CHAPTER THIRTEEN

Then and Now

In considering the work of the courts and bar of the pioneer period, it is difficult for those who had no personal experience of life and conditions prior to forty years ago to comprehend difficulties under which they labored. It is difficult to think of Chief Justice Stow riding from Fond du Lac on a pony with an Indian for a guide, following only the trails the Indians had adopted from the wild animals, through the unbroken forest extending from the shore of Lake Winnebago to the waters of Lake Michigan. Imagine him and his guide winding around the heads of the great swamps which existed in what is now the towns of Rockland and Eaton to organize his first court at the Rapids. The only settlers road then reaching to the west from Manitowoc was that to ‘‘Thayer’s Mills,’’ last called Heinz’s Mills, about seven miles out, and the Calumet road even on paper was two years away. If a storm arose or the rains fell, they simply had to go on until they found shelter in the log shanty of some new settler or the bark tepee of an Indian trapper. If the dark night overtook them in the woods they had to stop, build a fire and lie down until daylight.

It is recorded of Judge Wiram Knowlton that he was compelled to make the trip from La Crosse to St. Croix or Superior in the month of February, on snow-shoes carrying a pack of provisions and blankets, considering himself fortunate if he had a chance to go over the crusted snow in a dog-sleigh, with an Indian mail carrier. His circuit comprised nearly the northern one-third of the state, and reached from the north boundary of Grant county in the southwest corner of Wisconsin to the waters of Lake Superior. Except along a few streams emptying into the Mississippi, it was a wilderness. Wilderness or not, there were human rights to be protected by law, trappers, Indian traders, explorers, lumber men, and twice a year at five different points, the pioneer judge went to hear the cause and pronounce the judgment.

I recall a conversation with Judge Howe, in which he told me about being caught in March in a snow blizzard while on the military road from Green Bay to Manitowoc and was
obliged to spend two days and nights in the shelter of a settler’s cabin. He was on his way to hold court in Manitowoc and it took him four days to get through. He had forgotten the name of his host but remembered that he was a Frenchman and from his description I inferred that it must have been the old Clifford King, father of the present Clifford King of Cooperstown, or one of the Allie families who lived in that neighborhood.

Each of the circuits had an average of five counties. Some of them had eight, but one county would be attached to a contiguous county for judicial purposes, so that one term of court would include two counties. The terms were so arranged that at least two regular terms were held in each county during the year and in addition to that, all the judges met twice a year at the capitol to hold a term of the supreme court. Thus each circuit judge held twelve terms a year at least. For instance, Judge Howe at Green Bay would be compelled to come to Manitowoc twice a year, in April and September, through the woods, on foot, horseback, or buckboard stage, to hold a court, make similar journeys to Oshkosh, Calumet, Fond du Lac and Sheboygan, and twice a year in December and June go to Madison.

Each of the other four circuit judges had similar arduous duties to perform. They had, perhaps, less travel. Some of the circuits were much smaller, but more thickly settled, and more real law work to do. But in “traveling the circuit” as it had to be traveled in those days, all had an abundance of out-door exercise. For all these services and the real hardships which at times attended them, these pioneer judges received the munificent salary of $1500 per annum, payable quarterly, out of which they were expected to pay the expense of their travel and living which even in those days of low stage fare and “cheap” hotels was a considerable item. It was not until 1858 that the salary was increased to $2500 per annum.

It is hardly a matter of wonder that Chief Justice Stow refused a re-election, or that Judges Howe and Gorsline resigned before the end of their respective terms. Changes in the judgesthip were frequent in all the circuits of the state. But in those early days the honor of the judicial office was held in high esteem, and considered worth the sacrifice of many dollars. Many men, learned and scholarly, would quickly abandon a lucrative business, to sit even for a short period on the bench of the judge.

But “tempora mutanter,” Chief Justice Ryan writing as late as 1876, says sadly: “with all our boast of the present, judicial eminence is not what it was,” and yet, when he was appointed to that office at a time when he had no reason to
expect it, and in fact did not expect it, he declared he had reached the supreme ambition of his life.

Justice Timlin, also called to the supreme bench under circumstances the most gratifying, in one of his published opinions intimates that his leaving the forum for the bench was a mistake he regretted. These expressions may have been, after all, only made in moments of despondency or disillusion such as come to all men. But the fact is patent to every one who has spent thirty or forty years of his life among courts and lawyers, that we are losing the ancient respect for the courts, handed down by our Anglo-Saxon forefathers. In that loss we lose the greatest cohesive force in our democratic government. It is the truth that neither in the early day nor the latter, has a place on the supreme or circuit bench been a sinecure or a bed of roses. Then and now it has always meant to a conscientious judge, hard and continuous labor. In the pioneer period there was the added feature of physical stress and exposure to the elements while going to and from the places of their labors.

It was the same with the members of the bar. To "travel the circuit" as the early lawyers were expected to do, and did, involved no little physical discomfort and bodily fatigue. It also involved a good deal of expense in divers ways. In the period of the hot quarrel and excitement over the old Manitowoc and Mississippi River Railway litigation, I several times saw J. D. Markham, S. A. Wood and other attorneys start at daybreak to drive to Oshkosh, spending the whole day riding in some spring wagon, in order to argue some motion or ask for some injunction the day following. Winnebago county at that time formed part of the Fourth circuit.

In the early part of these papers I have spoken of how attorneys who were good walkers would hike out to Green Bay or Menasha to do business at the land offices. The late Judge J. T. Mills has told me often that it was his custom in the early years to send his books and papers on to Madison a week or so ahead of the meeting of the supreme court, and a few days after start out on foot and make the tramp of about one hundred miles in time to be present at the opening of court. He said he did this by preference as it was less fatiguing than to ride over depths of mud and slush or upon roads so furrowed by wheel ruts that they were worse for travel than a plowed field.

The difficulties of travel and also the attendant expense were such that it greatly hindered and delayed the transaction of business, and lawyers were obliged to send away to outside attorneys much work they now do themselves. Your client as a rule did not feel as if he could afford to pay you
for the ten days or so of time spent in going to Madison by stage to argue his appeal in the supreme court. The result was that in such work the local bar became simply a feeder for a big bar at Madison and Milwaukee.

The local lawyer prepared the case and wrote the brief, sent the papers and a retainer to Milwaukee or Madison attorneys who made the appearances in court, and received the credit (when there was any) and most of the cash.

It was not until after a lapse of twelve years that a case appealed from the circuit to the supreme court was there argued by the local attorneys. The case was that of the Chickerming Lodge of Odd Fellows vs. McDonald. John R. Bentley was attorney for McDonald and took the appeal, while B. R. Anderson was attorney for the lodge and won the case.

This was the first case in the supreme court handled exclusively by the local bar.

Even the ordinary every day work of the lawyer was not without physical discomfort and hardship. As late as the summer of 1875, I had occasion to take the deposition of a witness in the southern part of Door county. The witness was one of the proprietors of a small pier jutting into Lake Michigan from which shipments of wood, lumber, posts and the like were made. My friend L. J. Nash was the opposing counsel and we arranged that we would drive up there together. I had previously arranged with the witness to have a competent Justice of the Peace on hand to take the testimony as that was important. On the appointed day Bro. Nash and I got an early start and my little bay horse got us up to Stoney Creek pier about 4 P. M.

The time set for the justice to appear was 9 A. M. next morning but we urged the witness to send right out for the justice and we would try and finish his testimony that night. No use; we learned that the judicial officer on whom we depended lived about seven miles out and there was no road except an old logging road. He did, however, send a man out with notice of our arrival and a request that "his honor" would come down as early as possible in the morning.

Next morning about 10 A. M. the justice made his appearance. He was an intelligent German farmer who had only been in this country a little over a year. He had little knowledge of the language and no experience whatever. He at once promptly declared he could not possibly do what was expected of him. I gave my witness a stiff verbal castigation for not doing what I had directed. As he had a deep contingent interest in the litigation and was considered a good business man, his action was a surprise to me.
We were in a quandary what to do. I favored throwing up the whole business and later giving notice before some competent officer in Kewaunee. Mr. Nash declared he could not and would not come back again. We finally agreed that we would have the justice administer the oath to the witness, I would examine him and Mr. Nash would write down the testimony and his objections thereto. In turn he would cross-interrogate while I wrote down the cross-examination with my objections. All this was accordingly done. We entered into a stipulation waiving all objections to the manner of taking the deposition and agreeing that it should be used on the trial subject to the objections taken at the hearing. The justice duly certified that the deposition had been taken before him and had been reduced to writing by "a competent person" in his presence and under his direction.

The question of the expense of the proceeding fell to me as attorney for the moving party. I urged the justice to name the amount he thought would compensate him. He hesitated a long time and at last said "I don't know, you fellows done all the work." "Do ye think seventy-five cents would be too much?"

I nearly fainted, but recovered my presence of mind in time to hand him a two dollar bill, and shifted the burden to him. He was simply overwhelmed at my munificence.

It was about 4 P. M. when we got through and we determined to hitch up and push as far as we could in the direction of home. There was no hotel where we had been staying and we had slept the night before in the attic of an unplastered board shanty which housed the family of the manager of the little saw-mill. We had bunked together on a straw-tick and while I had spent many nights in worse quarters down in Virginia in war time, I had again become accustomed to better surroundings. Mr. Nash had roughed it less than I and was even more fastidious.

My little family horse, made good time in spite of rough roads. We got supper at Kewaunee and pushed on. Between that city and Two Creeks the night shut down black as pitch and soon we were compelled to go at a walk. We finally got to a wayside tavern kept by a Bohemian named Joe Bartosch about a mile and a half from Two Creeks and stopped.

They had retired for the night but we rattled and knocked until they finally let us in. I saw my horse cared for and we got ready for bed. I was just ready to turn in, when Mr. Nash came into my room writhing with pain and declared we must at once hitch up and get to Two Rivers, that he could not stand it and must have medical help. I protested and pointed out that we would have to walk the horse the whole
way, if we did not break down before we got a mile on the road. He declared he could not stand it and would start out on foot alone, to where he could get a doctor. Of course I could not consent to that. His limbs were spotted with red blotches from the ankles up which burned like fire. I could see that he was seriously alarmed. As I looked I recognized the well defined traces of old acquaintances I had met several times in my army life and began to laugh. Until then I had not felt anything much, but suggestion compelled my attention and I found on my person half a dozen or more samples which matched exactly.

What had happened was, that our sleeping place the previous night was placed directly against the board partition walls, and during the night a procession of insects, genus lectularius, (Anglice—bed bugs) had made a bridge of the bed clothes and marched over. They found my friend Nash plump and very much to their taste and stayed with him. As I was dry picking, being rather attenuated in those days, I escaped except where some samples had been taken.

Brother Nash's mind being now relieved from the visions of Scabies, Erysipelas, Small-pox, etc. which had begun to haunt him, asked if I did not know of something we might use to alleviate the pain and itching we now both felt. I recalled an old and rather rough remedy we used in the army when bitten by wood-ticks, and like poisonous insects, the foundation of which was the strong salt brine from our pork barrels. He routed up the landlady got a pitcher of boiling water and a bowl of salt, with a couple of other simples from which we concocted an imitation which we rubbed vigorously into our sore spots. Mr. Nash went to his room. I waited about fifteen minutes and taking my candle went to his room. I found him sound asleep, sleeping the sleep of the weary and un bitten. I followed his example.

Next morning we were up betimes. Mr. Nash declared himself perfectly cured. We had breakfast and had our horse and buggy brought around immediately after.

Nearly all the way to Two Rivers the road was a mass of clay half-dried and cut up into ridges and ditches, which tossed our buggy up in the air and from side to side, so that we were compelled to go slowly and exercise the greatest care. We realized then what would have resulted had we attempted to pass over it in the blackness of the previous night. It was well into the afternoon when we reached Manitowoc, too late indeed to do any effective work that day. That deposition had cost us three days' work with its attendant discomfort.

The following winter I had another unpleasant experi-
ence. I had a case pending in the U. S. Court at Milwaukee involving the validity of municipal bonds issued by a town in aid of a railway.

It was necessary for me to obtain certified copies of the proceedings as recorded in the town books. I left Manitowoc by railroad about ten o'clock P. M. and got to New London junction about two o'clock next morning. It was terribly cold, the mercury in the thermometer showing a good many degrees below zero. I had to spend about three hours in the station waiting for an early morning train to Green Bay. Paced the floor to keep from chilling. I finally got to my destination, a little way station about half way to Green Bay and was dumped out on the snow, to shift for myself, as best I could. No one was stirring and in the grey morning I wandered from house to house until I came to a sign which intimated that fluid refreshments and warm meals could be had within. I pounded vigorously on the door and finally a sleepy looking half dressed man let me in. He reckoned "it was cold out," and I confirmed his reckoning with emphasis. He proceeded to build up a fire in what was evidently a combination of bar-room and waiting room, and in due time a plain but substantial and bountiful breakfast was served in a small, but cold and fireless, dining room. After breakfast I made inquiry and found that the town clerk lived "out in the woods" about three or four miles. I tried to get some one to drive me out there in a sleigh of any sort, but nothing of that kind was to be had though I declared myself ready to pay almost any price. There was nothing left except for me to proceed on foot to interview him. The last half of my journey was through unbroken snow nearly up to my knees. I found my man just as he was getting ready to go to work for the day. He was suspicious that I was about to take some advantage of him in the pending lawsuit of the town, but I assured him that I asked nothing but what I had a right to take if I paid him his fees. I urged him to stay and help me, offering to pay him more than twice as much as he could earn in the woods, but to no avail. He had promised to go and the crew was short two men already, and go he must. He consented to allow me to take the copies I wished and his good wife fitted me out with a small table in the kitchen (the only warm room in the house) and there I worked all day and far into the night copying records, and preparing certificates for him to sign.

Early in the evening he returned and after supper we worked till nearly midnight comparing and certifying the copies. Incidentally he told me that he had gone straight to the town chairman to find out what right I had "to go over
them books" and that the chairman had told him, everybody had a right to look over the books, but to be careful and see that the copies were right before he signed any certificate. He was much more affable than in the morning, and as it was very late I was invited to stay all night. The cold was still intense, the night dark. I had no inclination to face a tramp of four miles through the woods with a good chance of losing the track and wandering about till daylight, in order to reach the little hotel at the station.

In due time I was conducted up stairs to the guest chamber which as usual in such houses was the furthest possible from the influence of any fire. It was a chamber of horrors. The bare plastered walls were covered an inch deep with ice and white frost from the frozen vapors, from the rooms below, the windows thick with ice and frost.

I prepared myself and tumbled into bed but the frozen sheets seemed to extract every particle of heat from my body, and my teeth rattled like castanets. After a little, I jumped from the bed, dressed myself, with the exception of my boots, put on my heavy overcoat, buttoning it tight. I even put on my fur cap drawing it down over my ears. I indulged in a series of active calisthenics, swinging my arms and lower limbs, pounding my body with my fists to induce circulation of the blood and then rolling myself in all the bed clothing threw myself on the bed and awaited results. I felt myself accumulating a little warmth and fell asleep. Several times I woke up and though I felt the cold was able to endure it. At last I heard the family stirring. I threw off the bed clothes, took off my overcoat and cap to save appearances put on my boots and went down stairs where I joined the family crowding around the kitchen stove. After a time we had a plain and substantial breakfast. I gathered my papers and other matters together, and settled with my friend the clerk for his fees and costs of certificates. He did not want to accept my compensation for his hospitality but I insisted on it. They had done the best they could for me, but I look back upon that night as one of the most miserable in my life. Taking my satchel in my hand I walked to the station in the sharp frosty air getting warmed up by the fast walk. After an hour or so of waiting, I got a way train to Green Bay. Another long wait of several hours, then a train to Appleton Junction. Another wait of long hours and near evening a train for Manitowoc where I arrived thoroughly exhausted from work and loss of sleep.

These two instances are simply two out of many similar ones. They were the same in the experience of every lawyer
in general practice. That was forty-six years ago. Pioneer days and ways were still existing. Railways alleviated matters somewhat where they existed, but connections were bad and even where there were railroads, for work within a radius of forty miles a good driving horse was generally preferable.

In either case lawyers who practised in those days could tell of many instances of real hardship.