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British Courts Martial in the Era of the First World War, 1914–1920

Introduction: The Unique Challenge of the First World War to British Military Law

Given the many challenges presented to the British military by the First World War, it is easy to overlook the implementation of military law and its enforcement through the legal process – courts martial. Few histories of the war include anything about courts martial and those that do, naturally, focus on the relatively few, but hugely significant cases of capital punishment. In reality, though, military law and its enforcement was constantly present for the millions of men who served in the military. The courts martial were an essential, but time-consuming and resource-heavy, element in this process. That so many men were simply reprimanded on conviction – an outcome that might have been achieved summarily – is an indication of the importance placed on the actual process itself. The vast volume of statistics compiled by the War Office and published in 1922 includes a whole section dedicated to discipline. The statistics – based on the data collected by the Judge Advocate General – are invaluable. But they do have some limitations. Sentences shown are only the final ones and not necessarily those passed by the courts. Instead, they record the outcome as confirmed by the relevant commander-in-chief (c-in-c), who often commuted or altered sentences. The work of the courts martials, therefore, is often obscured. Furthermore, the statistics show overall numbers and do not break them down by theatre of war.

These limitations are understandable given the enormity of the task facing the compilers in 1920. However, by focusing on a smaller group within these otherwise unmanageable statistics, it is possible to provide something of an insight into these areas. Taking as its starting point an overview of British courts martial and military law during the First World War, this chapter will then focus on the trials of officers to show how the legal process was largely shaped by context. Officers, though, were not typical of military forces as a whole and it will also be shown that officers benefitted from certain privileges in both the law and in process, but higher standards were expected of them too. Therefore, whilst it is possible to draw some general conclusions from analyses of this small sample group, this chapter will also highlight key differences.

A rapidly expanding army, navy – and in 1918 the addition of an air force – brought literally millions of men under the jurisdiction of a military law designed

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for far smaller "*gendarmerie*" style deployment of forces. The army establishment rose from a pre-war total of just over 800,000 to one of almost 5,337,000 by the armistice in November 1918.[1] The military code was set out in the annually renewable Army Act and had remained largely unchanged since 1881.[2] Therefore, those who had authored the military code – which had then been carried over into the Army Act 1914 – had not anticipated such changes in terms of size of the army, nor in its make-up. Procedures and structures were ill-equipped to deal with these challenges and, worse still, the vast majority of these new soldiers (and it is equally true of sailors and airmen) had little or no pre-war military training. For these so-called "citizen-soldiers"[3] military discipline was alien, confusing, and often viewed with contempt.

There were a number of different types – or levels – of court martial. But the main two for the purposes of this chapter are the General Court Martial (GCM) and its "in the field" offspring, the Field General Court Martial (FGCM). In the 1914 edition of *The Manual of Military Law*, the minimum requirement for staffing these courts was:

- For GCM held abroad – no fewer than five officers, each holding their commission for at least three years.[4]
- For FGCM held abroad – the normal requirement was for three officers, but this could be reduced to two.[5]

In practice this was an additional significant strain on the manpower of the officer corps given that during the war there was a total of 304,262 trials of officers and men by court martial.[6] This equates to almost 6,000 for each month of the war, although the distribution was far from even of course. This monthly average

1 War Office, *Statistics of the Military Effort of the British Empire during the Great War* (London: HMSO, 1920), 30–37.

2 Gerard Oram, "'The Administration of Discipline by the English is Very Rigid': British Military Law and the Death Penalty (1868–1918)," *Crime, Histoire et Sociétés/Crime, History and Societies,* 5.1 (2001): 100–110.

3 This term "citizen-soldiers" is not one that I am comfortable with. It implies a certain legal and constitutional status that the overwhelming majority of British men (let alone women) simply did not possess. However, it is a term that is in common use and in this context its meaning has come to refer to civilian volunteers.

4 *Manual of Military Law* (London: HMSO, 1914), 427.

5 *Manual of Military Law* (1914), 632.

6 *Statistics of the Military Effort*, 643.

is almost twice the total for the whole year immediately prior to the outbreak of war in 1914.[7]

Nor did the implications of rapid enlargement of the army end there. The officer corps – those upon whom the burden of staffing the courts martial would fall – also expanded from approximately 28,000 in 1914 to almost 165,000 by the end of the war.[8] These men were drawn from various sources: the reserve; retired officers; new recruits and some promoted from the ranks. Many had little experience of army life, let alone military law and its procedures. The lack of any legal knowledge or training of these officers was a serious concern. To counter this, the War Office created the role of Court Martial Officers (CMO) – often legally trained officers who could assist and advise courts martial. Although the number of CMOs was gradually increased throughout the war, there were far too few: in 1916, for example, there were just 34 CMOs.[9] Therefore, the vast majority of trials took place without any such legal oversight.

One other initiative was the production in 1916 of a small pocket-sized booklet – *The A.B.C. of Military Law* – designed to "provide officers, warrant officers and non-commissioned officers with a simple compass whereby to steer their way through the intricacies of military law".[10] But the lack of legal knowledge of those charged with implementing military justice through courts martial remained a key concern and was raised by the post-war committee constituted to enquire into the rules and procedures of courts martial. In its findings – published in *The Darling Report* 1919 – the committee recommended expanding the role of CMO and making it permanent.[11]

Finally, after 1916, a new phenomenon emerged that would have profound implications and altered the relationship between leaders and those whom they led: the conscript. I have argued elsewhere that the arrival in theatres of war of men who were not there of their own volition posed a significant challenge to military discipline and consequently to the processes by which it was enforced. This, I have further contended, impacted on the very nature of military law in Britain with wider implications too for future political policy.[12]

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7 *Report of the Committee Constituted by the Army Council to Enquire into the Law and Rules of Procedure Regulating Military Courts Martial* – hereafter referred to as the *Darling Report* (1919) (London: HMSO, 1919), 2.

8 *Statistics of the Military Effort*, 234.

9 Gerard Oram, '"The Administration of Discipline by the English is Very Rigid,'" 103.

10 Captain Francis Grierson, *The A.B.C. of Military Law: A Concise Guide for Officers, N.C.O.'s* [sic] *and Men* (London: T. Fisher Unwin, 1916), vii.

11 *The Darling Report* (1919), 2–3.

12 Gerard Oram, *Military Executions during World War 1* (Basingstoke: Palgrave, 2003), 41–42.

Briefly, courts martial represented the visible face of military justice. Whilst most transgressions were dealt with informally and thus remain largely hidden from the view of contemporaries and the historian alike, those who were tried and found guilty by courts martial would often have their sentences promulgated widely. Of particular significance are those who were condemned to be executed. The death sentence attracted attention in general orders, on parade, in the national press and even in parliament. Courts martial and the review process that followed, however, appears to have shrunk from exacting the ultimate penalty on men who had been conscripted. As far as can be ascertained, no conscripts were executed during the war. Less restraint appears to have been exercised for regular, territorial, or new army recruits – all of them volunteers, of course. But even then, significant variations can be detected. Broadly speaking those serving in regular divisions were subject to the harshest discipline, those in the territorial force divisions tended to experience the most lenient and the new armies fell between the two. However, this generalisation should be regarded as a very loose characterisation; divisions varied within each of those broad categories.

Conscription and the status of conscripts formed a key focal point in the debates about the retention or abolition of the military death penalty that followed the war. In a 1924 memorandum to the Army Council, the Labour government's under-secretary of state for war – Clement Attlee – proposed the abolition of the death penalty for most military offences, arguing that modern wars were likely to be fought by conscripted men for whom such a penalty was entirely inappropriate.[13] A broadly similar point was made by Lord Thomson, Secretary of State for Air, in the parliamentary debate on the subject in May 1930. A modern army of conscripts, he argued, should not be subjected to the kind of military law that was originally designed for mercenaries and near criminals.[14] Like Attlee, who had seen active service at Gallipoli, Lord Thomson was a veteran of the First World War and had served on the Western Front and then commanded the Royal Engineers in Palestine in 1917–1918. One of his opponents in the debate was his former Commander-in-Chief in Palestine, Lord Allenby, who, along with other notable figures such as Lord Plumer (in the Lords) and Winston Churchill (in the Commons) viewed the military death penalty as essential to army discipline. This placed the Labour-led House of Commons in conflict with the Tory-dominated House of Lords; a dispute that was eventually settled in favour of the former.[15]

13 John McHugh, "The Labour Party and the Parliamentary Campaign to Abolish the Military Death Penalty, 1919–1930," *The Historical Journal* 42.1 (1999): 242.

14 McHugh, 248.

15 McHugh, 233–249.

Courts martial dealt mainly with military offences. That is, those specific to military service and outlined in the Army Act (the focus of this chapter) or the Naval Discipline Act. Offences such as mutiny, desertion, cowardice, self-inflicted wounds, disobedience, sleeping on post and so on fall into this category. So too did conduct prejudicial to military discipline, which was contrary to Section 40 of the Army Act. This was a more general offence that was not prescribed and might include a range of acts, omissions, or other circumstances. The courts martial also often dealt with offences that were contrary to criminal law. Section 41 of the Army Act allowed for courts martial to proceed in such cases where the crime was "punishable by ordinary law of England" and the alleged offender was on active service.[16] This, then, could include a very wide range of offences. But it tended to be reserved for use mainly in more serious cases.

Responsibility for courts martial, for prosecution and for overseeing the judicial system fell to the Judge Advocate General (JAG) – a position created in the late sixteenth century. After the First World War there was some disquiet about the lack of separation of the various responsibilities of the JAG, but this was not altered until 1958. At the beginning of the war, the post of JAG was held by Sir Thomas Milvain, a barrister and also a (Conservative) Member of Parliament. He held the post until his death in 1915 whereupon it passed to his deputy Felix Cassel, also a barrister, who held it until 1934. Cassel had joined the London Regiment on the outbreak of war and saw active service in France until August 1915 when he was requested by Milvain to be his assistant. Interestingly, Cassel had been born in Germany.

1 The Judicial Autonomy of Courts Martial

Despite being the visible representation of military law, courts martial were not merely a blunt instrument by which discipline was imposed on an oppressed or coerced rank and file. In reality, they possessed a degree of autonomy, some judicial independence and could even act as a moderating influence to lessen the impact of the experience of war. In some cases, the extremes of military law and its potentially harsh penalties were actively avoided by what the eighteen-century legal commentator Judge Blackstone called "pious perjury". Blackstone had observed how some juries in England would convict of larceny but only at a much lower value than was really the case so that the threshold for capital punishment

16 Army Act 1914, section 41, cited in *Manual of Military Law* (1914), 413–412.

was not met.[17] A practice similar to this appears to have been quite common in the application of British military justice in the First World War. This was most visible in the British force in Italy during 1917–1918 where courts martial tended to convict of the non-capital offence of absence for many men charged with desertion, thereby averting any possibility of an execution. This practice appears to have existed in all theatres of the war but can most easily be detected in Italy.[18] One plausible explanation for this is that the Commander-in-Chief (the Earl of Cavan for most of the Italian campaign) was more tolerant of this practice than were Commanders-in-Chief in other theatres. Lord Allenby in Palestine, for example, regarded the death penalty as essential to military discipline. In the 1930 parliamentary debates on the abolition of the military death penalty, Allenby was one of a number of former military commanders, sitting in the House of Lords, who were prepared to cause major division between the Houses of Commons and Lords by vigorously opposing the Labour Government's bill.[19] But the Earl of Cavan had presented more moderate character traits during the 1924 debate on the matter. Whilst recording his objection to its abolition Cavan made it clear that he would nevertheless comply and accept the views of the Ministerial Members of the Army Council.[20]

On the Western Front, Douglas Haig (Commander-in-Chief from late 1915 to the end of the war) even intervened in an attempt to end the practice of "pious perjury". In a General Routine Order dated 27 January 1915 Haig, then commander of 1st Army, attempted to discourage courts from finding a man charged with desertion guilty of the lesser charge of absence:

> Proof that the absence did in fact lead to the avoidance of any such duty raises a presumption that the accused absented himself with that object in view; and the Court is entitled to act on that presumption unless the accused can prove that it is not well founded . . . if a soldier is charged with desertion, it will depend upon the evidence **adduced by the accused** [my emphasis] whether the Court find him guilty of that graver [capital] charge, or the less serious [non-capital] one of absence only.[21]

This attempted interference with the judicial independence of the courts martial indicates two things in particular: that the courts martial were perceived (by Haig

17 William Blackstone, *The Oxford Edition of Blackstone's Commentaries on the Laws of England: Book IV: Of Public Wrongs* (Oxford: Oxford University Press, 2016), 161.

18 Gerard Oram, "Pious Perjury: Discipline and Morale in the British Force in Italy, 1917–1918," *War in History* 9.1 (2002): 412–430.

19 McHugh, 249.

20 National Archives, Cabinet Papers, CAB232/24.

21 *Extracts from General Routine Orders issued to the British Armies in France by Field Marshal Sir Douglas Haig,* Part I (London: HMSO, 1918), 59.

in this case) to have exercised a degree of autonomy; and that the Commander-in-Chief might seek to undermine that independence. Most of all, though, by shifting the burden of proof from the prosecution and placing it on to the defendant, Haig's order is arguably in contravention of the guidance on the burden of proof set out in *The Manual of Military Law* of 1914.[22]

Significantly, the *Darling Report* of 1919 singled out the independence of the courts martial as being essential:

> It is of the utmost importance that members of Courts-Martial should feel that they are absolutely free to exercise their judicial discretion in cases which come before them, and also that all ranks in the Army and members of the public should have confidence that the free exercise of such discretion is not limited or interfered with by any superior authority.[23]

The committee further censured those who had sought to do so by adding: "We are satisfied that during the present war officers have, in one or two instances, issued circulars upon the subject of sentences in terms which cannot be justified."[24] A former CMO – Major Gerald Hurst – recorded in an article immediately after the war how commanders were often critical of officers whom they saw as "too kind-hearted" to be efficient disciplinarians. In one case, he claimed that the president of a court martial was required to "furnish in writing a full explanation of his conduct in allowing the acquittals [of two men charged with plundering a shop] to take place".[25] Judicial independence, then, appears to have been an important feature of the courts martial. But clearly there were attempts to compromise this by higher ranking commanders.

22 *Manual of Military Law* (1914), 58–59. The manual does discuss circumstances when shifting of the burden of proof to the accused is justified. But this only occurs when through "proof of facts" during trial certain presumptions can be made. As for intent, which is the key component that separates absence and desertion in law, the manual explicitly cites self-inflicted wounds as an example, but states that the ***wilful*** infliction of such a wound must be proven before intent can be presumed. Interestingly, the 1929 edition of the *Manual of Military Law* (London: HMSO, 1929), 72–73 introduced more ambiguity in respect of the burden of guilt and appears to reflect Haig's interpretation more closely.

23 *The Darling Report* (1919), 8.

24 *The Darling Report* (1919), 8.

25 Major Gerald Hurst, "The Administration of Military Law," *Contemporary Review*, Vol. CXV (1919), 321–327.

2 Rank and Status

British military law of the period partly reflected ideas about class and status in wider society. With what appears to be an assumption or expectation about the social status of both officers and men respectively, these ideas were formalised in the way each were treated by the military code, by courts martial and by legal process. Officers, it was expected, should be tried by the more formal GCM and not by FGCM. In practice, the First World War placed so much strain on the legal system and the high staffing requirements of the former that this stipulation was increasingly circumvented. Officers also had the right to petition the king – in effect, appeal the verdict and sentence of the court, whereas men of the ranks had no such recourse. For officers, then, the legal process was far closer to normal civilian criminal courts than it was for the men of the ranks. For them, any brush with military justice was more akin to a continuation of the strict hierarchy and discipline associated with their rank.

Sentencing also reflected status with some punishments deemed – through the formal military code – to be appropriate for men of the ranks and others for officers. The latter, for example, could be cashiered. This was a form of dismissal that carried with it a large degree of ignominy and social stigma. The practical implications were also significant and entailed dismissal from service, loss of pay and pension. Following the introduction of conscription in 1916, cashiered or dismissed officers were also liable to be re-enlisted as private soldiers. Some believed that to be cashiered or dismissed was worse than the prospect of capital punishment owing to its longer-term impact and implications for a gentleman who would lose all status as a result. In 1912, Sir F. Banbury, Conservative MP for the City of London, had told the House of Commons that it was not necessary to subject officers to capital punishment. The threat of dismissal, he said, was sufficient for an officer because "dismissal meant disgrace and ruin for the rest of his days".[26]

But perhaps the most visible difference in how officers and men experienced military law was in the sentences that courts martial imposed on them. The ultimate punishment – the death penalty – was available to courts in all cases (although analysis does indicate that it was differently applied – see below). However, a form of corporal punishment was only available to courts when sentencing men of the ranks. Flogging and whipping had been partially abolished in 1867 following the death from such punishment of Private Slim and despite a return to its use in

26 *Parliamentary Debates* (Hansard), vol. XXXVI, column 1286. Also reported in *The Times*, 11 April 1912.

the Zululand campaign in 1879, it was fully abolished by the 1881 Army Act.[27] Interestingly, it was still practised as a punishment for Indian (and other colonial) troops during the First World War – a reflection of persistent ideas about race. However, the gap left by the abolition of flogging was filled by something called Field Punishment. This fell into two categories. Both Field Punishments (number one and number two) entailed the placing of the convicted man in fetters or handcuffs. Field Punishment No 1 differed in that the prisoner was also attached to a fixed object.

The widespread use of Field Punishment Number One, its nature and the ritual attached to it, however, have Foucauldian implications.[28] This particular punishment entailed immobilisation of the convicted soldier by being attached to a fixed object for two hours a day for three out of every four days up to a maximum of 21 days.[29] Often this meant being tightly fixed to the wheel of a cart, gun carriage or other object where the man would be left immobile and "on public display . . . in order to shame and humiliate him".[30] The extreme discomfort caused by Field Punishment Number One indicate that despite the abolition of flogging the military retained its control over the body of the accused and through this and the ritual of public display it maintained dominance over men of the ranks through the application of military law.[31] Officers were spared this treatment under military law, but 60,210 men of the ranks were subjected to Field Punishment Number One during the war.[32] This highly visible demonstration of military authority also amounted to a clear delineation between officers and men shaped by ideas of class and social status.

There was differentiation also in a more informal sense. Even when like-for-like comparisons are made in terms of, say, conviction rates or sentencing there is a discernible difference in outcomes between officers and men of the ranks. Taking the overall figures for courts martial held abroad, for example, there is a vast difference between the two. According to War Office statistics, 3,562 officers were tried abroad with some 801 being acquitted. There were 159,585 trials of soldiers abroad with 16,206 acquittals.[33] Viewed in percentages, this equates to an acquittal rate of 22.5% for officers and 10% for men of the ranks. This is a highly significant statistical variation. Yet the difference was even greater for trials held

27 Oram, "'The Administration of Discipline by the English is Very Rigid'," 100–103.

28 Michel Foucault, *Discipline and Punish: The Birth of the Prison* (London: Allen Lane, 1977).

29 "Rules for Field Punishment" in *Manual of Military Law* (1914), 721–722.

30 David Englander, 'Mutinies and Military Morale' in *The Oxford Illustrated History of the First World War*, ed. Hew Strachan (Oxford: Oxford University Press, 1998), 192.

31 For a wider discussion of this aspect of discipline see Foucault, *Discipline and Punish*.

32 *Statistics of the Military Effort*, 670.

33 *Statistics of the Military Effort*, 667.

"at home": 2,390 officers were tried at home and 570 were acquitted; 138,725 soldiers were tried with 6,589 acquittals.[34] This is an "at home" acquittal rate of just under 23% for officers but less than 5% for ordinary soldiers.

One plausible explanation for this significant variation could be that officers were more likely to be tried by the more formally constituted general court martial rather than its smaller "field" variant. Very few men of the ranks were tried by general court martial and those who did tended to fare very well with an "abroad" acquittal rate of almost 80% and "at home" rate of 83% (the rate for officers remained at 23% for trials abroad but was 74% for those tried at home.).[35] Problematically, though, the number of soldiers tried by GCM, and the number of officers tried by FGCM, is so small that whilst this point is noteworthy for illustrating the differences between the "higher" court and its less formal equivalent, firmer conclusions cannot be justified. Nevertheless, owing to the simple fact that officers were more likely to be tried by GCM and men were more likely to face a FGCM it is possible to see how the formal process and application of military law might have impacted on outcomes.

Nonetheless, an examination of cases brought before courts martial does shed light on how the law – and its enforcement – could act as a vehicle to differentiate between officers and men. One such case was that of Second Lieutenant Shardlow and Private Williams – both of the 14th Battalion, Royal Welsh Regiment – who were jointly tried for cowardice on 6 April 1917 at Trois Tours Chateau on the Western Front. The officer, Shardlow, was acquitted, but Private Williams was found guilty and sentenced to 70 days Field Punishment No. 1.[36] The joint charge of cowardice brought against an officer and a private soldier in this case is unique in the courts martial registers.

The army took a dim view of officers who fraternised with soldiers and at times resorted to courts martial to discourage it. In such cases, the officer was often deemed to be the instigator and the soldiers regarded as being more passive – victims even. Temporary Second Lieutenant S.E. Shaw, 5th Connaught Rangers, was convicted of "Fraternising with privates" after he had "Occupied a box at theatre with Pte". The court, at Salonika on 9 March 1917 sentenced him to a severe reprimand and a loss of service.[37] On 28 April 1917 at Le Havre, France,

34 *Statistics of the Military Effort*, 658.

35 A total of 3,155 officers were tried by GCM abroad with 718 acquittals. There were only 267 other ranks tried by GCM abroad with 213 acquittals. At home GCMs tried 2390 officers and acquitted 1758 of them and tried 730 men of the ranks, ac quitting 607. *Statistics of the Military Effort*, 660–661 and 651–652.

36 National Archives, WO90/6/113.

37 National Archives, WO90/6/108.

Temporary Captain G.W. Gamet, Remount Service, was convicted of scandalous conduct for "soliciting a Private and Gunner to commit an act of gross indecency with him". He was cashiered.[38] In both cases the officer was viewed as the instigator. Most cases, though, appear to have revolved around drinking alcohol and the most usual charge brought was that of conduct prejudicial to military discipline (Section 40 Army Act). Again, in such cases, it was only the officer who stood trial. For example, Lieutenant J Harding, 2nd Australian Divisional Engineers, was tried at Armentieres in France on 15 April 1917 for drinking a bottle of whisky with a sergeant and private soldiers in the guard room. He received a severe reprimand.[39] Captain J. Thompson, 14th Royal Irish Rifles was dismissed from the army by a court on 22 February 1917 for drinking with NCOs in the sergeants' mess.[40] Lieutenant H.V.E. Byrne was also convicted for "consorting and playing cards and supplying whiskey to NCOs" just two days later. Both cases were tried in France, but Byrne received only a reprimand.[41] It appears, therefore, that there was little consistency in sentencing.

Sentencing itself also differed according to rank. This point is best illustrated by comparing cases involving charges of cowardice and desertion – those offences most likely to attract the most severe sentences (see Table 1, below). Fifty-two officers were tried for cowardice and thirty-six were tried for desertion. Of those charged with cowardice, twenty were cleared (through honourable acquittal, acquittal, or not guilty findings) – an acquittal rate of 35%, which clearly is higher than the overall average for officers for all offences (23%). It is slightly more complex for those charged with desertion, but similarities do exist. Fifteen of the thirty-six officers tried were acquitted of the offence of desertion – an acquittal rate of 42% – but eleven of these were then found guilty of the lesser (and non-capital) offence of absence.[42] In itself, these above average acquittal rates are indicative of how the more serious offences – ones that could result in capital punishment – were subject to a higher threshold or burden of proof.

The sentences passed on those found guilty, however, suggest that once this higher threshold had been passed the convicted officer was treated with greater severity than was normal for ordinary soldiers. Almost two thirds of officers convicted of cowardice were either cashiered or dismissed from service. This is consistent with the figures for those convicted of desertion or absence, having been originally charged with desertion. Again, almost two thirds were cashiered or dis-

38 National Archives, WO90/6/115.
39 National Archives, WO90/6/117.
40 National Archives, WO90/6/107.
41 National Archives, WO90/6/115.
42 Compiled from National Archives, courts martial registers, WO90/6, WO90/8, WO92/3, WO92/4.

missed from the army (twenty-five out of thirty-two cases). Additionally, however, five more officers convicted of desertion were sentenced to death. Two of these were commuted to cashiered but the remaining three were executed. Although such a small number is statistically problematic, it remains notable that 60% of officers sentenced to death were executed whereas the figure for soldiers was approximately 14%.[43] One such example of an officer who was convicted and then cashiered for cowardice is that of Second Lieutenant P.B. Haswell, 9th Battalion Welsh Regiment, who was tried by Field General Court Martial on the Western Front on 9 April 1917. The register records that: "[d]uring attack, failed to carry out certain ops, returned to British trenches without reason".[44] Where the legal requirements to sustain a charge of cowardice were not met, there remained the option of using Section 40 of the Army Act such as in the case of Second Lieutenant E.L.N. Cope, 3 (att. 2) East Lancashire Regiment, who, according to the register was dismissed because he was: "Posted CO of recce patrol, signalled Adjutant: 'I've been ordered to go with the patrol. I am unable to do so. For God's sake let me off.'"[45] The circumstances in these two cases are broadly similar and even though the charges brought differ, the outcome is also broadly the same and both officers were dismissed from the army.

A breakdown of the findings and sentences passed on officers charged with cowardice or desertion is shown in Table 1, below.

Table 1: Trials of Officers for Cowardice and Desertion.[46]

Sentence	Number	Additional Information
Honourable acquittal	3	All for cowardice
Acquittal	19	15 for cowardice 4 for desertion
Not Guilty	2	All for cowardice
Death	5	3 executed 2 cashiered
Cashiered	24	
Dismissal	25	
Forfeiture of seniority	3	

43 Gerard Oram, *Death Sentences passed by military courts of the British Army, 1914–24* (London: Francis Boutle, 1998).

44 National Archives, WO90/6/113.

45 National Archives, WO90/6/116.

46 Based on data compiled from courts martial registers, National Archives, WO90/6; WO90/7; WO/90/8; WO92/2; WO92/3; WO92/4; AIR21/2.

Table 1 (continued)

Sentence	Number	Additional Information
Severe reprimand	5	
Reprimanded	2	
TOTAL	88	11 guilty of absence. 6 (5 cowardice, 1 desertion) not confirmed by C-in-C or quashed by AC etc.

The use of military law was not restricted to prosecuting military crimes or maintaining discipline but was applied also to regulate contact with civilians and even prisoners of war. Based on an analysis of the 2nd Canadian Division, Craig Gibson has shown how relations between the British forces and local inhabitants on the Western Front, though initially good, deteriorated over time.[47] One of the issues appears to be that contact with civilians within territory occupied or garrisoned was far from normal and often problems arose because of drink or sex (including prostitution). This was true also in the UK where large groups of young men were garrisoned during training close to highly populated areas. The range of offences that arose from this awkward relationship was vast and could include anything from smuggling a woman into barracks – as in the case of Second Lieutenant W.C.H.W. Hammond, 4 Bedfordshire Regiment, who was reprimanded at Felixstowe on 18 April 1917 for trying to pass off one Lilian Comellie as his wife – to offences committed against inhabitants (a charge brought usually for quite serious offences, including rape).[48] A total of 1,703 convictions were recorded against soldiers for offences against inhabitants abroad, but only five such convictions were recorded against officers.[49] But it was also possible to bring alternative charges, meaning that the full extent of crimes committed against inhabitants is obscure. In most cases, this entailed a charge of conduct prejudicial to military discipline (Section 40 of the Army Act). The cases of Second Lieutenant R.W. Seldon and Second Lieutenant (Temporary Lieutenant) C.D. MacMillan, 1/1 South Nottinghamshire Hussars (Territorial Force), exemplify this. They were jointly charged and convicted of scandalous conduct and conduct prejudicial to military discipline in Salonika in May 1917. The register records that they had: "[t]hreatened shepherd then stole

47 Craig Gibson "'My Chief Source of Worry': An Assistant Provost Marshal's View of Relations between 2nd Canadian Division and Local Inhabitants on the Western Front, 1915–1917," *War in History* 7.4 (2007): 413–441.

48 National Archives, WO92/3/62.

49 *Statistics of the Military Effort*, 667.

and shot sheep. Threatened another with revolver, ordering him to produce a woman. Fired shots through door".[50]

Both were sentenced to a severe reprimand and loss of service which, under the circumstances, appears to be quite lenient. In Mustapha, Alexandria, Egypt, Captain W. Story, 2nd Cheshire Regiment, was convicted on 26 March 1917 for being drunk, impeding the provost and for "Following girls, harassing civilians and behaving in a riotous manner", which was deemed to be conduct prejudicial to military discipline. He was sentenced to be dismissed, which was confirmed by General Allenby (Commander-in-Chief for the Egyptian Expeditionary Force).[51] A similar outcome resulted from the trial of Lieutenant R.L. Jamieson, 2nd (Auckland) New Zealand Expeditionary Force when he was tried on the Western Front on 22 April 1917. He was convicted of scandalous conduct and also conduct prejudicial to military discipline for "Soliciting a woman to immorality/offering a bribe to NCO".[52]

Section 40 of the Army Act, therefore, could be applied imaginatively to a range of circumstances and was a valuable tool in the maintenance of expected standards, as well as discipline. For example, on 18 May 1917, Second Lieutenant D.W. Smith, 8th Durham Light Infantry, was convicted at Moicourt on the Western Front under this section for "Wrongfully obtaining watches from German prisoners." The option to charge him with theft was available under the military code, but Section 40, which gave the court more sentencing options, appears to have been preferred in this instance. The court sentenced him to be dismissed but this was reduced by the commander-in-chief (Field Marshal Douglas Haig) to a severe reprimand.[53] A more conventional use of the charge under Section 40 involved Captain Cecil G. Williamson, 1st/4 Buffs (Kent Regiment) who had used "Improper language about a General" and was sentenced by FGCM in Aden on 15 October 1915 to be dismissed.[54] This sentence was confirmed.

3 Royal Interventions

A unique feature of the process and application of British military law for officers – and one rarely, if ever, acknowledged in histories of courts martial – is

50 National Archives, WO90/6/118.
51 National Archives, WO90/6/113.
52 National Archives, WO90/6115.
53 National Archives, WO90/6/121.
54 National Archives, WO90/7/68.

that the King in his capacity as overall Commander-in-Chief could intervene in the final instance. In the era of the First World War, King George V did so on at least fifteen occasions. In each case, he did so to the benefit of the convicted officer and quashed or set aside judgements, reduced sentences, or reinstated rank. The grounds for these interventions are often obscure – owing to the lack of surviving sources – but in some cases an explicit rationale has been provided. Even where only the bare details are known these cases shed some light on an often-overlooked part of the legal process and reveal intriguing details about the work of courts martial and about wider British society. Officers could petition the monarch themselves, and it is likely that in most cases this is how the King came to be involved.

Perhaps the best known, and most chronicled, use of the royal prerogative was the case of Lieutenant-Colonel John Ford Elkington, 1st Royal Warwickshire Regiment, who was tried and convicted of scandalous conduct by a GCM at Chouy on the Western Front on 14 October 1914. He had also been tried for cowardice but was found not guilty by the court. Nevertheless, the court sentenced him to be cashiered. Briefly, the circumstances of the case were that Elkington, alongside a co-defendant – Lieutenant-Colonel Arthur Mainwaring, 2nd Royal Dublin Fusiliers – had signed an agreement with the mayor of the town of St. Quentin on 27 August 1914 to surrender to advancing German forces to avoid damage to the town arising from a battle. This incident arose from the desperate retreat from Mons and, as well as their own exhausted troops, the two battalion commanders found themselves in charge of a large contingent of stragglers who had been separated from their own units. All were suffering from severe exhaustion and hunger, and it was believed they were surrounded by superior German forces. But the arrival in the town of Major Tom Bridges, 4th (Royal Irish) Dragoon Guards, eventually restored a semblance of discipline to the British units. It also resulted in the discovery of the signed surrender agreement that then precipitated the court martial. Clearly, this was viewed as a most serious failure of leadership and Elkington and Mainwaring became the first officers to be cashiered during the war.[55] The King, however, remitted the sentence for Elkington on 22 August 1916 and in doing so restored his status.[56] Elkington's later actions in the war were brought to the attention of the King and deemed worthy of his redemption.

There are a number of features that make this case so remarkable. Firstly, by finding both officers not guilty of cowardice, the court had avoided any chance of a death penalty being inflicted. The not guilty finding was justified on the grounds

55 *The London Gazette*, 30 October 1914, issue 28957, 8764.

56 National Archives, Courts Martial Registers, WO90/6/28.

that both men had suffered mental breakdowns owing to extreme stress.[57] This highly unusual (for its time) rationale might appear, on the face of it, to indicate a progressive approach by the court, which was headed by Brigadier-General Sir Aylmer Hunter-Weston. Though in reality this finding was a shrewd political move that avoided the embarrassment of a death sentence on such senior officers and forestalled any potentially problematic outcomes either by having the sentences carried out or accusations of preferential treatment in the event that the sentences were commuted. By the time of the court martial, two men of the ranks had already been executed on the Western Front.[58]

Furthermore, only Elkington had his sentence remitted by the King. Unlike Mainwaring, who had remained largely in obscurity after his trial, Elkington had pursued his military career in other ways. Following his dismissal from the army, Elkington had re-enlisted but not in the British Army. Instead, he had joined the French Foreign Legion, serving with distinction and being awarded the *Croix de Guerre* and later also the *Médaille militaire* before returning to Britain in 1916. Although he was no longer fit for active service owing to his wounds he was pardoned by the King and had his former rank reinstated – a process initiated by the very man who had originally tried him. His rehabilitation was symbolically complete later that year when William Orpen painted his portrait and exhibited it in the Royal Academy.

Another to be pardoned by the King for an act of gallantry was Temporary Lieutenant S.J. Dickinson, 1st Somerset Regiment. He had been convicted of absence by a court martial in Rouen on 16 August 1918 and was sentenced to be reprimanded. The details of the specific act of gallantry remain obscure. However, it was sufficient for even this relatively minor stain on his character to be removed when the King ordered the "conviction to be erased from his records".[59] Dickinson's case was unique for being the only instance of an intervention by the King that did not involve a cashiered or dismissed officer (eight cases involved cashiered officers and the other six had been dismissed from the military). One of these was in the Royal Air Force, but the remaining fourteen were all in the army.

In two cases, the King had intervened to reduce a sentence from cashiering to one of dismissal from the service. In essence, the outcome was broadly the same, but this does illustrate the point that cashiering carried with it far greater

57 National Archives, Courts Martial Registers, WO90/6/28.

58 Private Thomas Highgate, 1 Royal West Kent Regiment, was executed for desertion on 8 September 1914 and Private G. Ward, 1 Royal Berkshire Regiment, was executed for cowardice on 26 September 1914. See Oram, *Death Sentences,* 19. Also National Archives, WO213/2.

59 National Archives, Courts Martial Register, WO90/8/96.

social implications than did being dismissed. The first case was that of Temporary Second Lieutenant C.A. James, RAF, who was sentenced to be cashiered for absence on 28 June 1918, which was reduced to dismissal by the King on 11 August 1918.[60] The second is perhaps of greater interest as it involved a well-known figure from one of the wealthiest families in the country. Temporary Captain and Acting Major Sir Derrick Julius Wernher, Royal Army Service Corps, was cashiered for an unspecified criminal offence (Section 41 of the Army Act) and for conduct prejudicial to military discipline (Section 40, Army Act) on 21 February 1919.[61] The King quashed the first conviction (for a criminal offence) and reduced the sentence to one of dismissal for the latter. Wernher was married to Theodora Romanoff of Russian nobility. He was also the eldest son of Julius Wernher – a German born gold mine owner who effectively controlled the De Beers Consolidated Mines in South Africa – and Alice "Birdie" Wernher, a socialite whose portrait had been painted by John Singer Sergeant in 1902. The family had a long tradition of military service (in the Prussian, Russian and British armies). Despite being so well connected, Wernher's dismissal from the army stood.

One other officer to benefit from the King's intervention had also been charged with a criminal offence under section 41 of the Army Act. In. this case, Major Lincoln Sandwith, late 8th Hussars and Adjutant Provost Marshal, Indian Army Cavalry Corps, was found not guilty of the criminal act of "having carnal knowledge of girl under 16". He was nevertheless convicted of the military offence of scandalous conduct by a GCM at St. Omer on the Western Front on 17 August 1915. This was an offence that only applied to officers. Sandwith was cashiered. However, this was commuted by the King on 30 November 1915.[62]

4 Diverse Theatres of War

The other main difference that can be detected is a contextual one: the various theatres of the war. The war was not just fought on the Western Front but across a diverse range of different theatres. Ideally, each of these would warrant a separate analysis, but such an undertaking is beyond the scope of this chapter. Some general points, however, can be made. Environments differed, communications varied, logistics were variously impacted by degrees of remoteness, commanders-in-chief were different, and sometimes even the enemy was a different one. Each

60 National Archives, RAF Courts Martial Register, AIR21/2/5.
61 National Archives, WO90/8/60.
62 National Archives, WO90/6/33.

factor shaped the nature of the war on each front and, therefore, impacted on the way that courts martial operated. As is clear from the number of trials of officers – shown in Table 2 below – one striking feature of the Gallipoli front, is the relative lack of trials by court martial when compared to other fronts. Given the nature of the Gallipoli campaign and the practicalities involved in convening courts martial on such a precariously held small area of territory, this is hardly surprising. Likewise, there were no distractions, such as bars or brothels for men to frequent. Troops were wholly reliant on the military structure and supply for their existence and with nowhere to flee to, desertion was limited to those cases where the act had been to avoid a specific duty rather than to desert His Majesty's service. Similarly, absence was not a practical option either.

Table 2: Trials of officers only by theatre of war.[63]

Theatre	Number of trials – Army	Number of trials – RAF
France and Flanders	2,427	69
Egypt and Palestine	398	29
Salonika	97	0
Italy	66	0
Africa	53	0
Russia (North & South)	35	0
Mesopotamia	27	0
Gallipoli	8	0
At Sea	6	0

Unsurprisingly, most trials were on the Western Front where the British Expeditionary Force was largest. However, given the relative sizes of the British forces deployed to each theatre, Egypt, and Palestine (the Egyptian Expeditionary Force – or EEF) does stand out. Direct comparisons are problematic owing to differences not just in the size of forces deployed (which varied across time as well), but also the length of time spent in each theatre. The EEF, formed in March 1916, was approximately twice the size of the forces deployed to Italy, for example, and saw action for a longer period. Nevertheless, the higher incidence of courts martial of officers is notable. The campaign in Egypt and Palestine was more fluid with greater movement than in most other theatres, including the Italian front.

63 Based on data compiled from courts martial registers, National Archives, WO90/6; WO90/7; WO/90/8; WO92/2; WO92/3; WO92/4; AIR21/2.

The enemy was the Ottoman armies whereas in Italy it was largely the Austro-Hungarian Army, with some German support. But perhaps the most significant difference lay in its leadership. The EEF was initially commanded by General Archibald Murray and then by General Edmund Allenby – both notable disciplinarians. The British forces deployed to Italy from October 1917 were placed under the command of General Hubert Plumer who was later singled out by Field Marshal Bernhard Montgomery for his more compassionate command style.[64] Plumer, was later replaced by the Earl of Cavan in March 1918. The approach adopted by British courts martial in Italy did appear to be more lenient and as we have seen earlier, the practice of "pious perjury" was commonplace. This contrasted with that of the Italian forces, which had a reputation for the most severe forms of discipline. Such was the concern about British forces being subjected to this that it was a potential obstacle to the deployment of the force in the first place. The British force was eventually deployed, but only once an assurance was secured that British forces would in no circumstances be subjected to Italian Army discipline or military law for any offence, including any committed against Italian civilians.[65] This might explain why Plumer – who it will be recalled had opposed abolition of the death penalty after the war – does not appear to have opposed or attempted to interfere with the work of the courts martial in Italy.

In the absence of any official statistics on courts martial in each theatre of war, the smaller and more manageable figures for officers do provide valuable insight from which it might be possible to extrapolate more widely on some general points. This should be done with considerable caution, of course, and subject to the caveats about key formal and informal differences, discussed above. Putting aside the Western Front temporarily, a survey of the other theatres in 1918 (when they were all active) shows some significant similarities. In particular, the highest incidence of courts martial was in July 1918 when the fronts were most active. The exception is Africa where the overall numbers are too low to draw any conclusions. There is then another peak at the end of the war in November). This is illustrated in Figure 1, below.

For the Western Front, the incidence of courts martial for officers differs. This is illustrated in Figure 2, below, which shows how the success of the German spring offensive launched on 21 March 1918, and which caused Douglas Haig to issue his desperate special order on 11 April urging:

64 *The Memoirs of Field Marshal Bernard Law Montgomery, 1st Viscount Montgomery of* Alamein (Bradford: Pen and Sword, 2007), 35.

65 Oram, "Pious Perjury," 415.

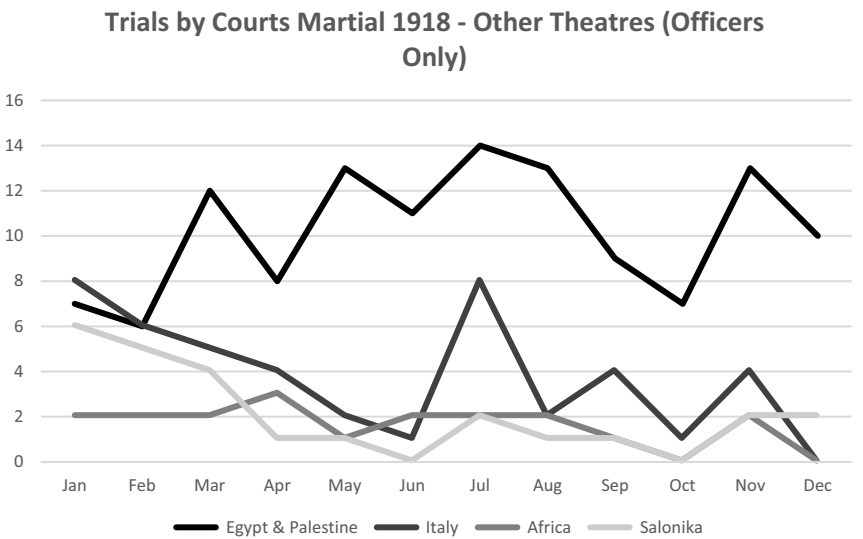

Figure 1: Trials of officers in "other theatres" 1918.[66]

> There is no other course open to us but to fight it out. Every position must be held to the last man: there must be no retirement. With our backs to the wall and believing in the justice of our cause each one of us must fight on to the end. The safety of our homes and the Freedom of mankind alike depend upon the conduct of each one of us at this critical moment.[67]

The peak in trials of officers on the Western Front, therefore, occurred in May 1918 and remained high through June and July as the courts worked their way through the caseload.

Trials for desertion and cowardice also peaked in May 1918 (see Figure 3, below). In fact, the six cases in May 1918 constitute the single highest incidence of trials for these offences throughout the war. Other peaks had occurred at the end of the Battle of the Somme in 1916 and following the Third Battle of Ypres in 1917 – though the five cases recorded in both October and November 1917 and a further three in December point to a more sustained period of activity for courts martial then.

This pattern is largely reflected in the trials of officers for absence as well (see Figure 4, below) with very obvious peaks in the frequency of trials. What

66 Compiled from courts martial registers, National Archives, WO90/6; WO90/7; WO/90/8; WO92/2; WO92/3; WO92/4; AIR21/2.

67 Field Marshal Sir Douglas Haig, Special Order of the Day, 11 April 1918.

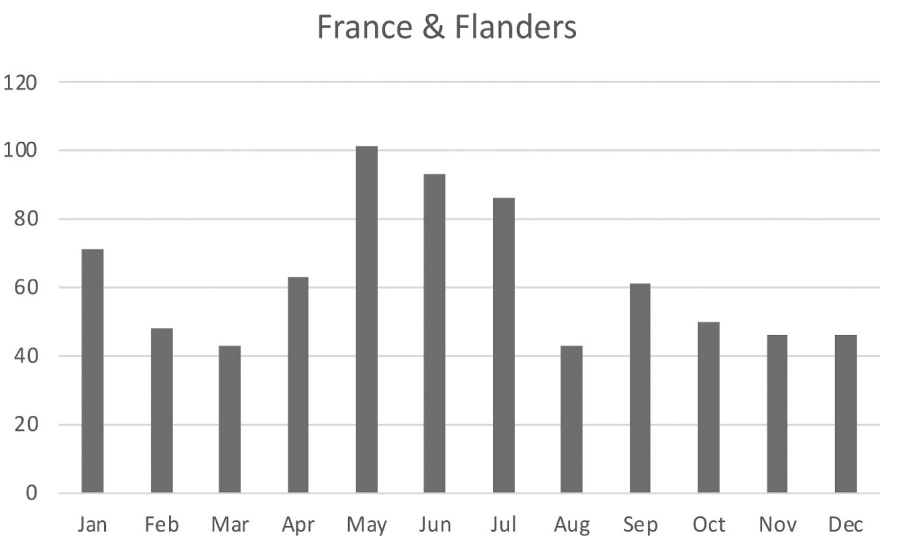

Figure 2: Trials of Officers by Courts Martial, Western Front 1918.[68]

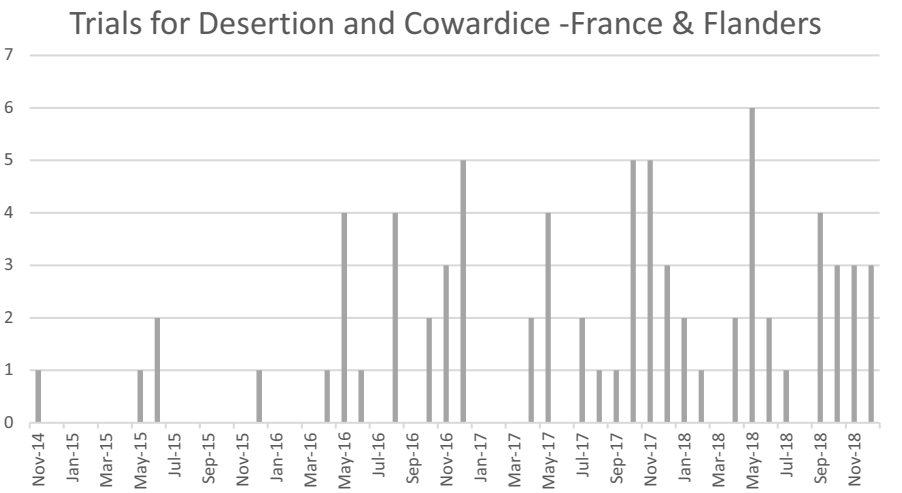

Figure 3: Officers tried for desertion and cowardice on the Western Front 1914–1918.[69]

68 Compiled from courts martial registers, National Archives, WO90/6; WO90/7; WO/90/8; WO92/2; WO92/3; WO92/4; AIR21/2.

69 Compiled from courts martial registers, National Archives, WO90/6; WO90/7; WO/90/8; WO92/2; WO92/3; WO92/4; AIR21/2.

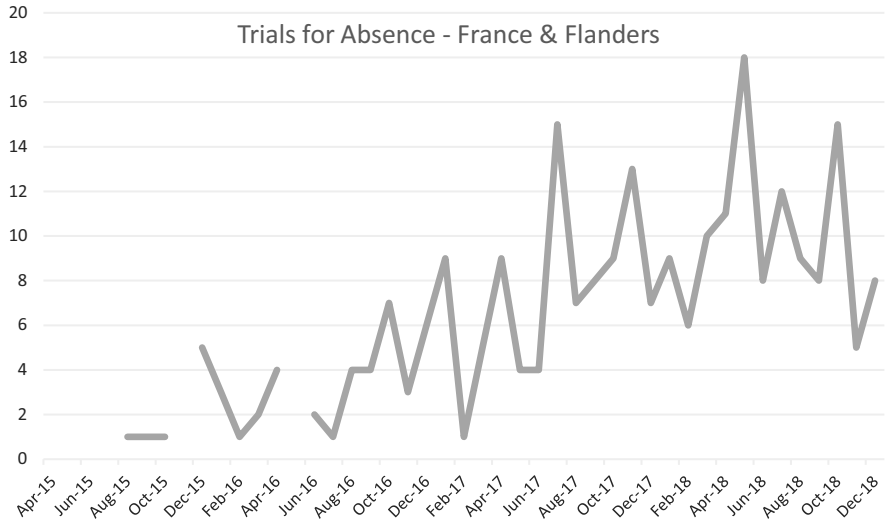

Figure 4: Trials of officers for absence, Western Front, 1914–1918.[70]

these two graphs (desertion/cowardice and absence) show is not just the impact on discipline and morale at specific moments of the war, but also the pressure placed on courts martial that had to deal with large numbers of cases at arguably the worst possible time. The additional burden and drain on resources caused by the requirement to convene, staff, and administer the courts fell largely on other officers. This might explain some of the sentencing patterns that can be identified.

A survey of courts martial on the Western Front for the whole period of the war shows that, up to and including August 1917 the only sentences for officers convicted of desertion or cowardice were cashiering, dismissal or death (see Figure 5, below). Each of these in effect ended in the loss of an officer for the army. But from September 1917, sentences increasingly included loss of seniority or in December 1917 and January 1918 – the period immediately following the Third battle of Ypres – a simple reprimand was favoured.[71] This pattern of sentencing meant that valuable officers were not lost but were instead retained at a time of great need.

70 Compiled from courts martial registers, National Archives, WO90/6; WO90/7; WO/90/8; WO92/2; WO92/3; WO92/4; AIR21/2.

71 Based on data compiled from courts martial registers, National Archives, WO90/6; WO90/7; WO/90/8; WO92/2; WO92/3; WO92/4; AIR21/2.

Sentencing patterns for officers guilty of the charge of absence on the Western Front are far more complex but in very broad terms the same overall outcome can be detected. Predictably, those convicted of this much lesser offence were treated more leniently by the courts from the beginning of the war and reprimands were quite common. But by April 1917, cashiering or dismissal was the most usual sentence passed for officers guilty of absence. This, though, changed towards the end of the Third Battle of Ypres in November 1917 when courts more often opted for loss of seniority over a sentence that resulted in the loss of a much-needed officer. Reprimands also became increasingly common once more until the last two months of the war at which point courts favoured sentences of dismissal or cashiering.[72]

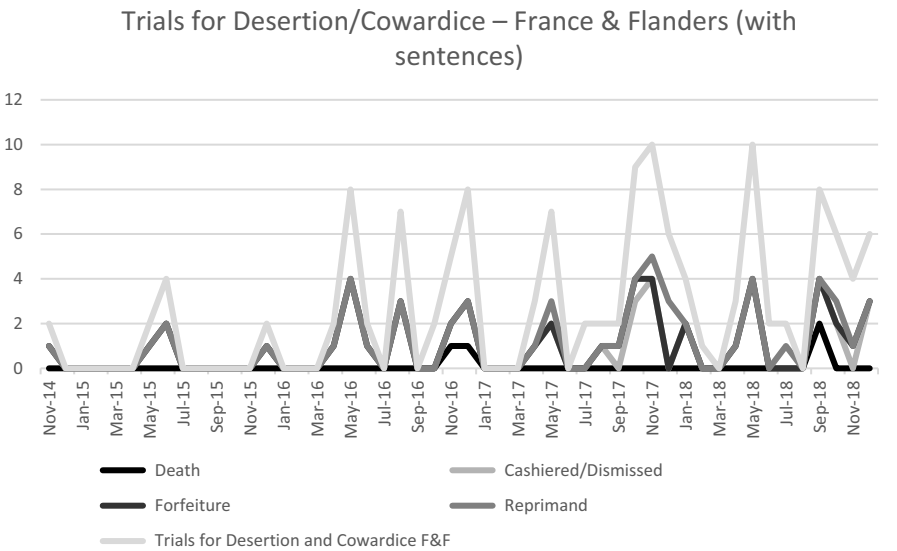

Figure 5: Sentences passed on officers on Western Front for desertion and cowardice.[73]

The Western Front dominates the statistics – naturally. However, taken overall the other theatres do not appear to have differed from the pattern established in France and Flanders. This is illustrated by the graph in Figure 6, below which shows how closely the overall pattern for officers cashiered tracked that of the

72 Based on data compiled from courts martial registers, National Archives, WO90/6; WO90/7; WO/90/8; WO92/2; WO92/3; WO92/4; AIR21/2.

73 Based on data compiled from courts martial registers, National Archives, WO90/6; WO90/7; WO/90/8; WO92/2; WO92/3; WO92/4; AIR21/2.

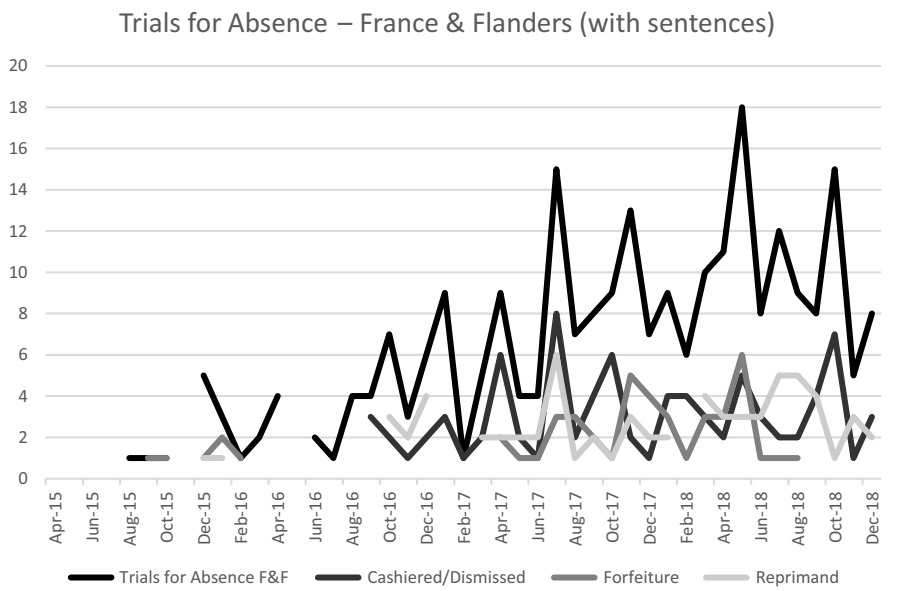

Figure 6: Sentences passed on officers on Western Front for absence.[74]

Western Front. There are exceptions: March 1916 and December 1916 deviate from a trend that is otherwise remarkable in its consistency. These exceptions appear to be caused by drunkenness cases in Egypt for which there is no obvious explanation and are in all likelihood merely an anomaly.

Conclusion

British military law, written with smaller conflicts than the First World War in mind, had to be adapted to cope with unexpected demands, most of all the massive increase in the size of the military forces. Moreover, the men of these new armies and conscripts were unaccustomed to military discipline and had undergone relatively little training. The key interface between pre-1914 laws and post-1914 recruits, therefore, was the court martial. Minor infractions could easily be dealt with summarily and here non-commissioned officers and subalterns played

74 Based on data compiled from courts martial registers, National Archives, WO90/6; WO90/7; WO/90/8; WO92/2; WO92/3; WO92/4; AIR21/2.

a particularly important role. But where the crime or the circumstance was more serious the court martial remained the key component of military discipline.

Therefore, those officers who staffed the courts found themselves acting as an extension of the military code and for that matter an extension of British society. Capital punishment was used relatively liberally on ordinary soldiers, but less so on officers. Field Punishments, which could only be inflicted on men of the ranks, even more so. The brutality of Field Punishment Number One was intended as a spectacle designed to assert the authority of the military hierarchy by controlling the body of the offender through its immobilisation. Courts martial legitimised this process. Yet on many occasions, it appears they acted in a way that mitigated the impact or severity of the law. The practice of "pious perjury" might have varied in the extent to which it was used in different theatres but seems to have persisted despite attempts by some senior commanders to prevent it.

Officers too found themselves on the receiving end of military justice. The law spared them certain punishments, and they also appear to have benefitted from other factors formalised in law. In particular the expectations that they will be tried by GCM. The process also seems to have benefitted officers and acquittal rates were far higher than they were for ordinary soldiers. But if officers did enjoy favour from their peers, this appears to have evaporated after conviction. For those who had breached the threshold of what was expected of an officer and been found guilty, sentences were generally harsher. This was especially true of more serious offences such as desertion. Whilst relatively few officers were convicted of desertion, those who were found guilty were very likely to face a firing squad and those who did not could expect to be cashiered or dismissed from the army. This reflected the expectations of society, as well as the army. Fraternisation with the men was discouraged and, again, the expectation was that officers were responsible for maintaining expected standards. Social stigma resulting from cashiering remained a powerful deterrent and it is significant that in the numerous occasions when King George V intervened it was to remove or mitigate this stigma though, as the case of Viscount Wernher demonstrates, there were limits even for the very best-connected.

Context did shape outcomes too. The practice of "pious perjury" by British courts martial in Italy contrasted with the severity of that of their Italian allies, reflecting political and military concerns over deploying to the front in the first place and thereby preserved troop morale. The shortage of officers in late 1917 and much of 1918 was reflected in the avoidance of sentences that would have worsened the situation.

Courts martial, then, were not merely a passive instrument of military justice, but could also be flexible and responsive in how they applied it. There is still

more work to be done on this, though if it turns out that the analysis of trials of officers here is typical, then it is clear that courts martial performed a key role that enabled the pre-war military code to be applied to a very different type of conflict involving a different type of army. The code as it existed was not appropriate for a modern army, as Atlee later argued. That it worked at all was in no small measure due to the work of the courts martial.