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Judicial Practice: Courts Military and Civil: A Contrast

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JUDICIAL PRACTICE—COURTS MILITARY AND CIVIL: A CONTRAST.

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The members of the Wisconsin bar have performed a great and patriotic work during these trying times. They have not spared themselves, but have given gladly of their time and have sacrificed much. They have performed their work cheerfully without attempting to advertise or commercialize it, and only now is the general public beginning to realize that the success of the draft was due to the unselfish efforts of the legal profession. The lawyer raised a draft army without friction and did it without seeking publicity. It is something to be proud of and the knowledge of that patriotic act well done will bring lasting happiness to those who participated in it. Let me state, too, that the war was not won by any particular division or any particular set or class of men. It was won by the co-operation of all, and I hope in years to come invidious comparisons will not be made, for it should be remembered that the civilian contributed just as much to the success of the war as did the man in uniform. The one could not have existed without the other. Each worked to a common end and each gave his best, and the will to do that work for which each was best fitted had much to do with the final result.

The controversy between General Crowder and General Ansell has been given so much newspaper publicity that perhaps everyone is more or less familiar with the faults to be found in the present court martial system. I shall try to avoid discussing that which has been printed in the newspapers.

While the present system is certainly to be condemned, if for no other reason than because of the autocratic power vested in one man, yet it does possess several distinct virtues which appeal to me strongly and which I propose to discuss here in the hope that the bench and bar of Wisconsin may profit somewhat from such discussion.

A general court martial is composed of not more than thirteen, nor less than five officers. The power to appoint or convene a general court is given to the President and to certain named officers of the army, such as the commanding general in the field, department commanders and commanding officers of camps and districts by the 8th Article of War. In practice a general

court is convened substantially as follows: Let us assume charges have been preferred and a number of men are awaiting trial by general court martial in the Eastern Department. The commanding general of that department publishes an order detailing thirteen officers to sit as the court in the trial of these cases. He also details a trial judge advocate and an assistant trial judge advocate. In theory the trial judge advocate is both the prosecuting attorney and legal advisor of the court and he is also supposed to advise with and protect the rights of the accused. The ranking officer of the court is called the President, and when an officer is on trial, the court is usually composed of officers who outrank him. After the court is detailed, the trial judge advocate arranges the dates of trial and notifies the accused thereof and also gives him an opportunity of being represented by counsel. The accused may select an officer of the army to defend him and the officer so selected is detailed for that particular purpose. If he prefers, he may secure civilian counsel, but the Government does not defray the expenses of such counsel and rarely do you find a civilian defending an accused in a general court martial. On the day of trial, the members of the court, the trial judge advocate and his assistant, the accused and his counsel and the reporter are all present. The proceedings are conducted with the greatest formality. The majesty of the law is revealed in every act. The court maintains its dignity throughout the trial and indecorum on the part of the judge advocate, counsel or spectators is unheard of. No matter how trivial the offense, this form is adhered to, and the moment one enters the court room, one realizes that the court is sitting for a serious purpose. Whether the members thereof be young or old, they realize the importance of their position for the time being and uphold the dignity of the court to the fullest extent. It is a dignity which commands respect and a dignity which many civilian judges and lawyers could emulate with considerable profit. Let me briefly sketch a trial to bring home the atmosphere of a general court martial. On the day of trial the judge advocate announces his readiness to proceed, whereupon the accused formally introduces his counsel to the court. The reporter is sworn in by the judge advocate. The order appointing the court is read to the accused and he is asked if he objects to being tried by any member thereof. If he replies in the negative, the trial judge advocate swears in the court. This is an extremely impressive ceremony. The officers of the court are equipped with swords and usually gloved. When they

rise to be sworn, everyone in the courtroom rises with them. The judge advocate calls each officer by name and collectively administers the oath prescribed by the manual. After the court is sworn, the president thereof administers the prescribed oath to the judge advocate and his assistant. All remain standing during this ceremony and continue standing until the president and the court resume their seats. Even in the seating of the court ceremony is observed. The president sits in the middle, facing the witness chair; to his right is seated the next ranking officer, to his left the next, and so on down to the junior officer present. Can you imagine how a proceeding of this character impresses the general public? Respect for law and order is driven home. For the time being, the court is regarded as something apart from the general public. Its seriousness is impressive and the very solemnity of the occasion breeds respect for a military court. I wish the same respect were shown to civilian judges as to members of a general court martial. After the ceremonies just described, the accused is ordered to rise and the charges and specifications are read to him by the judge advocate. If he pleads guilty, the president of the court fully explains the nature and effect of such a plea, so that only in rare instances does an accused enter a plea of guilty without full knowledge of his rights. If a plea of not guilty is entered, the judge advocate reads the paragraphs of the manual giving the gist of the offenses with which the accused is charged. This is for the instruction of the court. Witnesses are then called by the judge advocate and examined in much the same manner as in civil practice. After the Government rests, the president advises the accused that he may take the stand as a sworn witness and be examined the same as any other witness, or he may make a written or oral unsworn statement. He, of course, may call witnesses in his defense. When the testimony is in, the judge advocate and counsel usually argue the case to the court. When the arguments are concluded, the president closes the court, that is, orders everyone from the courtroom excepting the members of the court. The court then deliberates upon the verdict and if it finds the accused guilty, it also fixes his sentence. The court is then opened and the judge advocate enters. He alone is advised as to the court's verdict. This concludes the trial, in that the accused is not advised as to the result until after the case has been reviewed by the convening authority and the record sent to the judge advocate general at Washington for further review.

I hold no brief for the court martial system, but I do want to record my approval of one feature thereof which impressed me deeply. I refer to the dignity of the court and the respect which it demanded and received. The law is a noble profession and the true lawyer is always seeking to keep his profession on the highest plane possible. He is a molder of public opinion and in a way stands in a class by himself. He is an officer of the court and to the general public he represents and stands for law and order. As he is, so is the community in which he lives. The lawyer who lives up to the traditions of his profession is a vital factor for good in the solution of the manifold problems of the age. Anything which suggests a realization of our ideals, will, I am sure, not be considered offensive. In this article I am voicing only my personal views and so only because I have the interest of our bench and bar at heart. You may not agree with me, but at least know that I am sincere.

In the courts of Wisconsin there is a tendency on the part of many attorneys to forget the dignity of judicial position and in many instances a proper respect is not shown in the courtroom. Power, dignity and intellectual eminence is associated with the bench. These attributes demand respect, and if we choose men from among ourselves for judicial positions, it is our duty to pay them the proper respect and to see to it that the general public does likewise. It may be urged that the bar does pay the proper respect. That depends entirely upon how you define the word "respect". If sprawling over a table when addressing the court; if presenting papers for signature with coats on and lighted cigar in hand; if wrangling with the court after an objection has been ruled upon; if addressing the judge by his Christian name when on the bench; if talking audibly when a case is on trial; if these acts show respect, then you are right in saying that the duty has been well performed, for these acts are of frequent occurrence in many of the courtrooms of Wisconsin. I admit that there is no intentional disrespect, but somehow the majesty of the law seems lacking in a courtroom where these practices are indulged in. Think of the effect upon spectators. If we ourselves fail to show the proper respect, how can we expect anything else from the general public? We cheapen ourselves and our profession if we do not maintain dignity in the courtroom. Where there is dignity and decorum, the spectator is not only impressed, but his respect for law and order is thereby increased.

Too often the doctrine of equality as applied to a democracy withdraws from the judge those external badges of dignity, childish as they may appear to the philosopher, but which somehow have power over the imagination of the mass of mankind, and as Brice, in his American Commonwealth, says: "are not without a useful reflex influence on the person whom they surround, raising his sense of position and reminding him of his responsibility." Popular sentiment seems to tolerate nothing that seems to elevate a man above his fellows, even when the dignity is really the dignity of the people who have put him there. This country, therefore, would not tolerate the wig and gown of England and I do not care enough for form to wish anything of that kind either upon the people or the judges, but it has occurred to me that as a mark of respect to the judges we have chosen, we could with propriety ask that court be opened each day with some formality. Personally, I would suggest that the attorneys stand during the opening of court and not resume their seats until after the judge has done so. It is a little thing to do and yet I believe a proceeding of this kind could stimulate in the general public a greater respect for law and order. Someone may urge that this is undemocratic, but to my mind such an argument is not sound when the real meaning of democratic equality is understood. Democratic equality does not mean equality of intellect, usefulness or position or that all men are equal in person. It does mean that all men shall have equal opportunities regardless of birth and that equal justice shall be done to all. It is the ability to take advantage of the opportunity which distinguishes the successful from the unsuccessful man. All have the same opportunities in a democracy, and if we consider democratic equality in this light, you will readily appreciate that in doing the thing I suggest, we are none the less democratic.

Of course, it is true that if judges wish respect, they must command it, and their own personal conduct in the courtroom must be such as to uphold the dignity of the court. We want to help them, but they must co-operate with us to achieve that for which I earnestly hope — dignity and respect. It may be said that this idea does not appeal to the judiciary and, therefore, why worry? My answer is: regardless of their feelings, our natural pride in our profession should make us want to maintain the dignity of our courts, and we should get home that fact to them both by our conduct in and out of the courtroom. I feel, however, that our judges are in sympathy with a movement of this

kind, and if they have hesitated to reprimand us for our unlawyer-like habits, that hesitation has been due to a fear of giving offense. Judges are but human and they are just as anxious to uphold the dignity of the institution of which we are a part as we are to have them do it. They welcome suggestions looking to this end.

If we see a court falling into a practice which, if persisted in, will eventually subject the court to public criticism, it is our duty as officers of the court to tactfully call attention to it before the practice becomes an established fact. No judge objects to constructive criticism, particularly where its very purpose is to uphold judicial dignity and force the general public to respect judicial opinion. If we feel that any practice is tending in the slightest way to weaken the court's influence with the general public, we would be derelict in a duty did we not call the court's attention to that condition, and please remember, I refer only to judicial practices and not to judicial opinions. Recently our Supreme Court began the practice of deciding cases without submitting an opinion. I know the motive which prompts a practice of this kind. The multiplicity of decisions covering the same point in our printed reports. Somehow, however, I feel that such a practice is a serious mistake. I do not mean to say that in each case decided, the Supreme Court should file a long, elaborate opinion, but the court could, in very terse language, state the reason for its ruling and in many instances could dispose of the case by referring to the reported case in the Wisconsin Reports controlling its present action. My reasons for opposing this practice are briefly these: The men chosen by our citizens for the high office of Supreme Judge are chosen because the people want a court of last resort. If they are defeated below, they want to know why they were so defeated. The right of appeal from time immemorial has always been encouraged. Very few litigants appeal unless they believe in the justice of their cause. They employ attorneys to perfect the appeal and to argue their case. They go to this expense because they conscientiously believe that they are in the right. Oftentimes a lawsuit is the one big event in a man's life. He lives with it for the time being and when he exercises his right of appeal, when defeated, I feel that common courtesy and his right as a litigant to have stated the reason for his defeat outweighs every other consideration. The lawyer, of course, knows that the Supreme Court has read the record and studied the case, but not so with the layman. He erroneously labors under the impression

that the Supreme Court has been too indifferent to give him a fair hearing and he communicates his own views to his friends, and they to others, and I say to you very frankly that such action does not tend to develop that spirit which should exist between the highest court of the state and the general public. These, of course, are only my personal views and I am not, as a king, to coerce anyone to agree with me, but I know human nature tolerably well, and in the end you will find that I am right about this matter.

Our courts must maintain dignity and we must pay them the proper respect. As we respect the courts, so will the general public. If we show disrespect in the courtroom and contempt for judicial opinon, so will the general public. This contempt, carried far enough, is destructive of law and order and is one of the things which breeds Bolshevism in the unthinking masses. It is only by upholding the dignity of the judiciary and compelling the general public to respect the men we choose as our judges and ourselves as officers of the court, that we can hope to stamp out this crawling snake, which is slowly but surely making its way through the universe. If we uphold our institutions, the laity will quickly follow.

(EDITOR'S NOTE — This is a revision of an address delivered before the Milwaukee Bar Association on April 19, 1919, upon the return of Major Freeman from Washington, where he served as a member of the Judge Advocate General's Department.)