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# PROOF OF DESERTION THROUGH PROLONGED ABSENCE

Alfred Avins†

## I. INTRODUCTION

In the recent case of *United States v. Cothorn*<sup>1</sup> the United States Court of Military Appeals rejected what many authorities had considered a well-settled and basic rule of the law of desertion—the rule that where there is a prolonged absence which is unexplained “the court will be justified in inferring from that alone an intent to remain absent permanently.”<sup>2</sup> The decision has been widely followed and commented upon. This article examines the historical origins of, and the justification for, the rule of prolonged absence.

Article 85<sup>3</sup> the Uniform Code of Military Justice denounces one of the oldest of military offenses, desertion. In addition to being an ancient crime, it is also a popular one.<sup>4</sup> Section a(1) describes the offense of “straight” desertion, which originally was the only way in which desertion could be committed. It describes as a deserter one who “without proper authority goes or remains absent from his place of service, organization, or place of duty with intent to remain away therefrom permanently.” The problem typically presented in desertion cases to the prosecution is, how can the necessary intent to desert be proved?

The Manual for Courts-Martial<sup>5</sup> devotes one paragraph to this problem of how an intent to desert may be proved.<sup>6</sup> The first part of the paragraph lists various indicia by which one may infer an intent to desert; the latter part lists indicia by which the intent may be negated. It is significant that the first sentence of the paragraph is this: “If the condition of absence without proper authority is much prolonged and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain absent permanently.”<sup>7</sup> From the decided cases, it can be seen that the key word in this rule is “prolonged.”

The purpose of this article is to examine the prolonged absence rule in light of its history, its importance, its relation to other indicia by which an intent to desert may be found, and its present status as de-

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† See Contributors' Section, Masthead, p. 394, for biographical data.

<sup>1</sup> 8 USCMA 158, 23 CMR 382 (1957).

<sup>2</sup> Manual for Courts-Martial, U.S. Army, 1951, ¶ 164, at 313.

<sup>3</sup> 10 U.S.C. § 885 (1958).

<sup>4</sup> See Avins, *The Law of AWOL* 33 (1957), and the authorities cited therein.

<sup>5</sup> Manual for Courts-Martial, United States, 1951, Executive Order 10214.

<sup>6</sup> *Id.* ¶ 164a, at 313.

<sup>7</sup> *Ibid.*

terminated by recent decisions of the United States Court of Military Appeals. Some forecast will be attempted as to its place in the future development of the military law.

While, of course, the offense of desertion consists of two elements, absence without leave and intent to remain away permanently, the first of these will not be discussed. The author has already devoted an entire book to the subject,<sup>8</sup> and there would be no point in duplicating any of it here. It is therefore assumed in all of the cases under discussion that the length of the absence without leave was as found by the court. Nor will there be any discussion of the nature and quality of the intent which distinguishes desertion from absence without leave. The author has already detailed this,<sup>9</sup> and in this article, when the intent to desert is discussed, it will be assumed that the reader is familiar with the type of intent required to sustain the offense of desertion.

The importance of the subject of this article and the necessity for a review of this area of the military law was suggested to the author by several reviewers of his book.<sup>10</sup> It seems that this area of the military law is of sufficient importance in itself, and sufficiently different from absence without leave, to warrant a separate study.

## II. THE HISTORY OF THE RULE

While the offense of desertion is very old, the earliest textwriters on military law in England, in mentioning and describing the offense, do not detail the manner in which the all-important *animus non revertendi* is to be proved.<sup>11</sup> There is, in fact, no authoritative comment upon this point for almost a half century after the American Revolution. Nevertheless, the general acceptance of the rule of prolonged absence during this period can be deduced from two facts, namely, that it was considered well-settled by later authority, which will be gone into below,

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<sup>8</sup> Avins, op. cit. supra note 4.

<sup>9</sup> Id. at 39, 130, 134, and 135.

<sup>10</sup> In Brannon, "Review of Avins, The Law of AWOL," 44 Va. L. Rev. 155, 156 (1958), Major General Eugene M. Bannon, former Judge Advocate General of the Army said:

The book would be more useful if the author had included the subject of desertion, which is so closely related to AWOL that much of the discussion would be applicable to both. A thorough study of this offense is especially necessary in light of recent decisions of the Court of Military Appeals concerning the inferences to be drawn from a prolonged and unexplained absence. The law in this field is in a state of great confusion.

To the same effect, see Everett, Review, 10 J. Legal Ed. 557, 559 (1958); Gaynor, Review, Army, July 1958, p. 79; Mickelwait, "Review of Avins, The Law of AWOL," 45 Calif. L. Rev. 561 (1957); Peck, Review, 31 So. Cal. L. Rev. 218 (1958); Wurfel, Review, 33 Notre Dame Law. 659, 660 (1958).

<sup>11</sup> The point is not discussed in Tytler, Essay on Military Law (1806) or McArthur, Naval and Military Courts-Martial (4th ed. 1813).

and that it was the rule in the maritime law of the United States and England.

In the early history of the United States, military and naval law had a close affinity to the maritime law, a point noticed by Winthrop.<sup>12</sup> In respect to the maritime law, undoubtedly the leading authority in the early days of the Republic was the justly celebrated Mr. Justice Story. That eminent jurist, whose decisions laid the foundation for American maritime law, had this to say in reference to a statute in *Cloutman v. Tunison*:<sup>13</sup>

It treats absence, therefore, without leave, to be an equivocal act, and not necessarily desertion, *animo non revertendi*. But, inasmuch as such prolonged absence might endanger the safety of the ship, or the due progress of the voyage, it deems forty-eight hours' absence without leave, to be ipso facto a desertion, . . . It thus creates a statute desertion, and makes that conclusive evidence of the fact, which would, upon the common principles of the maritime law, be merely presumptive evidence of it.<sup>14</sup>

In considering the weight to be given to the above case, it must be remembered that this was the first American case in which the rule that a prolonged absence is presumptive evidence of intent to desert was expressly dealt with. It was decided less than a half-century after the founding of the United States, by the leading authority on the subject. Justice Story clearly implies in his opinion that the prolonged absence rule was well settled law in regard to seamen at that time. It seems only logical to assume, therefore, that the prolonged absence rule was a generally accepted one in maritime law at the time of the American Revolution, if not before. Likewise, although there is no English authority on the point, it is probable that the rule also was part of English maritime law.

If a prolonged absence was presumptive evidence of intent to desert in the maritime law, is it not highly probable that, at the very least, the same rule obtained in the military and naval law? If, as Winthrop has noted,<sup>15</sup> the discipline of the military law is stricter than that of the maritime law, can it be considered probable that less evidence would be required to prove desertion in the maritime law than in the military law? We can only conclude that since a prolonged absence was sufficient to prove desertion in the maritime law, it was also sufficient to prove desertion before a court-martial.

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<sup>12</sup> In Winthrop, *Military Law and Precedents*, 643 n.73 (2d ed., 1920 Reprint), he says: "What would absolutely excuse desertion in the merchant service may reasonably be held to palliate it in the similar but stricter law of discipline governing the soldier." And note that a textwriter as early as McArthur discusses both naval and military law together.

<sup>13</sup> 5 Fed. Cas. 1091, No. 2,907 (C.C. Mass. 1833).

<sup>14</sup> *Id.* at 1094.

<sup>15</sup> See note 10 *supra*.

Such little evidence as is extant indicates that this was indeed the rule in the military courts during the early days of the history of the United States. In one old naval case it is stated:<sup>16</sup> "and in most cases it is only by showing a long period of unauthorized absence that a presumption of intent can be raised." Likewise, the earliest English textwriter on military law to deal specifically with the subject, Hough,<sup>17</sup> has this to say:

Absence by itself, if continued so long as to exclude the reasonable idea of a meditated return, will, if unexplained, amount to desertion. . . . On the other hand, a short absence would not appear to indicate that he intended to desert.<sup>18</sup>

This author continues to make the same statement in his later works.<sup>19</sup>

This text statement is important not only because American military law was copied from the British,<sup>20</sup> but also because of the repeated tendency of American attorneys, both military and civilian, to cite and rely upon British military textwriters in the early history of the United States.<sup>21</sup> Hough himself was cited as an authority in American opinions.<sup>22</sup>

<sup>16</sup> CMO 1-1825, p. 4, as cited in CMO 1-1940, p. 60.

<sup>17</sup> Lt. Col. W. Hough, *The Practice of Courts-Martial* (1825).

<sup>18</sup> *Id.* at 136. And Samuel, *Courts-Martial* 323 (London, 1816), declares: "Absence, by itself, if continued so long as to exclude the reasonable idea of a meditated return, might, if unexplained, or unexplainable, be deemed desertion." Likewise, Delafons, *A Treatise on Naval Courts-Martial* 265 (London, 1805), says in discussing desertion:

Seamen are not run on the books of his Majesty's ships, till after they have been absent three musters checked without leave; and if taken up within that time, . . . each is charged twenty shillings straggling money . . . in which case he does not forfeit his wages, but is liable to punishment by the captain. Although the crime of desertion is a most capital offense, punishable by death in the navy, as well as in the army, yet there are fewer instances in the navy, of its being inflicted for such offense.

The discussion of forfeiture of wages refers to the common-law admiralty rule that a seaman guilty of desertion forfeits all of his wages. *The Cadmus v. Matthews*, 4 Fed. Cas. 977, No. 2,282 (CCNY 1830).

<sup>19</sup> Lt. Col. W. Hough, *Precedents in Military Law* 131 (1855). And on page 134 he says:

If a deserter gives himself up willing within a few days after he has quitted his regiment, such circumstance may be taken into favourable consideration, as it shows that there was no intent to desert the service altogether; but if he does not give himself up until many months have elapsed, the act must be presumed to have been the result of necessity— . . . He would then be punished as a deserter. [H]is not doing so, but long continued absence, would be a case of desertion.

<sup>20</sup> Attorney General Caleb Cushing, in 6 Ops. Att'y Gen. 200, 204 (1853) said:

The general rule is that English statutes passed before the Revolution, and in amendment of the common law, are to be assumed as part of the common law of the Colonies. . . . In this point of view, the English law, except where it is contradicted by, or incompatible with, our constitutional or statute law, our judicial decisions, or the spirit of our institutions, has come to be recognised as law in many of the States; . . . [and] we have to go to the common law as the suggestive, if not the authoritative, source of many doctrines of law, the forms of practice, the general principles of reasoning, and even the very meaning of the terms of law. And this theory applies to the jurisprudence of an exceptional forum, for instance, military or ecclesiastical, as well as to the ordinary forums of law or equity.

See also, as to the Articles of War: Ansell, "Military Justice," 5 Cornell L.Q. 1, 3 (1919); Ansell, "Some Reforms In Our System of Military Justice," 32 Yale L.J. 146 (1922); Morgan, "The Existing Court-Martial System and the Ansell Army Articles," 29 Yale L.J. 52 (1919); as to the Articles for the Government of the Navy; Pasley and Larkin, "The Navy Court-Martial: Proposals for its Reform," 33 Cornell L.Q. 195, 196 (1947).

<sup>21</sup> In the early days of the United States, before the Civil War, there was no office of

Two textwriters, whose books appeared somewhat later than Hough's, in the first half of the nineteenth century, also commented on the prolonged absence rule. O'Brien,<sup>23</sup> the first American military law textwriter to write an original military law textbook which was not merely a rehash of the English authorities, had this to say: "Absence, of itself, if continued so long as to exclude the reasonable idea of an intended return, might, if unexplained or unexplainable, be deemed desertion."<sup>24</sup> Likewise, a noted English authority, Simmons,<sup>25</sup> declared:

The evidence to support the charge of desertion must always vary; the intention may be proved by direct or circumstantial evidence; it may be inferred or presumed from the length of absence, . . . .<sup>26</sup>

Both O'Brien and Simmons were also widely used and cited textwriters.<sup>27</sup> Indeed, at one time Attorney-General Caleb Cushing referred to their books as "the most approved textbooks."<sup>28</sup> In view of these quotations, it appears clear that the prolonged absence rule was a well-established fixture in American and English military law long before the advent of the Civil War.

Two precedents of Civil War vintage also buttress the above argument. In one opinion, the first Judge Advocate General, under Lincoln, appears to recognize clearly the existence and effect of the prolonged absence rule.<sup>29</sup> In another, the accounting officers of the government

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the Judge Advocate General, either in the Army or the Navy. Legal questions arising in courts-martial were referred to the Attorney-General for his opinion. Hence, it is extremely significant that the Attorneys-General repeatedly cited and relied upon English military textwriters. See 1 Ops. Att'y Gen. 166 (Rodney 1811); 1 Ops. Att'y Gen. 233 (Wirt 1818); 1 Ops. Att'y Gen. 294 (Wirt 1819); 1 Ops. Att'y Gen. 296 (Wirt 1819); 3 Ops. Att'y Gen. 714 (Legare 1841); 3 Ops. Att'y Gen. 749 (Legare 1842); 4 Ops. Att'y Gen. 1 (Legare 1842); 4 Ops. Att'y Gen. 432 (Mason 1845); 4 Ops. Att'y Gen. 444 (Mason 1845).

<sup>22</sup> 2 Ops. Att'y Gen. 286 (Berrien 1829); 2 Ops. Att'y Gen. 297 (Berrien 1829); 2 Ops. Att'y Gen. 414 (Berrien 1831); 4 Ops. Att'y Gen. 17 (Legare 1842); 6 Ops. Att'y Gen. 200 (Cushing 1853); 6 Ops. Att'y Gen. 239 (Cushing 1853); 8 Ops. Att'y Gen. 328 (Cushing 1857); 9 Ops. Att'y Gen. 181 (Black 1858). Harwood, U.S. Naval Courts-Martial (1867) quotes Hough 11 times and Simmons 13 times. This was the earliest American naval law text.

<sup>23</sup> John O'Brien, *American Military Laws* (1846).

<sup>24</sup> *Id.* at 95.

<sup>25</sup> Thomas F. Simmons, *Courts-Martial* (4th ed. 1852). The above year, 1852, is a deceptively late date. The first edition of Simmons' text appeared in 1835.

<sup>26</sup> *Id.* at 301. Simmons also says, at the same place:

It is impossible to lay down any particular time of absence which may constitute a proof of the intention to desert: absence for a considerable time is *prima facie* evidence of intention not to return, but it is competent to the party accused to bring in proof, acts, or circumstances, implying a contrary intention. On the other hand, absence, for a very considerable time, . . . may amount to satisfactory evidence of the intention to desert.

Harwood, *op. cit. supra* note 20, at 193, quotes Simmons as to how intent to desert may be established in another aspect, showing that this section was quite familiar to American military lawyers.

<sup>27</sup> See 6 Ops. Att'y Gen. 239 (Cushing 1853).

<sup>28</sup> 6 Ops. Att'y Gen. 200, 206 (Cushing 1853).

<sup>29</sup> Winthrop, *Digest of Opinions of the Judge Advocate General of the Army* 138, No. 1 (1868):

recognize and give effect to the rule.<sup>30</sup> In both of these cases, it appears that the opinions assume the rule to be well-settled, and not to require further discussion of its validity or binding force.

Turning to the post-Civil War era, the two great military law writers during the period around the turn of the century both discuss the prolonged absence rule in their works. Winthrop, probably the most widely quoted military law writer in the United States,<sup>31</sup> has this to say:

A protracted unexplained absence affords indeed a strong presumption that the party absented himself with the animus of desertion, and the longer the absence (prior to the arrest), the stronger, in general, the presumption.<sup>32</sup>

Davis, in his book, says substantially the same thing,<sup>33</sup> and it is not without significance that he held the position of Judge Advocate General of the Army before World War I. Davis also notes the fact that, by the Army regulations of 1895, ten days is fixed as the period beyond which an AWOL soldier was presumed to have deserted.<sup>34</sup> It might be noted that the old Navy regulations also contained this same provision.<sup>35</sup>

It is about this time, in addition, from which the earliest naval authority on the subject dates. Examination of the naval precedents reveals that the rule in the Navy also was that "absence of long duration creates a presumption of specific intent to desert."<sup>36</sup> Thus, several old court-

There is, and can be, no precise rule to determine how short an absence shall constitute desertion on the part of a soldier, or shall make it proper that the soldier be brought to trial for desertion.

<sup>30</sup> Butterfield, *Digest of the Decisions of the Second Comptroller of the Treasury, 1817-1869*, 46, No. 327 (3rd ed. 1869):

A soldier absent from his regiment without authority, for a period of three months, though voluntarily returning to it, whether tried and convicted or not, is guilty of desertion, and forfeits the bounty.

Of course, decisions of the accounting officers in respect to contract aspects of desertion must be examined with care before they are accepted for purposes of a criminal prosecution for desertion. See generally, Avins, *The Law of AWOL*, 150 (1957). And it is also true that such decisions are not binding on military courts. *United States v. Coates*, 2 USCMA 625, 10 CMR 123 (1953). See also Levitt, "Review of Avins, *The Law of AWOL*," 26 *Ford. L. Rev.* 605 (1957). Nevertheless, such decisions are persuasive as to what the military law was, especially when fortified by other authority.

<sup>31</sup> See Prugh, "Colonel William Winthrop: The Tradition of the Military Lawyer," 42 *A.B.A.J.* 126 (1956).

<sup>32</sup> Winthrop, *Military Law and Precedents* 638 (2nd ed. 1920 Reprint). On page 640, he also declares:

The fact that he absented himself *animo non revertendi* is proved as a presumption from some one unequivocal fact, as an unexplained long-protracted absence without authority.

<sup>33</sup> Davis, *A Treatise on the Military Law of the United States* (2nd ed. 1909). At page 420 he declares:

Thus the circumstance that the absence has been exceptionally protracted and quite unexplained will in general furnish a presumption of the existence of the necessary intent.

<sup>34</sup> *Id.* at 422.

<sup>35</sup> *Reed v. United States*, 252 *Fed. 21* (2d Cir. 1918).

<sup>36</sup> McClellan, *Naval Digest* (Dig. Dec. Sec'y of the Navy and TJAGs of the Navy, 1862-1916) 168, No. 2 (1916). See too CMO 41-1914, p. 3:

Thus when the prosecution proves the unauthorized absence and the facts of appre-

martial orders state: "A long period of absence raises a presumption of specific intent permanently to abandon the naval service, which presumption can only be dispelled by a reasonable explanation thereof."<sup>37</sup> The naval law, as thus stated in these decisions, was identical with the military law; and it can therefore be seen that the rule on this point was the same in both services. Thus, the prolonged absence rule was a permanent part of both military as well as naval law at the turn of the century in the United States.

The early Army manuals for courts-martial, commencing with the 1895 edition, were small pamphlets which barely set forth the procedure to be followed, and the text of the Articles of War. They did not contain any discussion of how intent to desert was to be proved; and hence, they did not discuss the prolonged absence rule. However, the first real Army manual for courts-martial, containing a full discussion of procedure, evidence, and the substantive offenses, put out on the eve of America's entry into World War I, did contain such a discussion. This manual declared:

If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court may be justified in presuming from that alone an intent to remain permanently absent.<sup>38</sup>

The 1921 edition of the Manual contained identical language.<sup>39</sup>

In evaluating the fundamental fairness of the above rule, as well as its accuracy in stating the law, it must never be forgotten that the evidence portions of the 1917 and 1921 Manuals were written by Dean John H. Wigmore, then on leave from Northwestern University as a Lieutenant Colonel in the Judge Advocate General's Department.<sup>40</sup> Wigmore was intensely interested in military law,<sup>41</sup> and he often commented

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hension and delivery of the accused, this is all that is required to sustain the charge in the absence of evidence to the contrary. Or if the absence is of such duration or there are such other circumstances as to justify an inference that the accused intended permanently to abandon the service or pending contract of enlistment, this is sufficient even though he may have surrendered. In all these instances the evidence for the prosecution constitutes a prima facie case of guilt.

<sup>37</sup> *Id.* at 172, No. 63; CMO 39, 1901, p. 2; CMO 76, 1901; CMO 29, 1914, p. 9. And in GCMO 158, Navy Dept., Dec. 21, 1897, the Secretary of the Navy declared: "It is true that 'the duration of the absence of the person is especially material' (Digest of Opinions of the Judge Advocate General of the Army, Winthrop, 338), but time of absence alone is not conclusive proof of such intent." Accord: GCMO 115, Navy Dept., Oct. 10, 1900.

<sup>38</sup> Manual for Courts-Martial, U.S. Army, 1917, ¶ 284, at 134.

<sup>39</sup> Manual for Courts-Martial, U.S. Army, 1921, ¶ 234, at 226.

<sup>40</sup> See the Introduction to the Manual for Courts-Martial, U.S. Army, 1917, p. XIV. This introduction is also copied in the 1921 Manual. In Brown, "Administration of Justice in the Army," 3 Cornell L.Q. 178, 202 (1918), it is stated:

The Chapter of the Manual for Courts-Martial referred to above contains about one hundred paragraphs on the subject of evidence and was revised and approved by Professor Wigmore.

<sup>41</sup> For instance, he published the first casebook on the subject: Source-Book of Military



on it quite favorably.<sup>42</sup> Thus, he approved heartily of the evidentiary portions of the Manual for Courts-Martial.<sup>43</sup> He said that courts-martial are generally bound by common law rules of evidence, and noted that prior to 1916, they were so bound in all cases.<sup>44</sup> It can hardly be supposed that he had overlooked the significance of the prolonged absence rule, since he himself had incorporated it into the 1917 Manual; hence it seems clear that he approved of it. The fact that Wigmore himself wrote the original draft of the prolonged absence rule as it appears in the Manual goes far towards showing that the rule was historically a part of the military law, and was always considered as consistent with the normal common law rules of evidence in criminal trials.

The 1928 Army Manual for Courts-Martial made a slight change in the language of the rule which change benefited the defendant. The old rule stated that "the court may be justified in presuming" that the defendant intended to desert. In the 1928 manual, for these words there was substituted: "the court will be justified in inferring" the requisite intent.<sup>45</sup> The identical language was carried into the 1949 manual, both for the Army and for the Air Force.<sup>46</sup> This is the same language which appears in the present manual.<sup>47</sup>

Such naval authority as there is between the two World Wars also follows the same rule.<sup>48</sup> In one Court-Martial Order, the Judge Advocate General of the Navy stated:

The Navy Department has held that a prima facie case of desertion is established when the prosecution proves the unauthorized absence and the fact of apprehension and delivery or surrender of the accused with an absence of such duration as to justify an inference that the accused intended permanently to abandon the naval service.<sup>49</sup>

And, although the 1917 edition of Naval Courts and Boards makes no mention of the prolonged absence rule, the 1937 edition recognizes it.<sup>50</sup> Thus, the present prolonged absence rule represents merely a continuation of the older naval law.

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Law and War-Time Legislation (1918). See also Wigmore, "Modern Penal Methods in Our Army," 9 J. Crim. L., C. & P.S. 163 (1918).

<sup>42</sup> Wigmore, "Some Lessons for Civilian Justice to Be Learned from Military Justice," 10 J. Crim. L., C. & P.S. 170 (1919).

<sup>43</sup> See 1 Wigmore on Evidence 99 (3rd ed. 1939). Commenting on Naval Courts and Boards (1937), he says at 101: "In the above Manual . . . contains a lucid summary of the orthodox rules of evidence, in a style corresponding to that of the Army Manual."

<sup>44</sup> *Ibid.*

<sup>45</sup> Manual for Courts-Martial, U.S. Army, 1928, ¶ 130, at 143 (1943).

<sup>46</sup> Manual for Courts-Martial, U.S. Army and U.S. Air Force, ¶ 146a, at 199.

<sup>47</sup> See note 4 *supra*.

<sup>48</sup> CMO 1-1925, p. 4.

<sup>49</sup> CMO 9-1932, p. 8.

<sup>50</sup> Naval Courts and Boards, 1937, § 76 declaring that the duration of the absence establishes a prima facie case.

Furthermore, it is of considerable significance to an evaluation of the fundamental fairness and trustworthiness of the prolonged absence rule that it is in effect in the British services. In the British Manual of Military Law it is stated:

The existence of the intent (to desert) . . . may be inferred from the surrounding circumstances. Examples of facts from which the existence of the intent could be inferred are that the accused:—

- (i) has been absent a very long time although he had opportunities to return.<sup>51</sup>

It is noteworthy that this example appears as the first example in the British manual, just as it is the first one in the current American Manual for Courts-Martial. It thus appears that this rule is recognized in the British Commonwealth, as it is in the American services, as the most useful and most trustworthy of rules for ascertaining the intent of the absentee.

Moreover, this rule has not only been approved by English military authorities, it has received the approbation of high judicial authority in England. In *Rex v. Mahoney*,<sup>52</sup> Lord Goddard, Lord Chief Justice of England, speaking for a unanimous Court-Martial Appeals Court, had this to say: "If a man is absent from Oct. 9 to Oct. 31, I should say that that is ample time on which a court-martial might hold that he did not intend to return."<sup>53</sup> Thus, it is clear that the prolonged absence rule has been a part of the military law for at least a century and a half; and it appears probable that it has been a part of the military common-law for a much longer period of time. This rule has therefore stood the test of centuries of experience, in both the United States and the British Commonwealth, and its continued existence is fully justified from an historical point of view.

### III. THE IMPORTANCE OF THE RULE

The Manual for Courts-Martial, in discussing the circumstances which will justify or negative a finding of an intent to desert, does not limit itself merely to a commentary on the prolonged absence rule. Quite to the contrary, it lists a number of circumstances which may be adduced to prove the requisite intent. Those listed are:

1. Accused attempted to dispose of his uniform or other military property.

<sup>51</sup> Manual of Military Law, 1956, 251 n.2b, interpreting the Army Act, § 37 (Desertion). Almost identical language is contained in the Manual of Air Force Law, 1956, 268 n.2b. And the Manual of Military Law, 1951, 211 n.2b, says:

Evidence of intention not to return to His Majesty's service may be inferred from such facts as the length of absence.

<sup>52</sup> (1956) 3 All E.R. 799 (Ct. Mar. App. Ct.).

<sup>53</sup> Id. at 801.

2. He purchased a ticket for a distant point or was arrested or surrendered at a considerable distance from his station.

3. While absent he was in the neighborhood of military posts or stations and did not surrender.

4. He was dissatisfied in his company, on his ship, or with military service.

5. He had made remarks indicating an intention to desert the service.

6. He was under charges or had escaped from confinement at the time he absented himself.

7. Just previous to absenting himself he stole money, civilian clothes, or other property that would assist him in getting away.<sup>54</sup>

In addition, there are a number of other well-recognized circumstances from which an intent to desert may be inferred. For example, the fact that the accused had a civilian job, engaged in business, or supported himself through black market or other criminal activities would tend to show that he did not intend to return to the service. Likewise, an intent to desert may be inferred more readily if the absence was commenced in time of war, or in a combat zone, since, under some circumstances at least, the accused might desire to leave the service permanently to avoid the hazards of war.

With all of these circumstances from which an intent to desert may be proved, it may be asked, of what special significance is the prolonged absence rule? In other words, why is the prolonged absence rule of any more importance than the rule, for example, that an intent to desert may be inferred from the distance which an accused travels from his station, or from the fact that he is apprehended wearing civilian clothes, or from any of the other circumstances noted above, or any combination of them?

What makes the prolonged absence rule so important in the trial of a desertion case is that, typically, it constitutes the only reliable method available to prove the requisite intent. The reason for this is two-fold, the general unavailability of other evidence, and the variable probative value of such other evidence even when it is available.

The typical desertion case arrives in the prosecution's office with evidence of few, if any, of the indicia of intent to desert known or available to the prosecution to prove such intent. This is not to say that evidence of such circumstances as would justify a finding of an intent to desert is non-existent; it may be, in fact, abundant. However, the existence and location of such evidence is generally a matter peculiarly within the knowledge of the accused, who can hardly be expected to divulge it. Furthermore, as an absence becomes more and more prolonged, the availability of evidence of intent to desert, aside from the very length of

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<sup>54</sup> Manual for Courts-Martial, U.S. 1951, ¶ 164a, at 314.

the absence itself, decreases. Witnesses die, resign, retire, move, or are transferred. Documents become lost or destroyed. Real evidence cannot be found. Thus, by the very fact that an absence is prolonged, it is not infrequently impossible to prove other circumstances which would tend to show that the accused had the requisite intent.

The fact is, that in the usual desertion case, the prosecution knows only that the accused went absent without leave, remained absent for a period, and surrendered or was apprehended. What the accused did during the period he was absent, where he went, why he left the service, or even why he returned if he surrendered, is generally wholly unknown to the prosecution. It is the rare case indeed in which, before leaving, the accused has broadcast his intentions. Faced by such a blank wall, is it any wonder that the prosecution desires to use the only circumstance known to it to establish the requisite intent? As was said in a naval case:

. . . the duration of unauthorized absence when proved is one of the facts from which intent to desert may be inferred, . . . and in most cases this is the only evidence which the prosecution can offer to establish the offense.<sup>55</sup>

Even when evidence of other circumstances is available, the prosecution usually still relies basically on the prolonged absence rule to prove the requisite intent to desert. The reason for this is the variable probative value of the evidence of such other circumstances. The fact is that each of the other factors surrounding the unauthorized absence except its duration must always be evaluated in light of the circumstances, not only of the particular case, but also of the prosecution's case as it may be proved on trial, to determine its probative effect. This uncertainty weakens the value of such circumstances as an indication of intent to desert.

Nor does the above statement apply solely to indicia which are generally of questionable probative value. Even the usual tests for such intent are liable to have an insufficient probative value in particular cases. Thus, for example, the second set of circumstances mentioned in the Manual for Courts-Martial as ones from which an intent to desert may be inferred is that the accused traveled a considerable distance from his station. Yet an Army Board of Review, in reversing a conviction of desertion by a court-martial in Lieutenant Sower's case,<sup>56</sup> had this to say about the distance which accused had travelled:

Although he surrendered to the military authorities at a place which was 1160 miles from his proper station, that fact, standing alone, and when

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<sup>55</sup> CMO 1-1925, p. 4.

<sup>56</sup> CM 229525, Sower, 17 BR 167 (1943).

considered in the light of modern transportation facilities, should not be treated as compelling an inference of such an intent.<sup>57</sup>

The third circumstance on the list of factors by which the requisite intent may be proved is that the accused failed to surrender to military authority although he was in the vicinity of military posts. Yet this, too, cannot always be relied upon by the prosecution to establish the necessary intent to desert. In Private Fairchild's case,<sup>58</sup> in reversing a conviction for desertion, the Board of Review had this to say:

The failure of a soldier who is absent without leave to surrender while in the neighborhood of a military station may, under some circumstances, be indicative of an intent to desert (par. 130a, M.C.M.). But the mere failure of a soldier to surrender while living openly with his wife in a small community at the very gates of his post, as in this case, is merely an element of his continued absence and furnishes no substantial basis for an inference of intent to desert.<sup>59</sup>

The sixth circumstance on the list, that the accused had escaped from confinement, is still another criterion of intent to desert of a well-settled nature which cannot always be relied upon as proof of the necessary intent, for there are numerous cases in which this factor too was present, and yet a finding of desertion was reversed.<sup>60</sup> And the last item on this list furnishes a still further example of the point; for normally the wearing of civilian clothes is considered a significant factor tending to indicate that the accused intended to remain absent permanently, and so sought to conceal his military status. But this, too, is not an infallible test, for an Air Force Board of Review, in *United States v. Ingraham*,<sup>61</sup> thus characterized its significance:

Furthermore, the fact that he was apprehended in civilian clothes is of no probative value because all airmen in the United States were then permitted to wear civilian clothes when off duty.<sup>62</sup>

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<sup>57</sup> Id. at 170. And in CM 2084562, Meier, 9 BR 9 (1937), another Army Board of Review had this to say at 11:

. . . but the record, in its aspect most unfavorable to accused, shows no more than that he absented himself without leave and, while absent, went with conscious purpose to the general locality of his home before surrendering. In the opinion of the Board of Review, the mere fact that he traveled a considerable distance from his station, about 600 miles, is not, under the circumstances of the case and in the absence of other incriminating factors, sufficient to establish intent not to return thereto.

<sup>58</sup> CM 213817, Fairchild, 10 BR 287 (1940).

<sup>59</sup> Id. at 289.

<sup>60</sup> See *United States v. Scheaffer*, 9 CMR 847 (ACM 1953), and the cases cited therein. In that case, the accused also stole an ambulance which he used as a get-away car. Thus, no intent to desert was found in spite of the presence of two factors, from each of which the Manual for Courts-Martial says an intent to desert may be inferred.

<sup>61</sup> 1 (AF)CMR 520 (ACM 1949).

<sup>62</sup> Id. at 527. And in CM 196187 Roath, 2 BR 333 (1931), an Army Board of Review had this to say:

The fact that at the time of apprehension accused was dressed in civilian clothes cannot properly be said to show a fixed intention to desert the service, for the reason that it is a matter of common knowledge that enlisted men in peace-time are permitted to wear civilian clothing outside Army posts.

The problem is not confined to indicia listed in the Manual for Courts-Martial alone. Quite to the contrary, it extends to all other factors which may give rise to an inference of intent to desert except a prolonged absence. For instance, one of the oldest of such factors not enumerated in the Manual is that the absence took place in time of war,<sup>63</sup> for it is then a not unlikely inference that the accused left to avoid the hazards of combat.<sup>64</sup> Yet this too is a factor on which the prosecution may not invariably depend. Thus, one Board of Review held during World War II that "mere absence in time of war, unattended by other incriminating circumstances, cannot in reason be given greater probative force than is given to such absence in time of peace."<sup>65</sup>

Likewise, another weapon of ancient vintage in the prosecution's arsenal, and one which would seem to indicate almost invariably that the accused had severed his employment with the military permanently, is the fact that he took a civilian job. But even this sometimes misfires. In *United States v. Evans*,<sup>66</sup> an Air Force Board of Review declared:

And his civilian employment, in the circumstances, was as consistent with his statement of intention to return to his station as it is with prosecution's theory that an intention to desert could be inferred therefrom.<sup>67</sup>

The examples given above are by no means exhaustive. The fact is, that every circumstance from which a court-martial might logically infer an intent to desert, except for a prolonged absence, is subject to the same infirmity; there are cases wherein such factor lacks any probative value in regard to proving the requisite intent.

Interestingly enough, factors, other than the shortness of the period of absence, which would normally indicate an intent to return and which are traditionally brought forth by the defense, are subject to the same infirmity as are those factors favoring the prosecution. An excellent example of this is the fact that the accused wore his uniform while absent. Traditionally, courts-martial have considered this as an indication of an intent to return, because it shows that the accused was not attempting to

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<sup>63</sup> In *Winthrop*, op. cit. supra note 10, at 638, the author declares:

And, in time of war, an absence of slight duration may be as significant as a considerably longer one in time of peace.

<sup>64</sup> See, for example, CM A-2244, Tyree, 3 A-P 195 (1945). And in ETO 15272, Nichols, 29 ETO 67 (1945), the Board of Review declared:

The uncontradicted evidence shows that each accused left his command without authority on 28 February 1945, and remained absent until his apprehension in the month of May, over two months later. Their departure took place during a period of war and at a particular time when their organization was approaching and expecting to engage the enemy. . . . From these facts, unexplained, the court was justified in inferring that the absence without leave of accused was accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service.

<sup>65</sup> CM 226261, Wilcox, 15 BR 55 (1942).

<sup>66</sup> 1 (AF)CMR 114 (ACM 1948).

<sup>67</sup> *Id.* at 120.

conceal his status. However, during World War II, in numerous cases, Boards of Review in the European Theater of Operations held that the fact that accused wore his uniform lacked probative value because an American in Europe dressed in uniform was less likely to be suspected of being an unauthorized absentee than an American dressed in civilian clothes, since almost all Americans in Europe were soldiers.<sup>68</sup> Many other examples of this same treatment accorded to familiar rules for ascertaining the intent of an absent serviceman can be found.<sup>69</sup> When such time-honored indicia of intent to desert or lack thereof become valueless under the circumstances of particular cases, it is clear that the length of the absence without leave becomes of the utmost significance.

The illusive probative value of other indicia of intent to desert, either singly or in combination, is in sharp contrast to the fixed value of a given duration of absence. Of course, a smaller duration of absence, combined with other circumstances noted above, may outweigh a longer duration, standing alone; however, when the lengths of absence are taken alone, the longer the absence, the stronger is the inference that at some time during that period the accused, in the inner recesses of his mind, formed the intention not to return to military service. Thus, absent other circumstances to the contrary, the longer the absence the stronger the inference of intent to desert.

In addition, the length of absence *always* has probative value, in marked contrast to the other factors noted above, which may, under some circumstances, be wholly devoid of probative value. Even where it is proved by clear and convincing evidence that the accused had compelling reasons to go AWOL, other than a desire to separate himself per-

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<sup>68</sup> See ETO 1629, O'Donnell, 5 ETO 119 (1944) and numerous other cases following it. And in *United States v. McConnell*, 1 CMR 320, 322 (CM 1951), a Board of Review held:

The fact that he was in uniform when apprehended is not controlling. To be dressed in civilian clothes in a theater of operations is far more likely to excite suspicion than to remain in uniform.

<sup>69</sup> For example, the Manual for Courts-Martial, U.S. 1951, ¶ 164a implies that a factor from which a court-martial may infer an intent to return is the fact that the accused had recently re-enlisted or applied for the regular Army. Yet, in *Goulet v. Queen* (1957) 1 Canada C.M.A.R. 19 (1952), the Court-Martial Appeal Board of Canada held that such facts did not tend to negative an intent to avoid active service under the facts and circumstances of that case. And although the Manual for Courts-Martial, following very early precedent, indicates that surrender of the accused is evidence of intent to return, in GCMO 20, Navy Dept., Mar. 15, 1899, the Secretary of the Navy said: "It is not true that the voluntary surrender of an absentee is sufficient in itself to make it impossible to prove desertion; for although, as stated by Winthrop (Military Law and Precedents, page 196), the fact that a person surrenders himself as a deserter after but brief absence may properly be regarded as an extenuating circumstance, such fact is not conclusive as against desertion." Likewise, CMO 16-1913, p. 4, declares that "the subsequent voluntary return of a deserter, even within a reasonable time, does not, in itself, rebut the presumption of guilt arising from his previous act. In the absence of a reasonable excuse in the case of unauthorized voluntary withdrawal from the service, the intent to permanently abandon it must be inferred, and it would be more reasonable to so infer than to presume that an unauthorized voluntary lengthy absence indicated a return at some future time."

manently from the service, nevertheless, the duration of the absence may be weighed in the balance, and may be so persuasive standing alone as to permit the inference that at some period of time he had formed in his mind the idea of not returning to the service.<sup>70</sup> Because of these facts, the length of the absence without leave assumes a primary importance as the only constant in a situation of variables.

From the above noted factors, moreover, there is a subsidiary consequence. Since the length of the absence without leave is the only factor whose legal significance remains constant, as well as the only factor whose precise size can be measured with mathematical certainty, it is the only factor which a court may use to compare one desertion case in a meaningful way with a precedent from a previous case. Looking at the matter from another angle, all other factors must be evaluated in the light of the circumstances of the individual case to determine their probative effect, thus greatly weakening their value for precedent purposes; only the duration of the absence may be considered independently. Indeed, as a practical matter, desertion cases are first compared by the duration of the absences involved; only when the duration of absence is comparable does a military court attempt to line up the other circumstances bearing on the case. In testing for the legal sufficiency of a finding of intent to desert, it would be unheard of for a military court to compare a desertion case in which the accused was absent for 12 hours with one wherein he was gone for 12 years, although all the other circumstances adduced bearing on the intent were similar. Thus, the prolonged absence rule is the only rule for ascertaining intent which lends itself easily to precedent formation. Since lawyers much prefer to have an element established in their favor as a matter of law, rather than leave it to a fact-finding body's unpredictable determination, the prolonged absence rule assumes a primary significance for both prosecution and defense in desertion cases.

#### IV. THE FUNCTION OF THE RULE

Before discussing the present status of the prolonged absence rule in light of the most recent decisions of the United States Court of Military Appeals, it would be well to review the precise function of the rule in proving the requisite intent to remain away permanently.

Formerly, a prolonged absence was deemed to give rise to a presumption of intent to desert.<sup>71</sup> When the absence was very prolonged, statements can be found indicating that such prolonged absence would be

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<sup>70</sup> See *United States v. Linerode*, 11 CMR 262 (CM 1953).

<sup>71</sup> Note 36 *supra*.



considered desertion as a matter of law. Thus, in a World War I case, the Judge Advocate General of the Army declared: "absence without leave may be so prolonged that, unexplained and terminated by apprehension, it may be said as a matter of law, to constitute desertion. . . ." <sup>72</sup> Likewise, a Board of Review declared during World War II: "The absence of the accused for approximately fifteen and one-half months was so prolonged as to create an almost conclusive presumption of intent to desert." <sup>73</sup>

These statements are not correct, both on reason and on authority. An absence, no matter how prolonged, is never desertion as a matter of law. From a prolonged absence, the requisite intent may be inferred. However, a finding of a prolonged absence is not *ipso facto* a finding of desertion. As the Court of Military Appeals held in one of its early cases, the remark of a trial judge advocate that "if a member of the naval service absents himself for a period of forty, fifty, sixty, or a hundred days, he intended to desert and there is no question about it" constituted prejudicial error. <sup>74</sup>

Since no matter how prolonged an absence is, its sole result is to create an inference of the intent, it is always open to the accused to rebut this inference by presenting evidence which would cast doubt on the inference. While such evidence is very generally the accused's own testimony, relating what he did during the absence, it need not necessarily be his own statement. Such evidence may be documentary, or it may consist of the testimony of other witnesses, or other evidence which would so account for his absence as to dispel the inference. Since this evidence is almost always in the exclusive possession of the accused, unless he produces it, the court may rationally infer that his activities during his absence would, at the very least, not dispel the inference, and act accordingly.

While a recital of accused's activities during his AWOL and other circumstances presented in defense may not be enough to rebut the inference, <sup>75</sup> it is always open for him to try, and no matter how long the AWOL is, it is always possible that he can overcome the inference of intent to desert. Thus, in one World War I case, where the accused was absent for a year and a half, the Judge Advocate General held that the accused had successfully dispelled the inference of intent to desert. <sup>76</sup>

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<sup>72</sup> CM 125904, Moore (1919), Dig. Ops. JAG 1912-40, § 416(8), at 268.

<sup>73</sup> CM 266918, Freeman, 43 BR 317 (1944), at 319.

<sup>74</sup> United States v. Nash, 1 USCMA 538, 4 CMR 130 (1952).

<sup>75</sup> CM 318130, Scott, 67 BR 151 (1947). In this case, it was held that a four and a half month AWOL was sufficient to prove an intent to desert although the accused surrendered, wore his uniform, and stayed with sick relatives.

<sup>76</sup> CM 135431, Phillips (1919), Dig. CM Rev. 278 (1920). In this case the accused surrendered. While AWOL, he supported a sick mother, his wife and child, and helped his father.

In another case, an accused had been AWOL for a year and seven months, did not like his station, had had a fight with his commander, had civilian employment, and had evaded apprehension. At trial, the law officer failed to allow statements in evidence which the accused offered as testimony to prove he intended to return. It was held that this was prejudicial error, since the court might have found no intent to desert although evidence to support the inference of desertion was very strong.<sup>77</sup> And finally, in a World War II case involving an absence of two years and seven months, a Board of Review, in reversing for prejudicial error, declared that "it is not inconceivable that the court might have found the accused guilty of absence without leave . . . in the absence of other inculpatory circumstances showing an intention to remain permanently absent."<sup>78</sup>

It therefore appears that the function of the prolonged absence rule is to cast on the accused the burden of explaining the reason for his absence, failing which a court may assume that prolonged absence indicates an intent never to return.

#### V. COTHERN AND ITS PROGENY

Having brought the function of the prolonged absence rule into focus, there now remains the problem of analyzing its current status in light of recent decisions of the United States Court of Military Appeals. Such an analysis must necessarily commence with a consideration of the widely and justly criticized case of *United States v. Cothorn*.<sup>79</sup>

In the *Cothorn* case, the accused was AWOL for only 17 days, but was tried for and convicted of desertion. The law officer, after instructing the court as to the prolonged absence rule, declared:

If the court finds that an absence of approximately 17 days has been proved, it is for the court to determine if such period of absence is a much prolonged one under all the facts and circumstances in this case.<sup>80</sup>

Although the opinion points out that even the trial counsel conceded the fact that this period was not a "prolonged" absence, the Court passes the point by. (Judge Latimer, however, says that such a period could not support the finding, thus appearing to agree that seventeen days is not a prolonged period.)

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<sup>77</sup> *United States v. Peters*, 19 CMR 600 (CGCM 1955).

<sup>78</sup> CM 321618, Gardner, 70 BR 71, 78 (1947). See also *United States v. Swain*, 8 USCMA 387, 24 CMR 197 (1957), where the absence was for 12 years.

<sup>79</sup> 8 USCMA 158, 23 CMR 382 (1957). For some of the havoc wrought by *Cothorn*, see Wheat, "Desertion?," *The JAG Journal*, June, 1958, at 9. See also Jones, "Changing Concepts in the Administration of Military Justice," *Army*, July 1958, at 46, 50. But cf. Riter, "Review of the Law of AWOL," 6 *Utah L. Rev.* 150, 151 (1958).

<sup>80</sup> *Id.* at 383.

In reversing the conviction, however, Judge Ferguson argued against the prolonged absence rule. He said:

The first paragraph of the instructions set forth above states that if the absence alleged is characterized as much prolonged, and is not explained to the court-martial's satisfaction, they might infer from that "fact" *alone* that the accused intended to desert. Thus, on the basis of this first paragraph, the court-martial could believe that if they found that the absence was much prolonged they would not have to consider the intent of the accused.<sup>81</sup>

In support of the above proposition he quotes Justice Jackson's opinion in *Morissette v. United States*,<sup>82</sup> that "a presumption which would permit but not require the jury to assume intent from *an isolated fact* would prejudge a conclusion which the jury should reach of its own volition."<sup>83</sup> (Emphasis by USCMA.)

The above argument has two answers. One of them was given by Judge Latimer, who concurred specially in the result but dissented from the rationale. He declared in substance that the inference was justified from a prolonged absence even if that were the only fact on the record.<sup>84</sup> Even if this were the only thing which could be said in favor of the prolonged absence rule, it certainly should be enough to sustain it.

In addition, however, the principal opinion cannot stand close analysis for the simple reason that it is founded on a complete *non sequitur*. That a fact-finder may infer an intent from a single act does not mean that he need not consider whether the intent existed; if that were the case, he would need only consider whether the act alleged happened. But by

<sup>81</sup> *Id.* at 384.

<sup>82</sup> 342 U.S. 246 (1952).

<sup>83</sup> *Id.* at 275.

<sup>84</sup> Judge Latimer, in 8 USCMA at 161, 23 CMR at 386, said:

As I understand an inference it is a process of reasoning by which one fact sought to be established—in this instance, intent to remain away permanently—may be deduced as a logical consequence of another fact—here an unexplained prolonged absence. I believe it fair to say that that inference is neither illogical nor without substantial support in prolonged absence cases, for, unlike my associates, I am sure that when a member of the armed forces leaves without authority and remains away without explanation for an extended period—such as 17 months or 17 years, as suggested by my associates in their opinion—most well-thinking persons would deduce reasonably that the status had become permanent and that the absentee would not return until compelled to do so. I, therefore, cannot join with my colleagues in their sweeping condemnation of this long-recognized principle.

. . . Thus, the Manual does no more than simply announce that a much prolonged absence which is not satisfactorily explained is a circumstance from which the court members may infer justifiably the intent to desert. If that deduction does not follow logically then I misunderstand human behavior. Of course, if there are other facts or circumstances which tend to support or undermine the inference, they, too, should be considered by the members of the court in ascertaining intent. That, however, does not mean that the triers of fact cannot infer an intent to desert from what is, in fact, an unexplained prolonged absence when there are no other circumstances casting light on the accused's state of mind. Certainly one fact or set of facts may support an inference of intent. . . .

making the inference *permissive*, the fact-finder is required, even where there is no rebuttal evidence,<sup>85</sup> to weigh the inference against his own general knowledge in determining whether the necessary intent existed. As such, the ultimate question of whether the intent existed is never pre-judged, for even when it is established that the absence was prolonged as a matter of law, and even when no rebuttal evidence whatsoever was introduced, the inference, because it is permissive, must still be tested against the fact-finder's general knowledge of human behavior. It therefore seems that the major problem in the principal opinion is one of semantics.

To support its position, the principal opinion invokes some language in *Morissette* which at first glance might be taken as disapproving the right of the fact-finder to draw an inference from a single fact. But this language must be read in context, and not as an "isolated" sentence. The *Morissette* opinion was mostly concerned with a conclusive presumption (*i.e.*, a rule of law) of intent arising from a taking of property,<sup>86</sup> an issue which even the principal opinion recognizes is not here involved. Furthermore, numerous factors on both sides of the issue of intent were involved in *Morissette*. Hence the statement about the permissive presumption based on *one* fact on the prosecution's side must merely mean that when there are *other* factors present in the record, the fact-finder must consider all of them. This statement lends no support to the *Cothorn* opinion, for in desertion cases the prosecution's arsenal all too often consists of the *single*, "isolated" fact of prolonged absence with the accused remaining silent. It simply seems unreasonable to believe that Justice Jackson in *Morissette* found that it would be artificial for a fact finder to infer intent from a single fact if none other appeared.

Furthermore, footnote 34 of that opinion,<sup>87</sup> which is the only authority supporting the statement made by Justice Jackson, cites the two articles on presumptions written by Professor Morgan, chairman of the committee which drafted the Uniform Code.<sup>88</sup> These two articles, if anything, support, rather than contradict, the prolonged absence rule, and constitute merely another item of evidence that the contradiction between the rule and *Morissette* is more imagined than real.

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<sup>85</sup> The student note in 46 Geo. L.J. 354, 356-57 (1958) deals only with situations where in the accused attempts to explain the absence. Since the intent must be considered where there is no explanation offered, a fortiori it must be considered where an explanation is given.

<sup>86</sup> *Ibid.* The point, at best, is collateral, and need not be gone into.

<sup>87</sup> Note 81 *supra*.

<sup>88</sup> Morgan, "Instructing the Jury on Presumptions and Burden of Proof," 47 Harv. L. Rev. 59 (1933); Morgan, "Some Observations Concerning Presumptions," 44 Harv. L. Rev. 906 (1931).

The only other case support in *Cothern* consists of Judge Ferguson's two previous opinions in *United States v. Miller*<sup>89</sup> and *United States v. Ball*,<sup>90</sup> the former relying on the latter. In the latter case, we find the opinion relying on one of Professor Morgan's articles on presumptions,<sup>91</sup> and on Wigmore on *Evidence*.<sup>92</sup> Thus, it can be said that *Cothern*, derivatively, relies on Wigmore on *Evidence*. But, as was noted above, Wigmore wrote the evidence portion of the 1917 Manual for Courts-Martial, which included the first modern statement of the prolonged absence rule.<sup>93</sup> Hence, in *Cothern*, we find the singularly ironic phenomenon of Wigmore on evidence (civilian) being relied upon to overrule Wigmore on evidence (military).

Finally, there is one remaining prop to support the opinion in the *Cothern* case. The only other citation to any authority of any kind is as follows: "See, for a general discussion on other aspects of this problem, H. H. Brandenburg, Proof of Intent to Desert 17 *The Federal Bar Journal*, April-June, 1957."<sup>94</sup> The author has been informed by Captain Brandenburg that no such article has ever been published. The article may presently be found in its unpublished form in the Navy JAG library. Hence, the opinion in *Cothern* relies on two inapplicable cases and one article which, because it was not published, could not be analyzed by the military bar before it found its way into the overturning of a long-established rule of law.

The "author" of the phantom article cited in *Cothern* has, however, written a defense of *Cothern* in which he concedes that the case "overturned a standardized procedure for proving desertion which has been a fixture in the American military scene since the earliest days of our military establishment."<sup>95</sup> He also concedes that the case threw great confusion into the law. In defense of *Cothern*, however, he asserts that the "prolonged absence rule effectively made a deserter out of many a sailor whose only real offense was unauthorized absence for 60 days or more." He also, on the one hand, complains that the sentences for desertion were too uniform, while on the other he belabors the prolonged absence rule "as a breeding place for this lack of uniformity."

This defense, however, will not stand close scrutiny. The possibility that an absentee without leave who always intended to return would be convicted of desertion is very remote. The charge of desertion must run

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<sup>89</sup> 8 USCMA 33, 23 CMR 257 (1957).

<sup>90</sup> 8 USCMA 25, 23 CMR 249 (1957).

<sup>91</sup> Morgan, *supra* note 88.

<sup>92</sup> Wigmore, *Evidence* (3rd ed. 1940), § 2491(2) cited at 8 USCMA at 31, 23 CMR at 255.

<sup>93</sup> Note 38 *supra*.

<sup>94</sup> 8 USCMA at 161, 23 CMR at 385.

<sup>95</sup> Brandenburg, "Desertion After *Cothern's* Case," 4 JAG J. 23 (Dec. 1957—Jan. 1958).

the gauntlet of the investigating officer, court-martial, staff judge advocate, convening authority, and board of review. In each of these steps, the accused's guilt must be convincing beyond a reasonable doubt. If sailors are being convicted, right and left, of desertion, when they are only absentees without leave, then something is very wrong with the administration of naval justice, and not with the prolonged absence rule. The truth of this sweeping statement, however, is at the least doubtful, for naval boards of review seem not in the least reluctant to reverse a conviction for desertion even when the absence is prolonged as a matter of law.<sup>96</sup> At any rate, the far-fetched possibility that an incorrect conviction might slip through all of these screening processes hardly justifies throwing the baby out with the bath. Indeed, it would be far more accurate to say that *Cothern* effectively made an absentee without leave out of many deserters from the services.

The major defect of *Cothern* is that it fails to recognize the article denouncing desertion for what it actually is, the application of a criminal sanction to the violation of an employment relationship.<sup>97</sup> This analysis was recognized as early as the time of Lord Coke,<sup>98</sup> and yet the Court of Military Appeals still persists in talking about purely military offenses in the same way that it discusses civilian crimes. Thus, the principal

<sup>96</sup> See, for example, *United States v. DeGraffenreid*, 23 CMR 659 (NCM 1957), where the AWOL was for 110 days.

<sup>97</sup> No better analysis of the basis of absence offenses can be gained than from the vantage-point of their effect on the military. For example, the following appears in the *N.Y. Times*, May 20, 1958, p. 20, col. 3:

Thomas S. Gates Jr., Secretary of the Navy, used Armed Forces Day last Saturday as the starting point of a campaign to accentuate the positive. In a letter to all commanding officers of ships and stations in the Navy and Marine Corps accompanying a new General Order No. 21, he started a comprehensive attempt to improve naval leadership.

Mr. Gates said in his letter that "the increasing disciplinary problems in the Naval Establishment, especially AWOL (absent without leave) rates, brig population, have been a matter of grave concern to me." He continued:

"The AWOL rate rose 30 per cent in 1957 over 1956 and courts-martial continue at a rate of 1,000 a week. The human and financial losses in terms of wasted manpower cannot be afforded, either by the Navy or by our country.

Many of our problems can be resolved with leadership, better personnel management, and a sincere evaluation of basic moral standards."

It may be that the student commentator in Note, 46 *Geo. L.J.* 354, 359 (1958) was groping in this direction when he discussed public policy and military necessity as the basis of the prolonged absence rule.

<sup>98</sup> *The Case of Soldiers*, 6 *Co. Rep.* 27a, 77 *Eng. Rep.* 293 (1601). See also *The Soldier's Case*, *Hutt.* 134, 123 *Eng. Rep.* 1154, *Cro. Car.* 71, 79 *Eng. Rep.* 663 (1628). And another illustration of the fact that the law of desertion, in its formative years before the first Mutiny Act of 1689, grew out of the law of master and servant, in addition to the examples in admiralty law, is contained in Marshall, *Military Miscellany* 12 (1846), where it is stated: "During the sixteenth century, and for a long time after, the recruiting of the Army appears to have depended chiefly upon the Captains of companies, each captain recruiting his own company, which seems to have been in some measure his own property." Compare also the striking similarity of the derivation of UCMJ, Art. 85(a)(3) (see *Grant v. Gould*, 2 *H. Bl.* 69, 126 *Eng. Rep.* 434 (1792)) with the old action of seduction per quod servitium amisit.

opinion declares that "An absence of seventeen days, or seventeen months, or seventeen years, is only an absence—though its probative value may be great—and is not a substitute for intent."<sup>99</sup> Nevertheless, if an employee of a private company took off for seventeen months or seventeen years,<sup>100</sup> would his employer feel certain that he was gone forever? There is no question but that he would. Would a government employee who left for seventeen months or seventeen years without communication with his agency return to find his job waiting for him? He certainly would not. What if the law clerk to one of the judges who was in the majority in *Cothern* left for a period of seventeen months or seventeen years, would that judge leave the position vacant in the expectation that such clerk would some day return? To say the least, it seems most doubtful.

True it is that the application of criminal sanctions requires a higher degree of certainty than would the application of civil penalties. But that certainty is gained in just the same way as any lower degree of certainty. Thus, in spite of the tenderness of admiralty law to seamen, a prolonged absence gives rise to an inference of intent to desert in admiralty,<sup>101</sup> and until 1915, desertion by a seaman was a crime,<sup>102</sup> just as it is in the military. Today, although desertion in admiralty law only entails civil forfeitures, the period of absence denominated as "long" is much shorter than in the military.<sup>103</sup> If a short period of absence without leave is sufficient to support an inference of intent to desert by a preponderance of the evidence, a much longer period should sustain such

<sup>99</sup> 8 USCMA at 161, 23 CMR at 385.

<sup>100</sup> Of course, even when there is a contract, an employer may discharge an employee for even a very short absence from his job. See, for example, *Craig v. Thompson*, 244 S.W.2d 37 (Mo. 1951); *Georgiades v. Glickman*, 272 Wis. 257, 75 N.W.2d 573 (1956); *Blum Bros. Box Co. v. Wisconsin Labor Relations Board*, 229 Wis. 615, 282 N.W. 98 (1938).

<sup>101</sup> *Cloutman v. Tunison*, supra note 11. And in *Phiehl v. Balchen*, 19 Fed. Cas. 622, No. 11,137 (S.D.N.Y. 1844), the court declared at 624:

. . . there is nothing to excuse the libellant in concealing himself on shore, and continuing his absence from the vessel until her departure from Buenos Aires. The vessel remained seven or eight days longer at that port; and it is proved that the master inquired where the libellant could be found. [T]here was ample time for the libellant to have returned to his service on board, had he desired to do so. The lodgings of the master on shore were well-known to him, where he could have reported himself at once. It must be presumed he avoided doing either, because he intended to abandon the vessel. . . . I feel bound to hold that he voluntarily left the vessel at Buenos Ayres without leave, and without intending to return to her. Such abandonment of the ship is a desertion.

<sup>102</sup> *The Itulier*, 257 Fed. 712 (2d Cir. 1919). See R.S. of 1877, 4596, Act of 7 June 1872, 17 Stat. 273, c. 322, § 51.

<sup>103</sup> In *Flynn v. Waterman S.S. Corp.*, 44 F. Supp. 50 (E.D.N.Y. 1942), the libellant, a seaman, left his ship without leave on July 16th and remained away for only 13 days. Yet Chief Judge Inch held that he had deserted, saying at 53:

The ship was compelled to remain tied up until July 29, when the new crew from San Francisco arrived and took over, then she sailed. During this long period it is plain from the testimony that any of these strikers could have come back on board, reported for duty and gone to work, but none, except as stated, did so.

inference beyond any reasonable doubt. In both cases, the difference is one of degree only, and not of kind. Therefore, in failing to recognize the essential nature of desertion as an offense against an employment relation, the Court of Military Appeals in *Cothern* promulgated unsound law.

Not only is *Cothern* wrong in itself, but it has spawned progeny which are at once both numerous and hideous. For example, in *United States v. Burgess*,<sup>104</sup> decided the same day as *Cothern*, the Court of Military Appeals, by a divided vote, reversed a conviction for desertion where the accused was AWOL over six months because the law officer instructed the court that it might find the intent from the prolonged absence alone. Likewise, in *United States v. Nelson*,<sup>105</sup> the same result was reached, again based on *Cothern*, where the accused was AWOL for fifteen months. And in *United States v. Soccio*,<sup>106</sup> a like result was reached where the accused was away for four and a half years. And there are other decisions, growing in geometric progression, which bid fair to become even more extreme.<sup>107</sup>

To what extent *Cothern* and its progeny represent the military law cannot now be told with certainty. To delve into this question would entail a jurisprudential discussion of whether judges make, find, or interpret law, and whether their decisions are law or merely evidence of what the law is. Whether future changes in the court's personnel will result in a reversion to the traditional prolonged absence rule also cannot be predicted at this time. The *Cothern* case so far flies in the face of *stare decisis*,<sup>108</sup> legislative interpretation,<sup>109</sup> and every other canon of

<sup>104</sup> 8 USCMA 163, 23 CMR 387 (1957).

<sup>105</sup> 8 USCMA 278, 24 CMR 88 (1957).

<sup>106</sup> 8 USCMA 477, 24 CMR 287 (1957).

<sup>107</sup> See, for example, *United States v. Gravley*, 9 USCMA 120, 25 CMR 382 (1958) (AWOL for 2 yrs. 5 mo.); *United States v. Krause*, 8 USCMA 746, 25 CMR 250 (1958) (AWOL for 2 yrs.).

<sup>108</sup> This is not to say that the Court of Military Appeals should never change a rule of military law. But such changes should be made only after an exhaustive review of all of the preceding authorities and only for cogent reasons, and where the rule has been so long in existence, these reasons ought to be absolutely compelling. To this writer, at least, *Cothern* is not even mildly persuasive, let alone compelling. No comment is necessary on whether the review of authorities in *Cothern* was "exhaustive."

<sup>109</sup> The opinion suggests that there may be something in the Uniform Code of Military Justice to support it. It states: "Insofar as this portion of the Manual sets forth an erroneous principle of law—as distinguished from a rule of evidence—this Court is not bound thereby. Where the Manual conflicts with the Code or the law, as interpreted by this Court, it must give way." 8 USCMA at 160, 23 CMR at 384. Not a shred of legislative history is cited to support this statement, and none exists. Through repeated reenactments of the Articles of War and the Uniform Code of Military Justice, while the prolonged absence rule in the manuals for courts-martial remained unchanged, Congress may be presumed to have acquiesced in, or even adopted, the rule. At any rate, the rule is widely known, and since there is no evidence of legislative disfavor, at the very least it cannot be held to be contrary to the Code. See, for example, the following statement



law-formation by the judiciary that one is almost tempted to say that it represents, not the law, but merely a temporary judicial aberration, and that the tradition-laden prolonged absence rule is still good law, although for the time being in eclipse.

Lower military courts are, of course, compelled to follow *Cothern*. Whether it will be followed by other courts not in the military justice system cannot be foretold at this time. For example, will it commend itself to state courts reviewing national guard courts-martial decisions?<sup>110</sup> There are no decisions on this yet. Likewise, will federal courts follow it? Again, authority is scanty.

One case does, however, throw some light on this problem. In *Mancuso v. United States*,<sup>111</sup> the defendant was tried for harboring a deserter, knowing him to be such. Since the elements of this crime require that the absentee be proved to have intended to desert beyond a reasonable doubt, it follows that this case involved the identical problem involved in every desertion case. The defendant was convicted by the United States District Court for the Eastern District of Michigan and, on appeal, the conviction was affirmed by the United States Court of Appeals, which in the course of its opinion, declared:

of Professor Morgan in Hearings before A Subcommittee of the Committee on Armed Services, U.S. Senate, 81st Cong., 1st Sess., on the UCMJ, Apr. 27, 1949, p. 37:

You will notice as you study the punitive articles that we have consolidated a number of them in the same fashion as we have consolidated a number of other provisions throughout the rest of the code. An example of this is the crime of desertion, which is now contained in article 85. The same material was heretofore found in Articles of War 28 and 58 and in Articles for the Government of the Navy, 4 (par. 6) and 8 (par. 21).

See also Index and Legislative History, UCMJ, at 1225.

Furthermore, there is also evidence that the prolonged absence rule was before the congressional committees considering the draft of UCMJ at least twice. In the Index and Legislative History, UCMJ, the following appears at HH 789, referring to whether lawyers were needed before all general courts-martial (statement by Col. Frederick B. Wiener):

It is unnecessary because a lot of your cases that go before general courts are really police court cases. A man goes A.W.O.L. for more than 6 months. This is prima facie desertion and it is going to be tried by general court.

Likewise, at HH 791, this continues:

"Colonel WIENER: . . . an ordinary desertion case, what is there to it?"

"Mr. HARDY: How do you distinguish as to who is going to distinguish between the ordinary desertion case and one that may be somewhat involved?"

"Colonel WIENER: The staff judge advocate because before he recommends that the case go to trial, he has seen the transcript of evidence, or it is a simple case of putting in a report and showing the apprehension a year later."

And again, at HH 1264, there is the following:

"Mr. SMART: . . . I find that in the event of, we will say a Navy enlisted person, if he is AWOL in excess of 10 days he goes into a straggler status and if he continues to be AWOL for as much as 30 days he then goes into desertion and his file goes to the Chief of the Bureau of Personnel. Is that correct, Captain Woods?"

"Captain WOODS: Yes."

<sup>110</sup> This author has previously pointed out their right to do so. See Comment, "State Court Review of National Guard Courts-Martial and Military Board Decisions," 41 Cornell L.Q. 457 (1956).

<sup>111</sup> 162 F.2d 772 (6 Cir., 1947).

The single circumstance that DeRocco took French leave for 178 days would, of itself, seem sufficient evidence that he was a deserter; and, this being known to appellant, it is clear that civilian Mancuso violated the statute in harboring sailor DeRocco.<sup>112</sup>

Thus, wherever else *Cothern* may or may not be the law, in at least one jurisdiction it is not the law—the federal courts in the home state of the judge who wrote the opinion.

It is worthy of note that the opinion in *Cothern* made no reference to *Mancuso*. Had it done so, it might have explored an interesting possibility. Suppose that *X* was absent without leave from the service for a prolonged period. Knowing this, *Y* harbored him in the City of Detroit. Later, both were arrested, and in each case the only evidence the prosecution had to prove the intent to desert was the evidence of "prolonged" absence. *Y* could be convicted of knowing that *X* was an absentee who intended not to return, by a federal court, while *X* could not be convicted in military court of being an absentee who intended not to return. Thus, under *Cothern*, a court-martial could not be morally certain of the existence of a serviceman's intent, while, on the same state of facts, a civilian jury, knowing less of the service, could be morally certain that an accused knew for a fact that the serviceman's intent existed. A theory which could bring about such a result can hardly justify the destruction of precedent so old that the memory of military minds runneth not to the contrary.

## VI. CONCLUSION

Just as military law as a whole is a living law, so the law of desertion is also based on human experience. Desertion has been a military crime and serious problem since the time men fought with bows and arrows,<sup>113</sup> and it will continue to be one when interplanetary travel is commonplace. It has been distinguished since ancient times from absence without leave by reason of the difference of intent involved.<sup>114</sup>

The prolonged absence rule has been a part of the law of desertion since before court-martial records were kept.<sup>115</sup> It has been used "time out of mind" by military courts because, based on human experience over centuries of time, it is an accurate reflection of the actual intent of the accused. It could not have existed so long unless it had stood the test

<sup>112</sup> *Id.* at 773.

<sup>113</sup> See the Case of Soldiers, *supra* note 242; *King v. Dale*, 3 Mod. 124, 87 Eng. Rep. 80 (1687), *aff'd*, 2 Show. 511, 89 Eng. Rep. 1071 (1688); and Green, "Review of Avins, The Law of AWOL," 56 Mich. L. Rev. 833 (1958).

<sup>114</sup> Bruce, *The Institutions of Military Law* 237 (1717).

<sup>115</sup> Judge Latimer declared in *Cothern* that this was "a rule which is founded on good sense and logic and has long enjoyed approval in military forums." 8 USCMA at 161-62, 23 CMR 385-86. If anything, it seems that this characterization is overly conservative.

of human experience well. A rule which is so firmly rooted in human experience cannot be brushed aside by any passing theory. The repetition of such experience stands as a perpetual protest against any such theory, however well refined its logic. So long as human behavior and human motives remain basically the same, the rules of the military law must remain basically the same.

Some day, a court-martial will face a case of a serviceman accused of deserting his spaceship. The court will probably consider whether he left his spacesuit on the ship, whether travel to another planet is travel for a considerable distance, and similar issues. It is predicted, however, that the most important issue will still be, whether his absence was "much prolonged."