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SUMMING UP BY THE JUDGE ADVOCATE

Under the amended Rules of Procedure, gentlemen, it is now my duty as Judge Advocate to sum up in all cases, not only to instruct you on the law but also to sum up the facts of the case.

You will understand, of course, that a court-martial decides on both the law and facts and I am here to assist you on what the law is.

A fundamental principle of English law is that an accused person is presumed to be innocent until he is proven to be guilty, and that the burden of proof lies on the prosecution. The prosecution must prove the guilt of the accused beyond a reasonable doubt. A reasonable doubt must be distinguished from an imaginary doubt. Reasonable doubt is the type of doubt which might arise in the minds of reasonable men after considering all the facts, and if after such consideration the court is left in a state of real doubt the prosecution has then failed to satisfy the burden of proof.

You are the sole judges of the facts and you must consider the evidence and come to your own conclusions regardless of what I may say in regard to such facts, and if from listening to me you conclude I am instructing you on the facts you will please disregard what I have to say. You are sworn to try the accused on the evidence, and you have heard various witnesses in the witness box. However, you are entitled to take what we call judicial notice of all matters of notoriety, including matters within your general military knowledge. In other words, you do not require evidence on facts which are so generally known as not to require proof.

In determining the facts of the case you will also understand that in the Army Act provision is made for receiving documentary evidence, and some of the evidence of the prosecution today is in that form. The Declaration of the Court of Inquiry was introduced by the prosecutor, and admitted by the Court, to show the time of the commencement of the absence, and to some extent it also indicates the fact that the absence continued. Then, the termination of the absence was indicated by the prosecution's witness Private MacKenzie. The Declaration of the Court of Inquiry also indicates the original deficiencies of kit as of the time the Court of Inquiry was taken. Then the witness Sergeant James was introduced by the prosecution to give evidence as to what articles of kit, if any, were in the accused's possession on his return. He also indicated that there were kit bags found containing belongings of the accused and he submitted to the Court a document showing only the deficiencies.

Now, the accused is charged with desertion in the first charge and with loss of kit by neglect in the second charge. Desertion consists of two main elements. The basic element is absence -- mere absence -- and the second element is that of intention not to return to His Majesty's Service. Speaking generally, I might say intention is something which cannot be proven directly and distinctly. It is something that goes on in a man's mind and the only way to arrive at what is a person's intention is the manner in which he has acted, and his words, and conduct, and that sort of thing.

*M. A. J.*