shortly after World War I, however, an interpretation of the Judge Advocate General limited the rule that a soldier who goes absent without leave with intent to report, not at his proper post, but at another post, was guilty of desertion. In the case in question, a soldier left his own post and reported at another, in the hopes of effectuating a transfer. The Judge Advocate General held that this was not desertion. His reasoning was that desertion could only occur if the soldier intended to abandon the service as a whole, and not merely to leave one post for another. To support this position, he pointed to the fact that by Article of War 28 of 1920, desertion was extended to include cases where a soldier re-enlists in the service without a prior discharge.[84] Accordingly, he noted that

> it is a familiar rule of statutory construction that when by specific legislation, a certain act is provided against, which but for such specific provision might be construed to fall within the provisions of existing general legislation, the specific legislation amounts to legislative construction, binding upon the courts, that the general legislation does not cover, and was not intended to cover, the specific act in question.

From this he reasoned that but for the terms of Article of War 28,

[80] In *Hearings on H.R. 23628 Before the House Committee on Military Affairs* 62nd Cong., 2nd Sess. 53-54 (1912) General Crowder declared: 'There is another defect which is corrected by the insertion of the words "or when under orders for active service when war is imminent". A war might be imminent and we might send orders to the Fifteenth Cavalry at Fort Myer to be ready to march, and a desertion committed after receipt of such an order would be just as harmful as one occurring after the war had been declared.'

[81] *Manual for Courts-Martial* (U.S. Army 1916) 201 para. 409.

[82] *Manual for Courts-Martial* (U.S. Army 1920) 343 para. 409.

[83] Scott, *Handbook of Military Law* (1918) 50; Munson, *Military Law* (1923) 37. See also Morgan, *Notes on Military Law* (1920) 17-18. In *Digest of Opinions of The Judge Advocate General 1912-1917*, 526 it was likewise held that the fact that a soldier intended after absence without leave to report to another post, and did so, made him a deserter.

[84] Articles of War 1920; 41 Stat. 787; now Art. 85 (a) (3) Uniform Code of Military Justice; 10 U.S.C. §885 (a) (3). This argument is of interest in the United Kingdom, which has a similar statute: Army Act 1955 (3 & 4 Eliz. II c. 18) s. 37 (2).

'which specifically provide that a soldier who leaves his post of duty with the intention of going to another post *and there re-enlisting*, shall be deemed a deserter, such an act could not be held to be desertion at all under the statute'. Hence, he concluded that a soldier who leaves his post of duty without authority, and with the intention of going to another post, not to re-enlist, but to report for duty, cannot be held to be a deserter, whatever other military offence this may be.[85]

This opinion contains at least two misconstructions. The fact is that the statute involved made only the completed act of re-enlistment without discharge desertion. A mere intent to re-enlist, even if coupled with an unauthorized absence, is not covered by the statute, and it has long been held that until the moment of actual re-enlistment, the soldier does not become a deserter under the special fraudulent re-enlistment provision.[86] Of course, it is true that an intention to re-enlist, coupled with sufficient overt acts would make one guilty of attempted desertion,[87] but there is a good question as to whether the mere leaving of one post and going to another would not be mere preparation, rather than an overt act.[88] At any rate, such acts certainly would not constitute completed desertion.

Secondly, at least one opinion has specifically held that re-enlistment at the same post is desertion.[89] Accordingly, the leaving of one post for another has no bearing on guilt under the re-enlistment desertion section. It would therefore seem that the argument related to statutory interpretation cannot support the conclusion, since reporting to another post, intending to re-enlist, is not desertion, while re-enlisting at the same post is desertion under the special fraudulent re-enlistment desertion section.

Notwithstanding the defects in the above analysis, it does seem that the case of a soldier who reports at another post hoping for a transfer cannot rightly be equated with desertion. Such an act would lack the degree of criminality ordinarily equated with desertion, for there is nothing illegal in seeking a transfer as such. Moreover, the soldier thus reporting can always be transferred back to his proper duty station. Accordingly, such an act does not present as serious a danger to the military strength as does desertion with intent to remain absent permanently.

[85] *Opinions of the Judge Advocate General* 17 February 1922, 300.7. This opinion was followed in *Opinions of the Judge Advocate General* 30 November 1923, 215.19.

[86] *Grant v. Gould* (1792) 2 H.Bl. 69.

[87] See Avins, 'New Light on the Legislative History of Desertion Through Fraudulent Enlistment' (1961) 46 *Minnesota Law Review* 69, n. 174, which discusses the converse of this proposition under the general desertion statute.

[88] For a general discussion see Wechsler, Jones and Korn, 'The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy' (1961) 61 *Columbia Law Review* 571, 586-611.

[89] Howland, *loc. cit.*, reprinted in Avins, *The Law of AWOL* (1957) 168.

What seems to be the most satisfactory solution to the problem was set forth in a memorandum by Lieutenant Colonel Arthur W. Brown, later to be The Judge Advocate General of the Army, in 1925. He suggested that a soldier who quit his post to report elsewhere in the hope of getting a transfer there was not a deserter unless he formed an intent never to return to the prior post regardless of what happened. Under such circumstances, he would have left his post intending never to return, and would be guilty of desertion. He illustrated this by the case of a hypothetical soldier who leaves one post and reports to another, saying, 'I am sick of this place and am going to Post A without authority and try to get transferred there'. This statement does not indicate that the soldier intends not to return to his former post, but rather that he intends to return unless military authorities keep him at the new post. However, if he added: 'I won't come back here if they order me back', he would be a deserter.[90]

The above analysis seems to be a valid one since there is nothing inherently illegal about seeking a transfer.[91] The soldier who absents himself to seek the transfer with the intent to return to his former base if not transferred intends to return on the only contingency under which he would be obliged to return, and regardless of the rule that intent to return on a contingency generally is the equivalent of intent not to return at all, intent to return if one is required to return must be considered intent to return for all purposes. This is true because returning if one is required to do so fulfils completely one's military obligation, while returning on a contingency unrelated to military obligation does not completely fulfil the military obligation. Accordingly, Brown's analysis must be considered valid, and it might be noted that it was subsequently embodied, although in cryptic form, in the 1928 and 1949 *Manuals for Courts-Martial.*[92]

F. *The Effect of the Uniform Code of Military Justice*

Shortly after World War II, a movement gained momentum in the United States to reform the Articles of War and the Articles for the Government of the Navy. While procedure occupied most of the

[90] Memorandum by Lt Col A. W. Brown, Judge Advocate, for Judge Advocate General Hull dated 11 May 1925.

[91] *Cf. United States v. Fleming* (1953) 9 CMR (Court-Martial Reports) 502, where it was held that going absent without leave in the hope of being discharged does not aggravate the offence since there is nothing improper or illegal about seeking a discharge from one's superiors.

[92] *Manual for Courts-Martial* (U.S. Army 1928) 142, para. 130: 'The offense is complete when the person absents himself without authority from his place of service (which is for him "the service of the United States") with intent not to return thereto. . . . The fact that such intent is coupled with a purpose . . . to report for duty elsewhere . . . does not constitute a defense.' To the same effect see *Manual for Courts-Martial* (U.S. Army 1949) 197, para. 146.

attention of the critics of the existing articles,[93] proposals were also made to rewrite the substantive law sections. One proposal was as follows:

> [In the Keeffe Report] there is extensive comment on the need for better definitions of the offense of desertion, its elements and the mode of proof, and for it to be distinguished more clearly from A.W.O.L. and A.O.L. The report criticizes the tendency of courts to convict on proof of absence alone, without considering sufficiently whether the requisite intent to desert was present. This tendency was fostered by a Navy Department Directive which required that a man be charged with desertion after an absence of 45 days; with this requirement in force, courts tended to assume that a man who had been gone for this length of time was automatically guilty of desertion. On the other hand, if absence were less than 45 days the man was usually not charged with desertion at all.
>
> The report recommends that workable tests be established for distinguishing between desertion and mere unauthorized absence. If length of absence alone is to be the test, an intermediate offence of aggravated absence should be recognized, which would permit more severe punishment than A.W.O.L. or A.O.L. but not be a capital offense. Desertion would be reserved for a case of unauthorized absence, coupled with other evidence, of which prolonged absence would be one type, showing unmistakeably an intent not to return to the service.[94]

Professor Edmund M. Morgan of Harvard University Law School, chairman of the committee which drafted the Uniform Code of Military Justice, who thirty years before had criticized the provision in the Articles of War punishing desertion for 'remarkable indefiniteness',[95] brought forth a recommended Bill which, for the first time in American law, defined the offence of desertion. This Bill, designed to consolidate the Articles of War and the Articles for the Government of the Navy,[96] ultimately passed as the Uniform Code of Military Justice.[97] It provided:

> Art. 85 (a) — Any member of the armed forces of the United States who (1) without proper authority goes or remains absent from his place of service, organization, or place of duty with intent to remain away therefrom permanently . . . is guilty of desertion.

[93] 'Symposium of Military Justice' (1953) 6 *Vanderbilt Law Review* 161.

[94] *Comparative Studies Notebook* mimeographed by the Office of the Secretary of the Defense Committee on the Uniform Code of Military Justice (1949) 5-6.

[95] Morgan, 'The Existing Court-Martial System and the Ansell Army Articles' (1919) 29 *Yale Law Journal* 52, n. 2.

[96] In *Hearings on H.R. 2498 Before a Subcommittee of the House Armed Services Committee*, 81st Cong., 1st Sess. 605 (1949) he said: 'You will notice as you study the punitive articles that we have consolidated a number of them. . . . An example of this is the crime of desertion, which is now contained in article 85. The same material is heretofore found in Articles of War 28 and 58 and in Articles for the Government of the Navy 10, 4 (par. 6) and 8 (par. 21).' And at p. 1225 the commentary on the proposed Bill states that: 'This article consolidates all provisions relating to desertion. Paragraph (1) of subdivision (a) sets forth the elements of desertion, in order to clearly distinguish desertion from a.w.o.l.'

[97] Act of 5 May 1950; 64 Stat. 108.

The language of the above provision seems to have clearly adopted the prior interpretation of desertion by *Manuals for Courts-Martial* that an intent to leave one post permanently, even if coupled with an intent to report to another, is an intent to desert.[98] The current *Manual* so declares, saying that it is not necessary that the absence intended or effected be entirely from military control.[99]

Two decisions of the United States Court of Military Appeals have significantly changed the law of desertion since the Code was adopted. With respect to one, it may be noted first that the current *Manual for Courts-Martial* repeats the statement of prior *Manuals* that a soldier who is absent on a short leave of absence and

> who is found on board a ship at sea, without authority, bound for a distant port, may be regarded as having abandoned any authority he might have for his absence and to be absent without proper authority, although he may not have gone beyond the area fixed in the pass and the pass may not have expired.[1]

This provision was based on a 1908 ruling by the Judge Advocate General of the Army that a pass does not protect a soldier when it permits him to visit a nearby town and when he is found before the expiration of the pass at a more distant point speeding away as rapidly as possible, since the pass was not intended for the unlawful purpose of permitting the soldier to desert and cannot be so used.[2] And this ruling is, in turn, supported by statements in the British *Manual of Military Law* going as far back as 1888.[3]

In *United States v. Johnson*,[4] the accused was an American sergeant stationed in Germany who became dissatisfied with his unit and, having obtained a pass, was arrested as he attempted to leave West Germany and enter East Germany to defect to the Russians. His conviction for desertion was predicated on the theory that he had abandoned the authority of his pass by this palpable misuse of it and was hence absent without authority with intent not to return.

[98] *Legal and Legislative Basis, Manual for Courts-Martial* (U.S. 1951) 251-252: 'In general, this article presents few changes over the present law in the Army and Air Force, but it presents a major change in the Navy's concept of the offense of desertion as now announced by Articles 4 and 8, A.G.N. One of the essential elements of the offense under these naval articles is that the desertion be from the naval service and not merely from a certain ship or station. None of the provisions of Article 85 of the Code makes such a total absence from military control an element of the offense of desertion. In the Army and Air Force absence from the service of the United States in an element of desertion, but for a member of those forces the particular place of service is the "service of the United States", and total absence from military jurisdiction and control is not a requisite factor of the offense.'

[99] *Manual for Courts-Martial* (U.S. 1951) 311, para. 164a. See also the discussion in Avins, *The Law of AWOL* (1957) 132-134; and *United States v. Cooper* (1952) 3 CMR 406.

[1] *Ibid.* 313. This provision is found in *Manual for Courts-Martial* (U.S. Army 1949) 199, para. 146a; and *Manual for Courts-Martial* (U.S. Army 1928) 143, para. 130a.

[2] Howland, *op. cit.* 12. CM 1397, 5 August 1908.

[3] *Manual of Military Law* (1888) 6, para. 17.

[4] (1957) 22 CMR 278.

The Court of Military Appeals overturned the conviction. The majority opinion enunciated the proposition that a soldier cannot surrender or abandon a leave of absence because 'his status as a person on pass is as personally unalterable as that of any military assignment given to him',[5] a theory which not only contradicts all prior military law,[6] but erroneously confuses leave and orders.[7]

If anything is clear, it is that American soldiers are not given passes to defect to the Russians. Hardly a more perverted use of a pass could be found. It would strain credulity beyond the breaking point to believe that a sergeant would not recognize this. Since he is using the pass for unlawful purposes which he knows run contrary to the purpose of it, it seems not illogical to hold that he has abandoned its authority and is absent without leave.

The dissenting judge, while agreeing that a pass can be abandoned, declared that abandonment should not be deemed to occur until the soldier has placed himself in such a position that it is unlikely that he can return at the expiration thereof, and that until such time he should be deemed guilty of attempted desertion only, because he is merely attempting to abandon the pass.[8] This might serve as a workable rule where a mere mileage limitation on the pass is violated, but where the pass is used for the very purpose of deserting it is used for a purpose not contemplated on its issue, and becomes a mere instrument in the hands of the deserter. Application for a pass for the purpose of making a get-away is more than a fraudulent representation; it is, by the terms of a valid Presidential order, the *Manual for Courts-Martial,* grounds upon which the pass expires.[9] By virtue of the *Manual,* there is a limitation on the pass itself. Accordingly, this decision would seem to be clearly unsound.

In the other case, *United States v. Rushlow,*[10] the long-standing *Manual* provision that 'a purpose to return, provided a particular but uncertain event happens in the future, may be considered an intent to remain away permanently'[11] was involved. The accused here testified that he remained absent to help his parents, and intended to return to the service when his brother was discharged from military service, which was expected in a few months and which occurred on schedule, so that his parents would not be left alone. Of course, such testimony shows an intent to return based not on a contingency, but

[5] *Ibid.* 283. [6] Avins, *The Law of AWOL* (1957) 88-89, 264.
[7] *Ibid.* 85-87. [8] *United States v. Johnson* (1957) 22 CMR 278, 287.
[9] Fratcher, 'Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals' (1959) 34 *New York University Law Review* 861, 875 where Professor Fratcher declares: 'A pass is a permission to be absent granted under authority delegated by the President as Commander-in-Chief. The scope and effect of such permission are proper matters for the President to regulate under his constitutional power to direct the operations of the armed forces.' [10] (1953) 10 CMR 139.
[11] *Manual for Courts-Martial* (U.S. 1951) 313, para. 164a.

on an event the occurrence of which, if not time of occurrence, was certain, since accused's brother obviously was not going to be kept in service for life. Nevertheless, the court-martial below was instructed on the above rule as to contingent intent to return, and the conviction was reversed for this instruction, not because it was inapplicable and misleading, but because the *Manual* rule stated incorrect law. The basis of this holding was that an intent to return based on a contingency is the equivalent, at least generally, of an intent to return.[12]

This decision enunciates bad military policy and bad military law.[13] As an example of this, we may point to *United States v. Curtis,*[14] a pre-*Rushlow* case where an Air Force lieutenant went absent without leave after suffering serious gambling losses and incurring heavy debts because of this. The lieutenant testified that he intended to return when and if he had obtained 'sufficient money to discharge his debts'.[15] The Board of Review, however, affirmed the conviction of desertion, on the ground that 'his assertion that he intended to return if a particular but uncertain event happened, that is, a solution of his problems, is no defense'.[16] Under *United States v. Rushlow,* however, such a statement would be a good defence.

Does it really makes sense to require the Air Force to suspend their personnel planning until it can be known whether the accused will break the bank at Monte Carlo? Must the fortunes of the military ride with those of the lieutenant as he places two dollars on the nose of his favourite 'long-shot' at Belmont Race Track? Should the personnel needs of the service be tailored to meet the day-to-day fluctuations in price on the stock market of Outer Space Missiles, Inc., because some absent airman is waiting to make a 'killing' before he returns? One would think it safer, and saner, to write off, as gone for good, a man whose return depends on his skill at poker, his luck at roulette, or whether he buys the winning ticket in the Irish sweepstakes.

Perhaps it might be said that the contingency is too uncertain here. But how can it be known when the odds that the contingency will occur are great enough to warrant reliance on the return? Should it be a 25 *per cent* possibility, a 50 *per cent* possibility, or a 75 *per cent* possibility, or what? Suppose our inveterate horseplayer tells us that he is betting on the favourite, a 'sure thing', rather than on a horse with merely a remote chance to win. Must we give law officers advance courses in race 'handicapping'? Should we place an appendix containing detailed instructions on how to read 'tip sheets' in the back of the *Manual for Courts-Martial*? Or are we not once again

[12] *United States v. Rushlow* (1953) 10 CMR 139, 142.
[13] *United States v. Knoph* (1952) 6 CMR 108, 111. *Cf. United States v. Affronte* (1952) 7 CMR 815. [14] (1952) 3 CMR 735. [15] *Ibid.* 737. [16] *Ibid.* 738.

justified in saying that either the man intended to return absolutely, or we may, disregarding any ifs, ands, buts, or maybes, say that he was not coming back?

In *United States v. Tibbs*[17] the accused said that he would return if an emergency arose or war was declared. Of course, it is comforting to know that in the event of a national emergency numerous patriotic absentees from the service will spring out from the woodwork to save their country. Indeed, even the notorious Grover Cleveland Bergdoll returned after 19 years.[18] However, military leaders would hardly want to count on such people in planning the national defence. Here again, it would be more prudent to count on their absence than their presence.

Finally, in a case which arose after *United States v. Rushlow,* a desertion conviction was reversed because the court-martial was instructed in effect that it was no defence that the accused intended to return if he could cure the propensity for juvenile delinquency of his two younger brothers.[19] No quarrel can be had with the worthiness of the motive; indeed, the cure of juvenile delinquency has been a problem baffling experts in many countries. Here again, however, no prudent military commander would count on the man's return.

People who intend to return only on a contingency are of no more use than people who do not intend to return at all. They must be counted out of any military personnel planning. The fact that they may ultimately return is of no consequence if they ultimately may not come back. It therefore follows that the rule stated in the *Manual for Courts-Martial* that such personnel should be treated as deserters is the preferable one.

G. *Conclusion*

The offence of desertion, absence without leave with intent not to return, is a simple offence. The concept of the crime is today clearly crystallized, the unauthorized absence coupled with the formulation, at some time during that absence, of an intent not to return. That intent may be entertained for only a brief time, and then abandoned, but if formed at all it poses the danger that the accused will never return. It is this danger of permanent deprivation of the serviceman's service that the statute is designed to guard against. Any rule which permits the accused to satisfy a lesser obligation than unequivocal return to military service defeats the object of the desertion statutes as crystallized over the years.

[17] (1951) 4 (AF) CMR 537, 542.
[18] *Bergdoll* (1940) 10 BR (Reports of the Board of Review of the Army, Washington) 249. See 84th Cong., Rec. 4385-4389 (1939).
[19] *United States v. Johnsey* (1953) 11 CMR 798.