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Lewis K. Underhill

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NOTES ON THE PROCEDURE OF COURTS-MARTIAL

LEWIS K. UNDERHILL¹

In an article on "The Military Courts of Paris," which occurred in this JOURNAL, Vol. IX, No. 1, May, 1918, pp. 5-31, there appeared a comparison of the procedure of the American and the French military tribunals. In this comparison a number of adverse comments were made on certain alleged features of the American procedure. In view of the fact that the writer appears to have been in error on a number of these points, a brief review of the procedure of American courts-martial may be of interest.

These are three classes of courts-martial—general, special, and summary. Their jurisdiction is the same, except that only a general court-martial may try a commissioned officer, or a capital offense. In practice, the summary courts-martial do not try soldiers for the more serious non-capital offenses; the special court handles offenses somewhat more serious than those dealt with by the summary court. The punishing power differs widely: a summary court may adjudge only confinement at hard labor for three months and corresponding forfeiture of pay; a special court may adjudge confinement and forfeiture for six months; only a general court may adjudge death, dishonorable discharge, or confinement or forfeiture in excess of six months. (Articles of War, 12, 13, 14—39 Stat. 650.)

Certain commanders may appoint summary courts-martial; certain others may appoint special courts; others appoint general courts. This power is regulated by A. W. 8, 9, 10. Contrary to the view expressed in the cited article (p. 10), neither general, special, nor summary courts-martial are appointed, as a rule, for a single case. Usually the order appointing the court directs the court to meet for "the trial of such persons as may be properly brought before it." The life of any court is of indefinite duration; it is frequently terminated only by the transfer of the members away from the station where the court has been directed to meet. The fact that a court is not appointed, as a rule, for each case, appears to be recognized by the writer of the

¹Major, Fiftieth Infantry. Formerly Instructor of Law, U. S. Military Academy; now commanding Department of Military Science and Tactics, University of California, Berkeley, Cal.

article elsewhere (p. 12), as he complains, not without reason, that the court must be sworn anew "each time a case is to be tried."

When a case is to be brought to trial, charges are preferred by a commissioned officer, corresponding to the information of civilian procedure. The officer who investigates the case is not, as alleged in the cited article (p. 9), the officer appointed "to hold a summary court"—unless by pure coincidence. The charges are forwarded "by the officer preferring them to the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs" (Manual for Courts-Martial, par. 75), i. e., the officer competent to appoint a summary court-martial and to approve the sentence of such a court. This officer is frequently the regimental or post commander of the accused. The officer determines from the nature of the charges whether to refer them to the court which he has appointed for trial, or whether to forward them to higher authority with a view to trial by a special or general court. If he decides to forward them he must conduct, or appoint some subordinate officer to conduct, a preliminary investigation. The investigating officer, who is appointed anew for each case, and who corresponds in a measure to a committing magistrate, examines the witnesses, and affords to the accused an opportunity to make a statement if he so desires—warning him, however, that whatever he says may be used against him (M. C. M. par. 76; *ibid.* par. 225). He then returns the papers in the case to the officer who directed the investigation, with his opinion as to whether the charges can be sustained. The officer who directed the investigation adds his own opinion and recommendations, and forwards the papers to authority competent to appoint a special or general court-martial.

The officer competent to appoint a general court-martial is usually a division or department commander, who has on his staff a member of the Judge-Advocate General's Department. This staff judge-advocate determines whether the charges are in proper form, and recommends such modifications as he may deem necessary. The commanding officer then indorses the charges to the judge-advocate of some general court-martial, usually one already in existence, for trial. The trial judge-advocate serves a copy of the charges on the accused, who selects counsel and is given reasonable time to prepare his case. The trial judge-advocate—not the president of the court, as alleged in the cited article (p. 11)—receives the other papers in the case, and is thus rendered familiar with the expected evidence for the prosecution. The president does not have the "dossier," as alleged (p. 12);

if he did, his opportunity to prejudge the case on the basis of suggested testimony and opinion might prejudice the substantial right of the accused to be tried according to evidence (A. W. 19), and might, if it caused the president to form a definite opinion on the case, be a valid ground for challenge (M. C. M. par. 121; *ibid.*, par. 194).

At the opening of the case the reporter is sworn; the judge-advocate reads the order appointing the court; the accused may then exercise his right of challenge; the court and judge-advocate are then sworn. This necessity for swearing the court in each case causes delay—though not as great as the author of the cited article appears to believe—but it is difficult to see how it can be avoided in view of numerous decisions of the United States Supreme Court that the record of each court-martial must show affirmatively that all the statutory requirements for jurisdiction have been complied with (*Runkle v. United States*, 122 U. S. 543). After the swearing of the court the charges are read, and the accused is called upon to plead.

The possible pleas are of the following sorts: to the jurisdiction, in bar of trial (former jeopardy, statute of limitations, or pardon), in abatement, guilty, not guilty, and guilty of a minor included offense only. In naval courts the latter plea, if accepted, precludes prosecution on the greater charge, whereas in military courts it simply serves as an admission—not necessarily conclusive—of part of the facts charged. The demurrer and the motion to strike out, formerly permissible, are no longer recognized by the manual; apparently the only way to raise distinctively an issue of law is to plead guilty to the specification (the concrete allegations of fact) and not guilty of the charge (violation of a given article of war). On such a plea, however, if the point of law raised by the accused is not well taken, the accused has no chance to answer over. On a plea of not guilty to both charge and specification the court may itself determine that the specification does not state an offense by finding the accused guilty of the specification, but not guilty of the charge.

After a plea of not guilty, and sometimes after a plea of guilty, in order to guide it in adjudging an adequate sentence, the court hears evidence. The judge-advocate first reads the paragraphs of the manual which set out the gist of the offenses charged. The court is supposed to know the law, but experience has shown that this means of refreshing the judicial mind is salutary. The prosecution may then make an opening address, to which the defense may reply. The prosecution then proceeds with the evidence, and is followed by the defense. Each

side examines its witnesses first, and cross-examination, re-direct, and re-cross follow. The court may also examine. If the case is well prepared by the parties, this latter examination is unnecessary, but as neither judge-advocate nor counsel is usually a skilled lawyer, it frequently becomes necessary for the court to take a hand in ascertaining the truth. But though the court may ask questions, it does not conduct the case for either side, and to the Anglo-Saxon mind this procedure is more conducive to justice than for the court or any member of it to jeopardize the judicial attitude by forming a theory in advance and by proceeding to conduct the examination on that theory. As a general rule the court permits either side to reopen the examination of any witness at any time prior to the findings.

The writer of the cited article (p. 17) leads us to believe that courts-martial follow the rules of evidence of the civil courts "where possible," and that they venture into the realm of free proof. This statement is misleading. ". . . the rules of admissibility for witnesses and other evidence, are now by express congressional enactment placed under the authority of Executive regulation; and the rules laid down in this Manual have the force of such regulation. They therefore form the only binding rules, except such rules of evidence as are expressly prescribed (1) in the Articles of War; (2) in the Federal Constitution; and (3) in such Federal statutes as expressly mention courts-martial." (M. C. M., par. 198.) Courts-martial, therefore, have their own code of evidence, and study of that code will show that the rules are in substance those in force in states which have modified the common law rules by the most progressive legislation. Common law rules not found in the code are of persuasive force only (*ibid.*, par. 199), but this does not mean that the court can venture into the realm of free proof. The court which does so stands in grave danger of having its proceedings disapproved.

The writer of the cited article (p. 13) argues that courts-martial should abolish rules of evidence. And yet he complains of the confusion of issues due to the power of the members to ask questions (p. 12). Is it not reasonable to believe that in courts-martial, as elsewhere, the very purpose of rules of evidence is to prevent confusion of issues? To the Anglo-Saxon mind it is difficult to understand how the admission of hearsay, opinion, and irrelevant testimony can aid a court in arriving at a correct judgment.

At the close of the evidence, the accused may, if he so desires, take the stand, or he may—relic of the days when he was not a competent witness—make an unsworn statement. This is, perhaps, the state-

ment not under oath to which the writer of the cited article refers (p. 17). No other testimony not under oath can be received. However, it is possible, contrary to the writer's view, to base a conviction on this statement of the accused. The writer further states (p. 18): "In military courts the silence of the defendant bodes ill for him. The discretion of the court is usually, I should think, directed against the man who does not speak, and will not explain where he might." No fallacy could be greater. The court is sworn to try in accordance with the evidence (A. W. 19), and is held strictly to the rule of reasonable doubt (M. C. M., par. 288). In my experience, courts-martial are impressed with the right of the accused to remain silent, and while I have frequently seen an accused convicted on his own testimony under cross-examination, I have never seen him convicted on his silence—except where the prosecution had already proved its case beyond a reasonable doubt.

As in our civilian procedure, the prosecution has the first and last words in the arguments; the defense speaks between. The court is then closed. If it were true, as the writer of the cited article suggests, that the judgment is arrived at without discussion (p. 14), the lamentable consequence which he indicates might very well follow. But it is not true. While the manual neither permits nor prohibits discussion, it invariably takes place, except in an open and shut case. I have seen a court closed for two hours to arrive at a finding. What took place behind the closed doors, if not discussion? Certainly not constant balloting, for, as the writer remarks, a majority vote usually determines the findings. The writer intimates that voting is by secret ballot (p. 25). If this were so, of what value would be the provision that the junior must vote first, as indicated in the article (p. 25)?

The writer complains that evidence of previous convictions cannot be received until after the findings (p. 14). Of what efficacy would be such evidence to prove the accused guilty of the offense for which he is on trial? Are not the interests of society protected by the introduction of such evidence after conviction, to affect the sentence?

The writer is in error as to the method of arriving at a sentence (p. 16). Such members as desire to propose a sentence write their proposals, which the president reads to the court (M. C. M., par. 145). Discussion is in order. When the court is ready to vote, the lightest sentence is considered first, and then the next lightest, and so on, until one is adopted by majority vote—not a mere plurality (M. C. M., par. 308).

The record is now completed and sent to the officer who appointed the court, and by him referred to the staff judge-advocate. The latter must determine whether the record shows that the court had jurisdiction, and whether the procedure was regular. If irregular, he must determine whether the rights of the accused were prejudiced. If so, he must recommend disapproval. If not, he considers whether any evidence was improperly introduced. If such was the case, he must eliminate such evidence from consideration. He then draws up a resume of the remaining evidence, and determines whether, on the basis of such evidence, the finding of the court was reasonable or not. In other words, the whole case goes up for review without the necessity of objection, exception, appeal, or writ of error. If any error prejudiced the substantial rights of the accused, the staff judge-advocate must recommend disapproval of conviction and sentence—and disapproval is tantamount to acquittal; the case cannot be remanded for a new trial. It is obvious, therefore, that the trial judge-advocate must protect the record unless he desires to see a hard-earned conviction run the danger of being set aside. An error not prejudicial is not a ground for disapproval (A. W. 37).

The reviewing authority may also disapprove an acquittal, but such disapproval is effective only as an expression of opinion—the accused goes free. It is true that, before final approval or disapproval, the case may be sent back for reconsideration, but the court cannot be coerced, and the members, being sworn to secrecy as to the individual votes (A. W. 19), know they cannot be coerced. Similarly, the reviewing authority may reduce a sentence, but cannot increase it.