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.
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> "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 subpoena 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.