DEWITT DAVID MILLER

THE JUDICIAL MURDER OF MARY E. SURRATT

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"*Oceans of horse-hair, continents of parchment, and learned-sergeant eloquence, were it continued till the learned tongue wore itself small in the indefatigable learned mouth, cannot make the unjust just. The grand question still remains, Was the judgment just? If unjust, it will not and cannot get harbour for itself, or continue to have footing in this Universe, which was made by other than One Unjust. Enforce it by never such statuting, three readings, royal assents; blow it to the four winds with all manner of quilted trumpeters and pursuivants, in the rear of them never so many gibbets and hangmen, it will not stand, it cannot stand. From all souls of men, from all ends of Nature, from the Throne of God above, there are voices bidding it: Away! Away!*"
Past and Present.

PRELIMINARY

CHAPTER I.
The Reign Of Terror

The assassination of Abraham Lincoln burst upon the City of Washington like a black thunderbolt out of a cloudless sky. On Monday, the 3d of April, 1865, Richmond was taken. On the succeeding Sunday (the ninth), General Lee with the main Army of the South surrendered. The rebellion of nearly one-half the nation lay in its death-throes. The desperate struggle for the unity of the Republic was ending in a perfect triumph; and the loyal people gave full rein to their joy. Every night the streets of the city were illuminated. The chief officers of the government, one after another, were serenaded. On the evening of Tuesday, the eleventh, the President addressed his congratulations to an enthusiastic multitude from a window of the White House. On the night of Thursday (the thirteenth) Edwin M. Stanton, the Secretary of War, and Ulysses S. Grant, the victorious General of the Army of the North, were tumultuously greeted with banners and music and cannon at the residence of the Secretary. The next day, Friday the 14th, was the fourth anniversary of the surrender of Fort Sumter to the South, and that national humiliation was to be avenged by the restoration of the flag of the United States to its proper place above the fort by the hand of the same gallant officer who had been compelled to pull it down. In the evening, a torch-light procession perambulated the streets of the Federal Capital. Enthusiastic throngs filled the theatres, where the presence of great officials had been advertised by huge placards, and whose walls were everywhere festooned with the American flag. After four years of agonizing but unabating strain, all patriots felt justified in yielding to the full enjoyment of the glorious relaxation.

Suddenly, at its very zenith, the snap of a pistol dislimns and scatters this great jubilee, as though it were, indeed, the insubstantial fabric of a vision. At half past ten that night, from the box of the theatre where the President is seated, a shot is heard; a wild figure, hatless and clutching a gleaming knife, emerges through the smoke; it leaps from the box to the stage, falls upon one knee, recovers itself, utters one shout and waves aloft its bloody weapon; then turns, limps across in front of the audience and disappears like a phantom behind the scenes. Simultaneously, there breaks upon the startled air the shriek of a woman, followed close by confused cries of “Water! Water!” and “The President is shot!”

For the first few moments both audience and actors are paralyzed. One man alone jumps from the auditorium to the stage and pursues the flying apparition. But, as soon as the hopeless condition of the President and the escape of the assassin begin to transpire, angry murmurs of “Burn the Theatre!” are heard in the house, and soon swell into a roar in the street where a huge crowd has already assembled.

The intermingling throng surges into the building from every quarter, and mounts guard at every exit. Not one of the company of actors is allowed to go out. The people seem to pause for a moment, as if awaiting from Heaven a retribution as sudden and awful as the crime.

All their joy is turned to grief in the twinkling of an eye. The rebellion they had too easily believed to be dead could still strike, it seemed, a fatal blow against the very life of the Republic. A panic seizes the multitude in and around the theatre, and from the theatre spreads, “like the Night,” over the whole city. And when the frightened citizens hear, as they immediately do, the story of the bloody massacre in the house of the Secretary of State, occurring at the same hour with the murder of the President, the panic swells into a reign of terror. The wildest stories find the quickest and most eager credence. Every member of the Cabinet and the General of the Army have been, or are about

to be, killed; the government itself is at a standstill; and the lately discomfited rebels are soon to be in possession of the Capital. Patriotic people, delivering themselves over to a fear of they know not what, cry hoarsely for vengeance on they know not whom. The citizen upon whose past loyalty the slightest suspicion can be cast cowers for safety close to his hearth-stone. The terror-stricken multitude want but a leader cool and unscrupulous enough, to plunge into a promiscuous slaughter, such as stained the new-born revolution in France. A leader, indeed, they soon find, but he is not a Danton. He is a leader only in the sense that he has caught the same madness of terror and suspicion which has seized the people, that he holds high place, and that he has the power and is in a fit humor to pander to the panic.

Edwin M. Stanton was forced by the tremendous crisis up to the very top of affairs. Vice-President Johnson, in the harrowing novelty of his position, was for the time being awed into passive docility. The Secretary of State was doubly disabled, if not killed. The General of the Army was absent. The Secretary of War without hesitation grasped the helm thus thrust into his hand, but, alas! he immediately lost his head. His exasperation at the irony of fate, which could so ruthlessly and in a moment wither the triumph of a great cause by so unexpected and overwhelming a calamity, was so profound and intense, his desire for immediate and commensurate vengeance was so uncontrollable and unreasoning, as to distort his perception, unsettle his judgment, and thus cause him to form an estimate of the nature and extent of the impending danger as false and exaggerated as that of the most panic-stricken wretch in the streets. Personally, besides, he was unfitted in many respects for such an emergency. Though an able and, it may be, a great War-Minister, he exerted no control over his temper; he habitually identified a conciliatory and charitable disposition with active disloyalty; and, being unpopular with the people of Washington by reason of the gruffness of his ways and the inconsistencies of his past political career, he had reached the unalterable conviction that the Capital was a nest of sympathizers with the South, and that he was surrounded by enemies of himself and his country.

When, therefore, upon the crushing news that the President was slain, followed hard the announcement that another assassin had made a slaughter-house of the residence of the Minister's own colleague, self-possession – the one supreme quality which was indispensable to a leader at such an awful juncture – forsook him and fled.

Before the breath was out of the body of the President, the Secretary had rushed to the conclusion, unsupported as yet by a shadow of testimony, that the acts of Booth and of the assailant of Seward (at the moment supposed to be John H. Surratt) were the outcome of a widespread, numerous and powerful conspiracy to kill, not only the President and the Secretary of State, but all the other heads of the Departments, the Vice-President and the General of the Army as well, and thus bring the government to an end; and that the primary moving power of the conspiracy was the defunct rebellion as represented by its titular President and his Cabinet, and its agents in Canada. This belief, embraced with so much precipitation, immediately became more than a belief; it became a fixed idea in his mind. He saw, heard, felt and cherished every thing that favored it. He would see nothing, would hear nothing, and hated every thing, that in the slightest degree militated against it. Upon this theory he began, and upon this theory he prosecuted to the end, every effort for the discovery, arrest, trial and punishment of the murderers.

He was seconded by a lieutenant well-fitted for such a purpose – General Lafayette C. Baker, Chief of the Detective Force. In one of the two minority reports presented to the House of Representatives by the Judiciary Committee, on the Impeachment Investigation of 1867, this man and his methods are thus delineated:

> "The first witness examined was General Lafayette C. Baker, late chief of the detective police, and although examined on oath, time and again, and on various occasions, it is doubtful whether he has in any one thing told the truth, even by accident. In every important statement he is contradicted by witnesses of unquestioned credibility. And there can be no doubt that to his many previous

> outrages, entitling him to an unenviable immortality, he has added that of wilful and deliberate perjury; and we are glad to know that no one member of the committee deems any statement made by him as worthy of the slightest credit. What a blush of shame will tinge the cheek of the American student in future ages, when he reads that this miserable wretch for years held, as it were, in the hollow of his hand, the liberties of the American people. That, clothed with power by a reckless administration, and with his hordes of unprincipled tools and spies permeating the land everywhere, with uncounted thousands of the people's money placed in his hands for his vile purposes, this creature not only had power to arrest without crime or writ, and imprison without limit, any citizen of the republic, but that he actually did so arrest thousands, all over the land, and filled the prisons of the country with the victims of his malice, or that of his masters."

In this man's hands Secretary Stanton placed all the resources of the War Department, in soldiers, detectives, material and money, and commanded him to push ahead and apprehend all persons suspected of complicity in the assumed conspiracy, and to conduct an investigation as to the origin and progress of the crime, upon the theory he had adopted and which, as much as any other, Baker was perfectly willing to accept and then, by his peculiar methods, establish. Forthwith was ushered in the grand carnival of detectives. Far and wide they sped. They had orders from Baker to do two things:

I. – To arrest all the "Suspect." II. – By promises, rewards, threats, deceit, force, or any other effectual means, to extort confessions and procure testimony to establish the conspiracy whose existence had been postulated.

At two o'clock in the morning of Saturday, the fifteenth, they burst into the house of Mrs. Surratt and displaying the bloody collar of the coat of the dying Lincoln, demanded the whereabouts of Booth and Surratt. It being presently discovered that Booth had escaped on horseback across the Navy Yard Bridge with David Herold ten minutes in his rear, a dash was made upon the livery-stables of Washington, their proprietors taken into custody, and then the whole of lower Maryland was invaded, the soldiers declaring martial law as they progressed. Ford's theatre was taken and held by an armed force, and the proprietor and employees were all swept into prison, including Edward Spangler, a scene-shifter, who had been a menial attendant of Booth's. The superstitious notion prevailed that the inanimate edifice whose walls had suffered such a desecration was in some vague sense an accomplice; the Secretary swore that no dramatic performance should ever take place there again; and the suspicion was sedulously kept alive that the manager and the whole force of the company must have aided their favorite actor, or the crime could not have been so easily perpetrated and the assassin escaped.

On the night of the fifteenth (Saturday) a locked room in the Kirkwood House, where Vice President Johnson was stopping, which had been engaged by George A. Atzerodt on the morning of the fourteenth, was broken open, and in the bed were found a bowie-knife and a revolver, and on the wall a coat (subsequently identified as Herold's), in which was found, among other articles, a bank book of Booth's. The room had not been otherwise occupied – Atzerodt, after taking possession of it, having mysteriously disappeared.

On the morning of the seventeenth (Monday), at Baltimore, Michael O'Laughlin was arrested as a friend of Booth's, and it was soon thought that he "*resembled extremely*" a certain suspicious stranger who, it was remembered, had been seen prowling about Secretary Stanton's residence on the night of the 13th, when the serenade took place, and there doing such an unusual act as inquiring for, and looking at, General Grant.

On the same day at Fort Monroe, Samuel Arnold was arrested, whose letter signed "Sam" had been found on Saturday night among the effects of Booth.

On the night of the seventeenth, also, the house of Mrs. Surratt with all its contents was taken possession of by the soldiers, and Mrs. Surratt, her daughter, and all the other inmates were taken into custody. While the ladies were making preparations for their departure to prison, a man disguised as a laborer, with a sleeve of his knit undershirt drawn over his head, a pick-axe on his shoulder, and covered with mud, came to the door with the story that he was to dig a drain for Mrs. Surratt in the morning; and that lady asseverating that she had never seen the man before, he was swept with the rest to headquarters, and there, to the astonishment of everybody, turned out to be the desperate assailant of the Sewards.

During these few days Washington was like a city of the dead. The streets were hung with crape. The obsequies, which started on its march across the continent the colossal funeral procession in which the whole people were mourners, were being celebrated with the most solemn pomp. No business was done except at Military Headquarters. Men hardly dared talk of the calamity of the nation. Everywhere soldiers and police were on the alert to seize any supposed or denounced sympathizer with the South. Mysterious and prophetic papers turned up at the White House and the War Department. Women whispered terrible stories of what they knew about the "Great Crime." To be able to give evidence was to be envied as a hero.

And still the arch-devil of the plot could not be found!

The lower parts of Maryland seethed like a boiling pot, and the prisons of Washington were choking with the "suspect" from that quarter. Lloyd – the drunken landlord of the tavern at Surrattsville, ten miles from Washington, at which Booth and Herold had stopped at midnight of the fatal Friday for carbines and whisky – after two days of stubborn denial was at last frightened into confession; and Doctor Mudd, who had set Booth's leg Saturday morning thirty miles from Washington, was in close confinement. All the intimate friends of the actor in Washington, in Baltimore, in Philadelphia, in New York and even in Montreal were in the clutches of the government. Surratt himself – the pursuit of whom, guided by Weichman, his former college-chum, his room-mate, and the favorite guest of his mother, had been instant and thorough – it was ascertained, had left Canada on the 12th of April and was back again on the 18th.

But where was Booth? where Herold? where Atzerodt?

On the 20th, the Secretary of War applied the proper stimulus by issuing a proclamation to the following effect:

> "$50,000 reward will be paid by this department for the apprehension of the murderer of our late beloved President.
>
> "$25,000 reward for the apprehension of John H. Surratt, one of Booth's accomplices.
>
> "$25,000 reward for the apprehension of Herold, another of Booth's accomplices.
>
> "Liberal rewards will be paid for any information that shall conduce to the arrest of either of the above-named criminals or their accomplices.
>
> "All persons harboring or secreting the said persons, or either of them, or aiding or assisting in their concealment or escape, will be treated as accomplices in the murder of the President and the attempted assassination of the Secretary of State, and shall be subject to trial before a military commission and the punishment of death."

What is noteworthy about this document is that Stanton had already made up his mind as to the guilt of the persons named as accomplices of Booth; that he needed only their arrest, being assured of their consequent conviction; and that he had already determined that their trial and the trial of all persons connected with the great crime, however remotely, should be had before a military tribunal, and that the punishment to follow conviction should be death.

At four o'clock in the morning of the very day this proclamation was issued, Atzerodt was apprehended at the house of his cousin in Montgomery County, Md., about twenty-two miles northward of Washington, by a detail of soldiers, to whom, by the way, notwithstanding the arrest preceded the proclamation, $25,000 reward was subsequently paid. With Atzerodt his cousin, Richter, was taken also. O'Laughlin, Payne, Arnold, Atzerodt and Richter, as they were severally arrested, were put into the custody of the Navy Department and confined on board the Monitor *Saugus*, which on the morning of Saturday, when the President died, had been ordered to swing out into the middle of the river opposite the Navy Yard, prepared to receive at any hour, day or night, dead or alive, the arch-assassin. Each of these prisoners was loaded with double irons and kept under a strong guard. On the 23d, Atzerodt, by order of the Secretary of War, was transferred to the Monitor *Montauk*, to separate him from his cousin, and Payne, in addition to his double irons, had a ball and chain fastened to each ankle by the direction of the same officer. On the next day Spangler, who had hitherto been confined in the Old Capitol Prison, was transferred to one of the Monitors and presumably subjected to the same treatment. On the same day the following order was issued:

> "The Secretary of War requests that the prisoners on board iron-clads belonging to this department for better security against conversation shall have a canvass bag put over the head of each and tied around the neck, with a hole for proper breathing and eating, but not seeing, and that Payne be secured to prevent self-destruction."

All of which was accordingly done.

And still no Booth! It seems as though the Secretary were mad enough to imagine that he could wring from Providence the arrest of the principal assassin by heaping tortures on his supposed accomplices.

At length, in the afternoon of the 26th – Wednesday, the second week after the assassination – Col. Conger arrived with the news of the death of Booth and the capture of Herold on the early morning of that day; bringing with him the diary and other articles found on the person of Booth, which were delivered to Secretary Stanton at his private residence. In the dead of the ensuing night, the body of Booth, sewed up in an old army blanket, arrived, attended by the dog-like Herold; and the living and the dead were immediately transferred to the *Montauk*. Herold was double ironed, balled and chained and hooded. The body of Booth was identified; an autopsy held; the shattered bone of his neck taken out for preservation as a relic (it now hangs from the ceiling of the Medical Museum into which Ford's Theatre was converted, or did before the collapse); and then, with the utmost secrecy and with all the mystery which could be fabricated, under the direction of Col. Baker, the corpse was hurriedly taken from the vessel into a small boat, rowed to the Arsenal grounds, and buried in a grave dug in a large cellar-like apartment on the ground floor of the Old Penitentiary; the door was locked, the key removed and delivered into the hands of Secretary Stanton. No effort was spared to conceal the time, place and circumstances of the burial. False stories were set afloat by Baker in furtherance of such purpose. Stanton seemed to fear an escape or rescue of the dead man's body; and vowed that no rebel or no rebel sympathizer should have a chance to glory over the corpse, or a fragment of the corpse, of the murderer of Lincoln.

CHAPTER II.
The Bureau of Military (In)justice

Mingling with the varied emotions evoked by the capture and death of the chief criminal was a feeling of deepest exasperation that the foul assassin should after all have eluded the ignominious penalty of his crime. Thence arose a savage disposition on the part of the governing powers to wreak this baffled vengeance first, on his inanimate body; secondly, on the lives of his associates held so securely in such close custody; and thirdly, on all those in high places who might be presumed to sympathize with his deeds. It was too horrible to imagine that the ghost of the martyred Lincoln should walk unavenged. So stupendous a calamity must of necessity be the outcome of as stupendous a conspiracy, and must in the very justice of things be followed by as stupendous a retribution. A sacrifice must be offered and the victims must be forthcoming. To employ the parallel subsequently drawn by General Ewing on the trial of the conspirators: On the funeral pyre of Patroclus must be immolated the twelve Trojan captives. They were sure of Payne and of Herold. They held Arnold and O'Laughlin and Atzerodt and Spangler and Doctor Mudd – all the supposed satellites of Booth, save one. John H. Surratt could not be found. Officers in company with Weichman and Holahan, boarders at his mother's house, who in the terror of the moment had given themselves up on the morning of the fifteenth, traced him to Canada, as has already been noticed, but had there lost track of him. They had returned disappointed; and now Weichman and Holahan were in solitary confinement. Notwithstanding the large rewards out for his capture, as to him alone the all-powerful government seemed to be baffled. One consolation there was, however – if they could not find the son, they held the mother as a hostage for him, and they clung to the cruel expectation that by putting her to the torture of a trial and a sentence, they might force the son from his hiding place.

In the meanwhile the Bureau of Military Justice, presided over by Judge-Advocate-General Holt, had been unceasingly at work. General Baker with his posse of soldiers and detectives scoured the country far and wide for suspected persons and witnesses, hauled them to Washington and shut them up in the prisons. Then the Bureau of Military Justice took them in hand, and, when necessary, by promises, hopes of reward and threats of punishment, squeezed out of them the testimony they wanted. Colonel Henry L. Burnett, who had become an expert in such proceedings from having recently conducted the trial of Milligan before a military tribunal at Indianapolis, was brought on to help Judge Holt in the great and good work. In the words of General Ewing in his plea for Dr. Mudd:

> "The very frenzy of madness ruled the hour. Reason was swallowed up in patriotic passion, and a feverish and intense excitement prevailed most unfavorable to a calm, correct hearing and faithful repetition of what was said, especially by the suspected. Again, and again, and again the accused was catechised by detectives, each of whom was vieing with the other as to which should make the most important discoveries, and each making the examination with a preconceived opinion of guilt, and with an eager desire, if not determination, to find in what might be said the proofs of guilt. Again, the witnesses testified under the strong stimulus of a promised reward for information leading to arrest and followed by convictions."

The Bureau conducted the investigation on the preconceived theory, adopted, as we have seen, by the Secretary of War, that the Confederate Government was the source of the conspiracy; and, by lavishing promises and rewards, it had no difficulty in finding witnesses who professed themselves to have been spies on the rebel agents in Canada and who were ready to implicate them and through them the President of the defunct Confederacy in the assassination. Richard Montgomery and Sanford Conover, who had been in personal communication with these agents during the past year, were

eagerly taken into the employ of the Bureau, and made frequent trips to Canada, to return every time laden with fresh proofs of the complicity of the rebels.

To illustrate how the Bureau of Military Justice dealt with witnesses who happened to have been connected more or less closely with Booth, and who were either reluctant or unable to make satisfactory disclosures, here are two extracts from the evidence given on the trial of John H. Surratt in 1867.

The first is from the testimony of Lloyd, the besotted keeper of the Surratt tavern:

> "I was first examined at Bryantown by Colonel Wells. I was next examined by two different persons at the Carroll prison. I did not know either of their names. One was a military officer. I think some of the prisoners described him as Colonel Foster. I saw a man at the conspiracy trial as one of the Judges who looked very much like him. * * * I told him I had made a fuller statement to Colonel Wells than I could possibly do to him under the circumstances, while things were fresh in my memory. His reply was that it was not full enough, and then commenced questioning me whether I had ever heard any person say that something wonderful or something terrible was going to take place. I told him I had never heard anyone say so. Said he I have seen it in the newspapers.
>
> "He jumps up very quick off his seat, as if very mad, and asked me if I knew what I was guilty of. I told him, under the circumstances I did not. He said you are guilty as an accessory to a crime the punishment of which is death. With that I went up stairs to my room."

The next is from the testimony of Lewis J. Carland, to whom Weichman confessed his remorse after the execution of Mrs. Surratt:

> "He [Weichman] said it would have been very different with Mrs. Surratt if he had been let alone; that a statement had been prepared for him, that it was written out for him, and that he was threatened with prosecution as one of the conspirators if he did not swear to it. He said that a detective had been put into Carroll prison with him, and that this man had written out a statement which he said he had made in his sleep, and that he had to swear to that statement."

Let us add another; it is so short and yet so suggestive. It is from the testimony of James J. Gifford, who was a witness for the prosecution on both trials.

> "Q. – Do you know Mr. Weichman?
>
> "A. – I have seen him.
>
> "Q. – Were you in Carroll prison with him?
>
> "A. – Yes, sir.
>
> "Q. – Did he say in your presence that an officer of the government had told him that unless he testified to more than he had already stated they would hang him too?
>
> "A. – I heard the officer tell him so."

After a fortnight of such wholesale processes of arrest, imprisonment, inquisition, reward and intimidation, the Bureau of Military Justice announced itself ready to prove the charges it had formulated. Thereupon two proclamations were issued by President Johnson. One, dated May the first, after stating that the Attorney General had given his opinion "that all persons implicated in the murder of the late President, Abraham Lincoln, and the attempted assassination of the Hon. William H. Seward, Secretary of State, and in an alleged conspiracy to assassinate other officers of the Federal Government at Washington City, and their aiders and abettors, are subject to the jurisdiction of and legally triable before a Military Commission," ordered 1st, "that the Assistant Adjutant-General (W.

A. Nichols) detail nine competent military officers to serve as a Commission for the trial of said parties, and that the Judge-Advocate-General proceed to prefer charges against said parties for their alleged offences, and bring them to trial before said Military Commission." 2d, "that Brevet Major-General Hartranft be assigned to duty as Special Provost-Marshal-General for the purpose of said trial and attendance upon said Commission, and the execution of its mandates."

The other proclamation, dated May 2nd, after reciting that "it appears from evidence in the Bureau of Military Justice, that the atrocious murder of the late President, Abraham Lincoln, and the attempted assassination of the Hon. William H. Seward, Secretary of State, were incited, concerted, and procured by and between Jefferson Davis, late of Richmond, Va., and Jacob Thompson, Clement C. Clay, Beverly Tucker, George N. Sanders, William C. Cleary, and other rebels and traitors against the Government of the United States, harbored in Canada," offered the following rewards:

> "$100,000 for the arrest of Jefferson Davis.
> "$25,000 for the arrest of Clement C. Clay.
> "$25,000 for the arrest of Jacob Thompson, late of Mississippi.
> "$25,000 for the arrest of Geo. N. Saunders.
> "$25,000 for the arrest of Beverly Tucker.
> "$10,000 for the arrest of Wm. C. Cleary, late clerk of Clement C. Clay.
> "The Provost-Marshal-General of the United States is directed to cause a description of said persons, with notice of the above rewards, to be published."

At this date the President of the defunct Confederacy was a fugitive, without an army; and bands of U. S. Cavalry were already on the scout to intercept his flight. Military Justice, however, was too impatient to await the arrest of the prime object of its sword; and in obedience to the first proclamation proceeded without delay to organize a court to try the prisoners selected from the multitude undergoing confinement as the fittest victims to appease the shade of the murdered President. Over some of the "suspect" the Judge-Advocates for a time vacillated, whether to include them in the indictment or to use them as witnesses; but, after a season of rigid examinations, renewed and revised, they at last concluded that such persons would be more available in the latter capacity.

On the third day of May the funeral car, which, leaving Washington on the twenty-first of April, had borne the body of the lamented Lincoln through State after State, arrived at last at Springfield; and on the following day the cherished remains were there consigned to the tomb. On the sixth, by special order of the Adjutant-General, a Military Commission was appointed to meet at Washington on Monday, the eighth day of May, or as soon thereafter as practicable, "for the trial of David E. Herold, George A. Atzerodt, Lewis Payne, Michael O'Laughlin, Edward Spangler, Samuel Arnold, Mary E. Surratt, Samuel A. Mudd and such other prisoners as may be brought before it, implicated in the murder of the late President and in the attempted assassination of the Secretary of State and in an alleged conspiracy to assassinate other officers of the Federal Government at Washington City, and their aiders and abettors. By order of the President of the United States." And so, all things being in readiness, let the curtain rise.

PART I.
THE MURDER

CHAPTER I.
The Opening of the Court

On the ninth day of May the Commission met but only to adjourn that the prisoners might employ counsel. On the same day, two of its members, General Cyrus B. Comstock and Colonel Horace Porter – names to be noted for what may have been a heroic refusal – were relieved from the duty of sitting upon the Commission, and two other officers substituted in their stead.

So that Tuesday, May 10th, 1865 – twenty-six days after the assassination, a period much too short for the intense excitement and wild desire for vengeance to subside – may properly be designated as the first session of the Court. On the early morning of that day – before daylight – Jefferson Davis had been captured, and was immediately conducted, not to Washington to stand trial for his alleged complicity in the assassination, but to Fort Monroe. On the next day Clement C. Clay, also, surrendered himself to the United States authorities, and was sent, not to Washington to meet the awful charge formulated against him, but to the same military fortress.

The room in which the Commission met was in the northeast corner of the third story of the Old Penitentiary; a building standing in the U. S. Arsenal Grounds at the junction of the Potomac with the Eastern Branch, in a room on the ground floor of which the body of Booth had been secretly buried. Its windows were guarded by iron gratings, and it communicated with that part of the prison where the accused were now confined, by a door in the western wall. The male prisoners had been removed some days before from the Monitors to the Penitentiary, where Mrs. Surratt was already incarcerated, and each of them, including the lady, was now immured in a solitary cell under the surveillance of a special guard.

Around a table near the eastern side of this room sat, resplendent in full uniform, the members of the Court. At the head as President was Major-General David Hunter – a stern, white-headed soldier, sixty-three years old; a fierce radical; the first officer to organize the slaves into battalions of war; the warm personal friend of Lincoln, at the head of whose corpse he had grimly sat as it rested from place to place on the triumphal progress to its burial, and from whose open grave he had hurried, in no very judicial humor to say the least, to take his seat among the Judges of the accused assassins. On his right sat Major-General Lew Wallace, a lawyer by profession; afterwards the President of the Court-Martial which tried and hung Henry Wirz; but now, by a sardonic freak of destiny, known to all the world as the tender teller of “Ben Hur, a Tale of the Christ.” To the right of General Wallace sat Brevet Brigadier-General James A. Ekin and Brevet Colonel Charles A. Tompkins; about whom the only thing remarkable is that they had stepped into the places of the two relieved officers, Colonel Tompkins being the only regular army officer on the Board. On the left of General Hunter sat, first, Brevet Major-General August V. Kautz, a native of Germany; next, Brigadier-General Robert S. Foster, who may or may not have been the “Colonel Foster” alluded to in the testimony of Lloyd quoted above, as threatening the witness and as afterwards being seen by him on the Commission – the presence of an officer, previously engaged by the Government in collecting testimony against the accused, as one of the judges to try him not being considered a violation of Military Justice. Next sat Brigadier-General Thomas Mealey Harris, a West Virginian, and the author of a book entitled “Calvinism Vindicated;” next, Brigadier-General Albion P. Howe, and last, Lieutenant-Colonel David R. Clendenin.

Not one of these nine men could have withstood the challenge which the common law mercifully puts into the hands of the most abandoned culprit. They had come together with one determined and unchangeable purpose – to avenge the foul murder of their beloved Commander-in-Chief. They dreamt not of acquittal. They were, necessarily, from the very nature of their task, *organized to convict.*

The accused were asked, it is true, whether they had any objections to any member of the Court. But this was the emptiest of forms, as bias is no cause of challenge in military procedure, and peremptory challenges are unknown.

Moreover, it was nothing but a cruel mockery to offer to that trembling group of prisoners an opportunity, which, if any one of them had the temerity to embrace, could only have resulted in barbing with the sting of personal insult the hostile predisposition of the judges.

At the foot of the table around which the Court sat – the table standing parallel with the north side of the room – there was another, around which were gathered the three prosecuting officers, who, according to military procedure, were also members of the Commission.

First, was Brigadier-General Joseph Holt, the Judge-Advocate of the U. S. Army, and the Recorder of the Commission. During his past military career he had distinguished himself on many a bloody court-martial.

Second, designated by General Holt as First Assistant or Special Judge-Advocate, was Hon. John A. Bingham, of Ohio – long a Representative in Congress, then for a short interval a Military Judge-Advocate, now a Representative in Congress again, and to become in the strange vicissitudes of the near future, one of the managers of the impeachment of President Johnson, whom he now cannot praise too highly. He was one of those fierce and fiery western criminal lawyers, gifted with that sort of vociferous oratory which tells upon jurors and on the stump, by nature and training able to see but one side to a case and consequently merciless to his victims. His special function was to cross-examine and brow-beat the witnesses for the defense, a branch of his profession in which he was proudly proficient, and, above all, by pathetic appeals to their patriotism and loyalty, and by measureless denunciations of the murder of their Commander-in-Chief and of the Rebellion, to keep up at a white heat the already burning passions of the officers composing the tribunal. Next to him came Colonel Henry L. Burnett; brought from Indiana where he had won recent laurels in conducting the trial of Milligan for treason before a Military Commission – laurels, alas! soon to be blasted by the decision of the U. S. Supreme Court pronouncing that and all other Military Commissions for the trial of citizens in places where the civil courts are open illegal, and setting free the man this zealous public servant had been instrumental in condemning to death.

In the centre of the room was a witness-stand facing the Court. To the left of the witness-stand a table for the official reporters. Along the western side and directly opposite the Court was a platform about a foot high and four feet broad, with a strong railing in front of it. This was the prisoners' dock. The platform was divided near the left hand or southern corner by the doorway which led to the cells. In front of the southern end of the dock and behind the witness-stand was the table of the prisoners' counsel.

At the appointed hour the door in the western side opens and an impressive and mournful procession appears. Six soldiers armed to the teeth are interspersed among seven male prisoners and one woman.

First walks Samuel Arnold, the young Baltimorean, who is to sit at the extreme right (*i. e.*, of the spectators), followed close by his armed guard; next, Dr. Samuel T. Mudd and a soldier; next, Edward Spangler and a soldier; next, Michael O'Laughlin, another Baltimorean, and his soldier; next, George B. Atzerodt and a soldier; next, Lewis Payne, a tall gladiator, though only twenty years old, and his soldier; and then David E. Herold, looking like an insignificant boy, who is to sit next the door. As they enter, their fetters clanking at every step, they turn to their left and take seats on the platform in the order named, the six soldiers being sandwiched here and there between two of the men.

Each of these prisoners, during the entire trial, was loaded down with irons made as massive and uncomfortable as possible. Their wrists were bound with the heaviest hand-cuffs, connected by bars of iron ten inches long (with the exception of Dr. Mudd, whose hand-cuffs were connected by a chain), so that they could not join their hands. Their legs were weighed down by shackles joined by chains made short enough to hamper their walk. In addition to these fetters, common to all, Payne and Atzerodt had, attached by chains to their legs, huge iron balls, which their guards had to lift and carry after them whenever they entered or left the Court room.

Last, there emerges from the dungeon-like darkness of the doorway the single female prisoner, Mary E. Surratt. She, alone, turns to her right and, consequently, when she is seated has the left hand corner of the platform to herself. But she is separated from her companions in misery by more than the narrow passage-way that divides the dock; for she is a lady of fair social position, of unblemished character and of exemplary piety, and, besides, she is a mother, a widow, and, in that room amongst all those soldiers, lawyers, guards, judges and prisoners, the sole representative of her sex. Her womanhood is her peculiar weakness, yet still her only shield.

Is she too ironed?

The unanimous testimony of eye-witnesses published at the time of the trial is, that, though not hand-cuffed, she was bound with iron "anklets" on her feet. And this detail, thus universally proclaimed in the Northern Press and by loyal writers, was mentioned not as conveying the slightest hint of reprobation, but as constituting, like the case of the male prisoners, a part of the appropriate treatment by the military of a person suffering under such a charge. And, moreover, no contemporaneous denial of this widespread circumstance was anywhere made, either by Provost-Marshal, Counsel, Judge-Advocate or member of the Court. It passed unchallenged into history, like many another deed of shame, over which it is a wonder that any man could glory, but which characterized that period of frenzy.

Eight years after, during the bitter controversy between Andrew Johnson and Joseph Holt over the recommendation of mercy to Mrs. Surratt, General Hartranft, the former Special Provost-Marshal in charge of the prisoners, first broke silence and, coming to the aid of the sorely-tried Ex-Judge-Advocate, sent him a vehement categorical denial that Mrs. Surratt was ever manacled at any time, or that there was ever a thought of manacling her in any one's mind. Now, what force should be given to such a denial by so distinguished an officer, so long delayed and in the face of such universal contemporaneous affirmation?

No one knows how close and exclusive the charge of the prisoners by the special Provost-Marshal was, nor how liable to interruption, interference and supersession by the omnipotent Bureau of Military Justice, or by the maddened Secretary of War and his obsequious henchmen.

At the time the naked assertion was made, to heap indignities upon the head of the only woman in the whole country whom the soldiery took for granted was the one female fiend who helped to shed the blood of the martyred President, was so consonant with the angry feeling, in military circles, that an officer, having only a general superintendence over the custody and treatment of what was called "a band of fiends," would be very likely to overlook such a small matter as that the she-assassin was not exempted, in one detail, from the contumelies and cruelties it was thought patriotic to pile upon her co-conspirators. The only wonder ought to be that they relieved her from the hand-cuffs. They appear to have discriminated in the case of Dr. Mudd also, substituting a chain for an inflexible bar so that he for one could move his hands. There may have been some unmentioned physical reasons for both of these alleviations, but we may rest assured that neither sex, in the one case, nor profession in the other, was among them.

General Hartranft (or any other General) never denied, or thought it necessary to deny, that the seven male prisoners sat through the seven weeks of the trial, loaded, nay tortured, with irons. And there is no doubt that this unspeakable outrage, if thought of at all at the trial by the soldiery – high

or low – so far from being thought of as a matter of reprobation, was a subject of grim merriment or stern congratulation.

Eight years, however, passed away – eight years, in which a fund of indignation at such brutality, above all to a woman, had been silently accumulating, until at length to a soldier, whose beclouding passions of the moment had in the meantime cooled down, its weight made every loop-hole of escape an entrance for the very breath of life.

The entire atmosphere had changed, and denials became the order of the day. Memory is a most convenient faculty; and to forget what the lapse of years has at last stamped with infamy is easy, when the event passed at the time as a mere matter of course. Leaving these tardy repudiators of an iniquity, the responsibility for which in the day of its first publication they tacitly assumed with the utmost complacency, to settle the question with posterity; – we insist that the preference is open to writers upon the events of the year 1865 to rely upon the unprejudiced and unchallenged statements of eye-witnesses; and, therefore, we do here reaffirm that Mary E. Surratt walked into the court-room, and sat during her trial, with shackles upon her limbs.

At this late day it is a most natural supposition that these nine stalwart military heroes, sitting comfortably around their table, arrayed in their bright uniforms, with their own arms and their own legs unfettered, must have felt at least a faint flush of mingled pity, shame and indignation, as they looked across that room at that ironed row of human beings.

Culprits arraigned before them, guarded by armed soldiery, without arms themselves – why, in the name of justice, drag them into Court and force them to sit through a long trial, bound with iron, hand and foot? Was it to forestall a last possible effort of reckless and suicidal despair?

These brave warriors could not have feared the naked arm of Payne, nor have indulged the childish apprehension that seven unarmed men and one unarmed woman might overpower six armed soldiers and nine gallant officers, and effect their escape from the third story of a prison guarded on all sides with bayonets and watched by detective police! And yet, so far as appears, no single member of the Court, to whom such a desecration of our common humanity was a daily sight for weeks, thought it deserving of notice, much less of protest.

There is but one explanation of this moral insensibility, and that applies with the same force to the case of the woman as to those of the men. It is, that the accused were *already doomed*. For them no humiliation could be thought too deep, no indignity too vile, no hardship too severe, because their guilt was predetermined to be clear. And the members of the Military Commission, as they looked across the room at that sorry sight, saw nothing incongruous with justice, or even with the most chivalrous decorum, that the traitorous murderers of their beloved Commander-in-Chief should wear the shackles which were the proper precursors of the death of ignominy, they were resolved the outlaws should not escape.

We, civilians, must ever humbly bear in mind that the rule of the common law, that every person accused of crime is presumed to be innocent until his guilt is established beyond a reasonable doubt – a rule the benignity of which is often sneered at by soldiers as giving occasion for lawyers' tricks and quibbles, and as an impediment to swift justice, is reversed in military courts, where every person accused of crime is presumed to be *guilty* until he himself prove his innocence.

After the prisoners had been seated, and the members of the Commission, the Judge-Advocates and the official reporters sworn in, the accused were severally arraigned. There was but one Charge against the whole eight. Carefully formulated by the three Judge-Advocates upon the lines of the theory adopted by the Secretary of War, and which Gen. Baker and the Bureau of Military Justice had been moving heaven and earth to establish, it was so contrived as to allege a crime of such unprecedented, far-reaching and profound heinousness as to be an adequate cause of such an unprecedented and profound calamity.

The eight prisoners were jointly and severally charged with nothing less than having, in aid of the Rebellion, "*traitorously*" conspired, "together with one John H. Surratt, John Wilkes Booth,

Jefferson Davis, George N. Sanders, Beverley Tucker, Jacob Thompson, William C. Cleary, Clement C. Clay, George Harper, George Young and others unknown, to kill and murder" "Abraham Lincoln, late President of the United States and Commander-in-Chief of the Army and Navy thereof, Andrew Johnson, then Vice-President, Wm. H. Seward, Secretary of State, and Ulysses S. Grant, Lieutenant-General;" and of having, in pursuance of such "traitorous conspiracy," "together with John Wilkes Booth and John H. Surratt" "traitorously" murdered Abraham Lincoln, "traitorously" assaulted with intent to kill, William H. Seward, and lain in wait "traitorously" to murder Andrew Johnson and Ulysses S. Grant.

On this elastic comprehensive Charge, in which treason and murder are vaguely commingled, every one of the men, and Mary E. Surratt, were arraigned, plead not guilty, and were put upon trial. There is no doubt, by the way, that the Secretary of War would have been included as one of the contemplated victims, had not Edwin M. Stanton borne so prominent a part in the prosecution; and it was for this reason, and not because of any change in the evidence, that General Grant stood alone, as the mark of O'Laughlin.

To this single Charge there was, also, but a single Specification. This document alleged that the design of all these traitorous conspirators was, to deprive the Army and Navy of their Commander-in-Chief and the armies of their Commander; to prevent a lawful election of President and Vice-President; and by such means to aid and comfort the Rebellion and overthrow the Constitution and laws.

It then alleged the killing of Abraham Lincoln by Booth in the prosecution of the conspiracy, and charged the murder to be the act of the prisoners, as well as of Booth and John H. Surratt. It then alleged that Spangler, in furtherance of the conspiracy, aided Booth in obtaining entrance to the box of the theatre, in barring the door of the theatre box, and in effecting his escape. Then, that Herold, in furtherance of the conspiracy, aided and abetted Booth in the murder, and in effecting his escape. Then, that Payne, in like furtherance, made the murderous assault on Seward and also on his two sons and two attendants. Then, that Atzerodt, in like furtherance, at the same hour of the night, lay in wait for Andrew Johnson with intent to kill him. Then, that Michael O'Laughlin, in like furtherance, on the nights of the 13th and 14th of April, lay in wait for General Grant with like intent. Then, that Samuel Arnold, in prosecution of the conspiracy, "did, on or before the 6th day of March, 1865, and on divers other days and times between that day and the 15th day of April, 1865, combine, conspire with and counsel, abet, comfort and support" Booth, Payne, Atzerodt, O'Laughlin and their confederates. Then, "that, in prosecution of the conspiracy, Mary E. Surratt, on or before the 6th of March, 1865, and on divers other days and times between that day and the 20th of April, 1865, received, entertained, harbored and concealed, aided and assisted" Booth, Herold, Payne, John H. Surratt, O'Laughlin, Atzerodt, Arnold and their confederates, "with the knowledge of the murderous and traitorous conspiracy aforesaid, and with intent to aid, abet and assist them in the execution thereof, and in escaping from justice." And, lastly, that in prosecution of the conspiracy Samuel A. Mudd did from on or before the 6th day of March, to the 20th of April "advise, encourage, receive, entertain, harbor and conceal, aid and assist" Booth, Herold, Payne, John H. Surratt, O'Laughlin, Atzerodt, Mary E. Surratt, Arnold and their confederates, in its execution and their escape.

After the prisoners, who as yet had no counsel, had pleaded not guilty to the Charge and Specification, the Court adopted rules of proceeding – one of which was that the sessions of the Court should be secret, and no one but the sworn officers and the counsel for the prisoners, also sworn to secrecy, should be admitted, except by permit of the President of the Commission; and that only such portions of the testimony as the Judge-Advocate should designate should be made public.

On the next day (Thursday, May 11th), Mr. Thomas Ewing, Jr. and Mr. Frederick Stone appeared as counsel for Dr. Mudd, and Mr. Frederick A. Aiken and Mr. John W. Clampitt for Mrs. Surratt; and on the succeeding day (12th), Mr. Frederick Stone appeared for Herold "at the earnest request of his widowed mother and estimable sisters;" General Ewing for Arnold (and on Monday,

the 15th, for Spangler); Mr. Walter S. Cox for O'Laughlin, and Mr. William E. Doster for Payne and Atzerodt.

By the rules of the Commission no counsel could appear for the prisoners unless he took the "iron-clad oath" or filed evidence of having taken it. So supersensitive was the loyalty of the Court that it could not brook the presence of a "sympathizer with the South," even in such a confidential relation as counsel for accused conspirators in aid of the Rebellion.

The demeanor of the Court towards the counsel for the defense, reflecting as in a mirror the humor of the Judge-Advocates, was highly characteristic. Sometimes they were treated with haughty indifference, sometimes with ironical condescension, often with contumely, generally with contempt. Their objections were invariably overruled, unless acceded to by the Judge-Advocate. The Commission could not conceal its secret opinion that they were engaged in a disreputable and disloyal employment.

This statement must be somewhat qualified, however, so far as it relates to General Ewing. He was, or had been recently, of equal rank in the army of the Union with the members of the Court. He was a brother-in-law of General Sherman, and he had acquired a high reputation for gallantry and skill, as well as loyalty, during the war. That such a distinguished fellow-soldier should appear to defend the fiendish murderers of their beloved Commander-in-Chief – outlaws they were detailed as a Court to hang – evidently perplexed and disconcerted these military Judges and tended in some degree to curb the over-bearing insolence of the Special Judge-Advocate. Thus, this able lawyer and gallant officer and noble man was enabled to be "the leading spirit of the defense;" and, as we shall see, he wrought the miracle of plucking from the deadly clutches of the Judge-Advocates the lives of every one of the men he defended. But this instance was a most notable exception. As a rule, even the silent presence of the counsel for the accused jarred upon the feelings of the Court, and their vocal interference provoked, at intervals, its outspoken animadversion. A trifling incident will serve to illustrate.

The witnesses, while giving their testimony, were required to face the Court, so that they necessarily turned their backs on the counsel for the prisoners who were placed some distance behind the witness-stand. These counsel were also forced to cross-examine the witnesses for the prosecution, and interrogate their own, without seeing their faces; and as often as a witness in instinctive obedience to the dictates of good manners would turn round to answer a question, the President of the Court would check him by a "sharp reprimand" and the stern admonition: "Face the Court!" The confusion of a witness, especially for the defense, when thundered at in this way by General Hunter, and the reiterated humiliation of counsel implied in the order, seem to have only called forth the wonder that witnesses "would persist in turning towards the prisoners' counsel!"

Clearly these lawyers were an unmeaning, an impeding, an offensive, though unavoidable, superfluity.

CHAPTER II.
Animus of the Judges

On Saturday, the 13th of May, an incident occurred which throws much light upon the judicial temper of the Court at the very beginning of the trial. On that day Reverdy Johnson appeared as counsel for Mrs. Surratt. Admitted to the bar in 1815, Senator of the United States as far back as 1845, Attorney-General of the United States as long ago as 1849, and holding the position of Senator of the United States again at that very moment; having taken the constitutional oath in all the Courts including the Supreme Court of the United States at whose bar he was one of the most eminent advocates; three years after this time to be Minister Plenipotentiary to England; as he stood there, venerable both in years and in honors, appearing at great personal and professional sacrifice, gratuitously, for a woman in peril of her life, one would have thought him secure at least from insult. Yet no sooner did he announce his intention, if the Court would permit him at any time to attend to his imperative duties elsewhere, to act as counsel, than the President of the Commission read aloud a note he had received from one of his colleagues objecting "to the admission of Reverdy Johnson as a counsel before this Court on the ground that he does not recognize the moral obligation of an oath that is designed as a test of loyalty;" and, in support of the objection, referring to Mr. Johnson's letter to the people of Maryland pending the adoption of the new constitution of 1864.

The following colloquy then took place:

> "Mr. Johnson. – May I ask who the member of the Court is that makes that objection?
>
> "The President. – Yes, sir, it is General Harris, and, if he had not made it, I should have made it myself.
>
> "Mr. Johnson. – I do not object to it at all. The Court will decide if I am to be tried.
>
> "The President. – The Court will be cleared.
>
> "Mr. Johnson. – I hope I shall be heard.
>
> "General Ekin. – I think it can be decided without clearing the Court.
>
> "General Wallace. – I move that Mr. Johnson be heard.
>
> "The President and others. – Certainly.
>
> "Mr. Johnson. – Is the opinion here to which the objection refers?
>
> "The President. – I think it is not."

It was discovered, farther on, that General Harris by his own admissions had not even seen the opinion since he had read it a year ago, and that his objection, involving so grave an attack upon the moral character of so distinguished a man, was based upon a mere recollection of its contents after that lapse of time.

Naturally, the gray-haired statesman and lawyer was indignant at this premeditated insult. In his address to the Court he repudiated with scorn the interpretation put upon his letter by his accuser. He explained the circumstances under which the opinion was delivered; that the Maryland Convention had prescribed an oath to the voter which they had no right to exact; "and all that the opinion said, or was intended to say, was, that to take the oath voluntarily was not a craven submission to usurped authority, but was necessary in order to enable the citizen to protect his rights under the then constitution; and that there was no moral harm in taking an oath which the Convention had no authority to impose."

Among other things he said:

> "There is no member of this Court, including the President, and the member that objects, who recognizes the obligation of an oath more absolutely than I do;

> and there is nothing in my life, from its commencement to the present time, which would induce me for a moment to avoid a comparison in all moral respects between myself and any member of this Court.
>
> "If such an objection was made in the Senate of the United States, where I am known, I forbear to say how it would be treated.
>
> "I have lived too long, gone through too many trials, rendered the country such services as my abilities enabled me, and the confidence of the people in whose midst I am has given me the opportunity, to tolerate for a moment – come from whom it may – such an aspersion upon my moral character. I am glad it is made now, when I have arrived at that period of life when it would be unfit to notice it in any other way.
>
> "I am here at the instance of that lady (pointing to Mrs. Surratt) whom I never saw until yesterday, and never heard of, she being a Maryland lady; and thinking that I could be of service to her, and protesting as she has done her innocence to me – of the facts I know nothing – because I deemed it right, I deemed it due to the character of the profession to which I belong, and which is not inferior to the noble profession of which you are members, that she should not go undefended. I knew I was to do it voluntarily, without compensation; the law prohibits me from receiving compensation; but if it did not, understanding her condition, I should never have dreamed of refusing upon the ground of her inability to make compensation."

General Harris, in reply, insisted that the remarks of Mr. Johnson, explanatory of the letter, corroborated his construction. "I understand him to say that the doctrine which he taught the people of his state was, that because the Convention had framed an oath, which was unconstitutional and illegal in his opinion, therefore it had no moral binding force, and that people might take it and then go and vote without any regard to the subject matter, of the oath."

Mr. Johnson, interrupting, denied having said any such thing. General Hunter, thereupon, to help his colleague out, had the remarks read from the record. Mr. Johnson assenting to the correctness of the report, General Harris continued: "If that language does not justify my conclusion, I confess I am unable to understand the English language;" and then repeated his construction of the letter.

After he had concluded, Mr. Johnson endeavored to show the author of "Calvinism Vindicated" that he did not understand the English language, by pointing out the distinction between stating "there was no harm in taking an oath, and telling the people of Maryland that there would be no harm in breaking it after it was taken." Again repelling the misconstruction attempted to be put upon his words, he proceeded to open a new line as follows:

"But, as a legal question, it is something new to me that the objection, if it was well founded in fact is well founded in law. Who gives to the Court the jurisdiction to decide upon the moral character of the counsel who may appear before them? Who makes them the arbiters of the public morality and professional morality? What authority have they, under their commission, to rule me out, or to rule any other counsel out, upon the ground, above all, that he does not recognize the validity of an oath, even if they believed it?"

General Harris, in rejoinder, stated that under the rules adopted by the Commission gentlemen appearing as counsel for the accused must either produce a certificate of having taken the oath of loyalty or take it before the Court, and that therefore the Court had a right to inquire whether counsel held such opinions as to be incompetent to take the oath. He then expressed his gladness "to give the gentleman the benefit of his disclaimer. It is satisfactory to me, but it is, I must insist, a tacit admission that there was some ground for the view upon which my objection was founded."

Mr. Johnson closed this irritating discussion by saying:

> "The order under which you are assembled gives you no authority to refuse me admission because you have no authority to administer the oath to me. I have taken

> the oath in the Senate of the United States – the very oath that you are administering; I have taken it in the Circuit Court of the United States; I have taken it in the Supreme Court of the United States; and I am a practitioner in all the Courts of the United States in nearly all the States; and it would be a little singular if one who has a right to appear before the supreme judicial tribunal of the land, and who has a right to appear before one of the Legislative departments of the Government whose law creates armies, and creates judges and courts-martial, should not have a right to appear before a court-martial. I have said all that I proposed to say."

The President of the Court, who had already made himself a party to this gross insult to a distinguished counsel – as if disappointed that the affair was about to end so smoothly – here burst out:

> "Mr. Johnson has made an intimation in regard to holding members of this Court personally responsible for their action.
>
> "Mr. Johnson. – I made no such intimation; did not intend it.
>
> "The President. – Then I shall say nothing more, sir.
>
> "Mr. Johnson. – I had no idea of it. I said I was too old to feel such things, if I even would.
>
> "The President. – I was going to say that I hoped the day had passed when freemen from the North were to be bullied and insulted by the humbug chivalry; and that, for my own part, I hold myself personally responsible for everything I do here. The Court will be cleared."

On reopening, the Judge-Advocate read a paper from General Harris withdrawing his objection because of Mr. Johnson's disclaimer. General Wallace remarked that it must be known to every member of the Commission that Mr. Senator Johnson had taken the oath in the Senate of the United States. He therefore suggested that the requirement of his taking the oath be dispensed with.

> "The suggestion was acquiesced in, *nem. con.*
>
> "Mr. Johnson. – I appear, then, as counsel for Mrs. Surratt."

In reviewing, at this distance of time, the foregoing scene, it is scarcely possible to realize the state of mind of a member of a tribunal claiming at least to be a court of justice, that could prompt such an onslaught – so shocking to the universal expectation of dignity and decorum, not to say absolute impartiality, in a judge.

The interpretation put upon the letter of Reverdy Johnson to his constituents by Generals Harris and Hunter was the ordinary, ill-considered, second-hand version circulated by blind party hostility. This is clearly shown by the fact that the objection of General Harris was not founded upon a recent perusal of the letter, but upon his own recollection of the impression it made in his own party circles the year before.

When, on the next Wednesday, General Harris, having in the meantime looked it up, presented a copy of the incriminated opinion, prefacing a request that it be made a part of the record by the sneering remark that "the Honorable gentleman ought to be very thankful to me for having made an occasion for him to disclaim before the country any obliquity of intention in writing that letter;" and, on the suggestion of General Hunter, the letter was read; every fair minded man ought to have been convinced that it was open to such a malign misconstruction only by an unscrupulous political enemy.

But suppose for a moment that their own hasty and uncharitable construction was correct, what right – what color of justification – did that give these two military Judges to make that letter of the year before the pretext for a sudden attack in open court upon such a man as Reverdy Johnson, and on the consecrated occasion of his appearing as counsel for a lady on trial for her life?

As to General Harris' argument that the requirement of an oath gave the Commission a right to inquire whether the written opinions of a counsel chosen for a defendant, previously delivered as a

party leader, were of such a character as to render him incompetent to take an oath which the Supreme Court of the United States and the Senate of the United States had recognized his competency to take; why, it is charitable to suppose – and his subsequent claim would have been scouted as preposterous in any law-court in the world.

With regard to General Hunter, his ferocious personal defiance, hurled from the very Bench, demonstrated in a flash his preëminent unfitness for any function that is judicial even in a military sense. It is manifest that this whole attack, whether concerted or not, was not made from any conscientious regard for the sanctity of an oath, nor from any sensitive fear that Reverdy Johnson, as an oath-breaker, might contaminate the tribunal; but it was either a mere empty ebullition of party spleen, or of party hatred towards a distinguished democrat, or it was made with a deliberate design to rob a poor woman of any probable advantage such eminent counsel might procure for her.

And whether the latter terrible suspicion be well founded or not, true it is that this cruel result, notwithstanding the withdrawal of the objection, did not fail of full accomplishment.

Reverdy Johnson, though suffered to appear as counsel, was virtually out of the case. He was present only at rare intervals during the trial, and sent in his final argument to be read by one of his juniors. The Court had put its brand upon him, and to any subsequent effort of his it turned an indifferent countenance and a deaf ear. He, forsooth, had "sympathized" with the Rebellion and that was enough! His appearance worked only harm to his client, if harm could be done to one whom the Court believed to have been also a sympathizer with rebellion, and who was already doomed to suffer in the place of her uncaptured son.

Another incident, occurring after the testimony on behalf of the prisoners had begun, will illustrate still more clearly, if possible, the mental attitude of the Court.

Among the witnesses sworn on the first day of the trial in secret session was one Von Steinacker, who, according to his own statement, had been in the Confederate Army, on the staff of Major-General Edward Johnson. He told the usual cock-and-bull story about seeing Booth in Virginia, in 1863, consorting with the rebel officers and concocting the assassination of Lincoln. At the time of his examination he was a prisoner of war, but after he had given his testimony he was discharged. The counsel for the defense knowing nothing of the witness did not cross-examine him at all. But, subsequently, they discovered that, after having once been convicted of an attempt to desert, he had at last succeeded in deserting the Union Army, and had entered the service of the Confederates; that he had been convicted of theft by a court-martial; and that his whole story was a fiction. Thereupon, as soon as possible, the counsel for Mrs. Surratt applied for the recall of the witness for cross-examination, so as to lay the basis for his contradiction and impeachment; and they embodied the facts they were ready to prove in a paper which was signed by Reverdy Johnson and the other counsel for Mrs. Surratt. This application seems to have strangely disturbed the Judge-Advocates and aroused the ire of the Court. The prosecuting officers professed to have no knowledge of the whereabouts of the witness; and General Wallace, moved from his wonted propriety, delivered himself as follows:

> "I, for my part, object to the appearance of any such paper on the record, and wish to say now that I understand distinctly and hold in supreme contempt, such practices as this. It is very discreditable to the parties concerned, to the attorneys, and, if permitted, in my judgment will be discreditable to the Court."

Mr. Clampitt, with the most obsequious deference to the Court, deprecated any such reflection upon the conduct of counsel and alluded to their duty to their unfortunate clients. But this humble apology was declared not satisfactory to the General or to the Court; and the application was not only refused but the paper was not allowed to go upon the record. However, this summary method of keeping facts out of sight availed nothing. Mrs. Surratt's counsel had caused to be summoned as a witness, to contradict and impeach Von Steinacker, Edward Johnson, the very Major-General on whose staff the witness had sworn he had been.

General Johnson, a distinguished officer in the Confederate Army, was taken prisoner in 1864 and had been in confinement since, as such, at Fort Warren. From thence he had been brought to attend before the Commission in obedience to a subpœna issued by the Court.

On the 30th of May, he was called as a witness and appeared upon the stand to be sworn. As he stood there, in his faded uniform, bearing, doubtless, traces of the six months' imprisonment from which he had come at the command of the Court, facing the officers of the Army he had so often encountered, and with his back turned upon the woman on whose behalf he had been summoned; General Albion P. Howe deemed it his duty as an impartial judge to make the following attack upon him.

After stating that it was well known that "the person" before the Court had been educated at the National Military Academy, and had since for many years held a commission in the U. S. Army, and had therefore taken the oath of allegiance, this gallant officer and upright judge proceeded:

> "In 1861, it became my duty as an officer to fire upon a rebel party, of which this man was a member, and that party fired upon, struck down, and killed loyal men that were in the service of the Government. I understand that he is brought here now as a witness to testify before this Court, and he comes here as a witness with his hands red with the blood of his loyal countrymen, shed by him or by his assistants, in violation of his solemn oath as a man and his faith as an officer. I submit to this Court that he stands in the eye of the law as an incompetent witness, because he is notoriously infamous. To offer as a witness a man who stands with this character, who has openly violated the obligations of his oath, and his faith as an officer, and to administer the oath to him and present his testimony, is but an insult to the Court and an outrage upon the administration of justice. I move that this man, Edward Johnson, be ejected from the Court as an incompetent witness on account of his notorious infamy on the grounds I have stated."

General Ekin welcomed the opportunity to distinguish himself by seconding the motion and characterizing the appearance of the witness before the Commission, "with such a character" as "the height of impertinence!" In his haste to insult a fallen foe, he seems to have forgotten that the witness had no alternative but to come.

The counsel for the prisoner humbly reminded the Court that the prosecution itself had sworn as its own witnesses men who had borne arms against the Government. The Judge-Advocate saw that the members of the Court had gone too far, and, after calling their attention to the familiar rule that the record of conviction in a judicial proceeding was the only basis of a total rejection of a witness, proceeded to provide a channel for the relief of the Court by suggesting that they could discredit the witness upon the ground stated, although they could not declare him incompetent to testify.

The assertion is confidently made that in the whole annals of English criminal jurisprudence, full as they are of instances of the grossest unfairness to persons on trial, no such outrage upon the administration of justice as the foregoing can be found. To find its parallel you must go to the records of the French Revolutionary Tribunal. What are we to think of the complaint of a Union General, that "a rebel party" fired (first? No! but that when "it became his duty as an officer to fire upon a rebel party" the rebel party fired) back? What in Mars' name did this warrior expect? Would he have had kinder feelings towards his brave adversary if, in response to his own volley, the Confederate General had tamely laid down his arms, or played the coward and run?

Nowadays, when the blue and the gray meet, charges of infamy are no longer heard, but the more deadly the past warfare, the greater the reciprocal respect.

However, this unprovoked assault upon an unoffending officer, powerless to repel it, although it did not result in his ejection from the Court, effectually disposed of General Johnson as a witness.

In answer to the questions of counsel he calmly gave his testimony, which exploded both Von-Steinacker and his story. Judge Bingham confined his cross-examination to eliciting the facts, that the witness had graduated from West Point, served in the U. S. Army until 1861, resigned, and joined the Confederate Army. The Court paid no attention to his direct testimony because he had fired upon Union men when they had fired upon him.

The foregoing incidents conclusively show (were any such demonstration necessary) that a Board of nine military officers, fresh from service in the field in a bloody civil war, with all the fierce prejudices naturally bred by such a conflict hot within their bosoms, was the most unfit tribunal possible to administer impartial justice to eight persons charged with the murder of the Commander-in-Chief of the Army to which every member of the Court belonged, committed in aid of that Rebellion which during four years of hard fighting they had helped to suppress.

CHAPTER III.
The Conduct of the Trial

The whole conduct of the trial emphasizes this conclusion. The Court, in weighing the evidence, adopted and acted upon the following proposition; that any witness, sworn for any of the prisoners, who had enlisted in the Confederate service, or had at any time expressed secession sentiments, or sympathized in any way with the South, was totally unworthy of credit. The Court went a step farther, and adopted the monstrous rule that participation in the Rebellion was evidence of participation in the assassination! This assertion now seems incredible, but it is fully attested by the record. At one stage of the trial, the Judge-Advocate asked a witness whether or not the prisoner Arnold had been in the military service of the rebels. General Ewing, his counsel, strenuously objected to this question on the ground, that it tended to prove the prisoner guilty of another crime than the one for which he was on trial, and thus to prejudice him in the eyes of the Court.

Judge Holt remarked: "How kindred to each other are the crimes of treason against a nation and assassination of its chief magistrate.

"The murder of the President * * * was preëminently a political assassination.

"When, therefore, we shall show, on the part of the accused, acts of intense disloyalty, bearing arms in the field against the Government, we show with him the presence of an animus towards the Government which relieves this accusation of much, if not all, of its improbability."

He asserted that such a course of proof was constantly resorted to in criminal courts; and when General Ewing challenged him (as well he might) to produce any authorities for such a position, he called upon the indomitable Bingham to state them.

The Special Judge-Advocate responded, but he courteously, but unmistakably, shied away from his colleague's position and put the competency of the testimony upon another ground, viz.: that where the intent with which a thing was done is in issue, other acts of the prisoner which tend to prove the intent may be given in evidence. Here he was dealing with a familiar principle, and could cite any number of cases. He then proceeded to apply his good law. How? By claiming that conspiracy to murder having been laid in the charge, "*with the intent to aid the Rebellion*," that was the intent in issue here, and therefore to prove that a man was in the Rebellion went to prove that intent.

At the request of General Ewing he read the allegation which ran "in aid of the Rebellion," and not "*with intent* to aid," and the counsel pointed out that that was "an allegation of fact, and not of intent;" but the Judge insisted that it was in effect an allegation of intent – implied if not expressed.

General Ewing then replied to his adversary's argument by showing that such an allegation was an unnecessary allegation. Conspiracy to murder and attempted murder were crimes done with *intent to kill*; and it was a matter of no moment in pleading to allege a general intent to aid the Rebellion. Courts had no right to violate the laws of evidence because the prosecution has seen fit to violate the laws of pleading.

Judge Bingham contended (and cited authorities) for his familiar law, and then again in applying it triumphantly asked:

"When he [Arnold] entered it (*i. e.*, the Rebellion) he entered into it to aid it, did he not?"

"Mr. Ewing. He did not enter into that to assassinate the President."

At this, the Assistant Judge-Advocate rising to the decisive and culminating point of his argument gave utterance to the following proposition:

> "Yes: he entered into it to assassinate the President; and everybody else that entered into the Rebellion entered into it to assassinate everybody that represented the Government, that either followed the standard in the field, or represented its standard in the counsels. That is exactly why it is germane."

And, thereupon, the Commission immediately overruled the objection. General Ewing told the exact truth, without a particle of rhetorical exaggeration, when, in the closing sentence of his argument against the jurisdiction of the Commission, he exclaimed:

"Indeed, the position taken by the learned Assistant Judge-Advocate * * * goes to this – and even beyond it – namely, that participation in the Rebellion was participation in the assassination, and that the Rebellion itself formed part of the conspiracy for which these men are on trial here."

Throughout the whole trial, the Commission took the law from the Judge-Advocates with the unquestioning docility usually manifested by a jury on such matters in civil courts. In truth, the main function of a Judge-Advocate appears to be to furnish law to the Court, as in civil courts the main function of the Judge is to furnish law to the jury. Consequently, his exposition of the law on any disputed point – whether relative to modes of procedure, or to the competency of testimony, or even to questions of jurisdiction – instead of standing on the same level with the antagonistic exposition of counsel for the accused as an argument to be weighed by the Court against its opposite in the equal scales of decision, was at all times authoritative, like the opinion of a judge overruling the contention of a lawyer. This, surely, was bad enough for a defendant; but, what was still more fatal to his chances of fair dealing, this habit of domination, acquiesced in by the Court on questions of law, had the effect (as is also seen in civil courts) of giving the same superior force to the expositions of questions of fact by the Judge-Advocate. And as this office combined the functions of a prosecuting officer with the functions of a judge, there could be no restraints of law, custom or personal delicacy, against the enforcement, with all the powers of reasoning and appeal at command, the conclusion of the Judge-Advocate upon the matters of fact.

In a word, the judgment of the prosecuting officer – the retained counsel for the Government, the plaintiff in the action – ruled with absolute sway, both on the law and on the facts, the judgment of the Commission; the members of which, for that matter, were also in the pay of the Government.

It may, therefore, be readily anticipated with how little impartiality the trial was conducted.

Mrs. Surratt (as did the rest of the accused) plead to the jurisdiction of the Commission on the grounds (1) that she was not and had not been in the military service of the United States, and (2) that when the crimes charged were committed the civil courts were open in Washington; both of which allegations were admitted and were notoriously true. Whatever might be the indifference with which the rights of the men to a constitutional trial may have been viewed, it was so utterly incongruous with the spirit of military jurisprudence and so unprecedented in practice to try a woman by court-martial, that had Mrs. Surratt been alone before that Commission we venture to say those nine soldiers could not have brought themselves, or allowed the Judge-Advocate to bring them, to the overruling of her plea. As it was, however, the court-room was cleared of all save the members of the Commission and the three Judge-Advocates; and after a season of what is called "deliberation" (which meant the further enforcement of the opinion of the prosecuting officers upon the point under discussion, where necessary), the court reopened and "the Judge-Advocate announced that the pleas * * * had been overruled by the Commission."

Mrs. Surratt (as did the other prisoners) then asked for a separate trial; a right guaranteed to her in all the civil courts of the vicinage. It was denied to her, without discussion, as a matter of course.

And yet no one now can fail to recognize the grievous disadvantage under which this one woman labored, coupled in a single trial with such culprits as Payne who confessed his guilt, and Herold who was captured with Booth.

In fact, the scheme of trial contrived by the Judge-Advocates on a scale comprehensive enough to embrace the prisoners, the Canadian exiles and the Confederate Cabinet, would not work on a trial of Mrs. Surratt alone. Of this pet plan they were highly proud and greatly enamoured. To it, everything – the rights of woman as well as man; considerations of equity and of common fairness – must be made to give way.

To the maintenance of this scheme in its integrity, they had marshalled the witnesses, and they guided the Commission with a firm hand so that not a jot or tittle of its symmetry should be marred.

This determined purpose is indicated by the starting-point they chose for the testimony.

On Friday, the twelfth, the first witness was sworn, and his name was Richard Montgomery. His testimony, as well as that of the other witnesses sworn that day, was taken in secret session, and no portion of it was allowed to reach the public until long after the trial. It was all directed to establish the complicity of the rebel agents in Canada and through them the complicity of Jefferson Davis and other officers of the "Confederacy" in the assassination. In other words, this testimony was given to prove the guilt, not of the men much less of the woman on trial, but of the men included in the charge but not on trial; and whom, as it now appears, the United States never intended to try.

To connect the defunct Confederacy in the person of its captive Chief with the murder of the President would throw a halo of romantic wickedness about the crime, and chime in with the prevalent hatred towards every human being in any way connected with the Rebellion.

This class of testimony continued to be introduced every now and then during the trial – whenever most convenient to the prosecution – and as often as it was given the court-room was cleared of spectators and the session secret; the isolated counsel for Mrs. Surratt, utterly at a loss to imagine the connection of such testimony, given under such solemn precautions, with their own client, and knowing nothing whatever of the witnesses themselves, must have looked on in bewildered amazement, and had no motive for cross-examination.

The chief witnesses who gave this carefully suppressed evidence were spies upon the rebel agents in Canada paid by the United States, and, at the same time, spies upon the United States paid by the rebel agents.

They were, of course, ready to swear to as many conversations with these agents, both before and after the assassination, in which those agents implicated themselves and the heads of government at Richmond in the most reckless manner, as the Judge-Advocates thought necessary or advisable.

The head, parent and tutor of this band of witnesses was a man called Sanford Conover. After giving his testimony before the Commission, he went to Canada and again resumed his simulated intimacy with the Confederates there, passing under the name of James W. Wallace. An unauthorized version of his testimony having leaked out and appearing in the newspapers, he was called to account for it by his Canadian friends. He then made and published an affidavit that the person who had given testimony before the Commission was not himself but an imposter, and at the same time also published an offer of $500 reward for the arrest of "the infamous and perjured scoundrel who secretly personated me under name of Sanford Conover, and deposed to a tissue of falsehood before the military Commission at Washington."

Конец ознакомительного фрагмента.