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."

Being reclaimed by the government from his Canadian perils, he appeared again before the Court after the testimony had been closed and the summing up of all the prisoners' counsel had been completed (June 27th); when he testified that his affidavit had been extorted from him by the Confederates in Canada by threats of death at the point of a pistol. This man Conover was subsequently (in 1867) tried and convicted of perjury and sent to the penitentiary; and with him the whole structure of perjured testimony, fabricated for reward by him and Montgomery and their co-spies,

fell to the ground. Secretary Seward testified before the Judiciary Committee of the House of Representatives, in 1867, that, "the testimony of these witnesses was discredited and destroyed by transactions in which Sanford Conover appeared and the evidence of the alleged complicity of Jefferson Davis thereupon failed."

But, at the period of the trial, when the passionate desire for vengeance was at its height, any plausible scoundrel, whose livelihood depended on the rewards for wholesale perjury, and who was sure to be attracted to Washington by the scent of his favorite game, was thrice welcome to the Bureau of Military Justice. Any story, no matter how absurd or incredible, provided it brought Jefferson Davis within conjectural fore-knowledge of the assassination, was greedily swallowed, and, moreover, was rewarded with money and employment. These harpies flocked, like buzzards, around the doors of the old Penitentiary, and all--black and white, from Richmond, from Washington and from Montreal--were eager, for a consideration, to swear that Davis and Benjamin were the instigators of Booth and Surratt. And such testimony as it was! For the most part the sheerest hearsay! The private impressions of the witness! In one instance, his recollection of the contents of a letter the witness had heard read or talked about, the signature of which, although he did not see it himself, he heard was the signature of Jefferson Davis!! Testimony wholly inadmissible under the most elementary rules of evidence, but swept before the Commission in the absence of counsel for the parties implicated and under the immunity of a secret session.

For example: a blind man, who had been, at an undated period during the

war, a hanger-on around the camp at Richmond, being asked whether he had heard any conversations among the rebel officers in regard to the contemplated assassination, answered:

"In a general way, I have heard sums offered, to be paid with a Confederate sum, for any person or persons to go North and assassinate the President."

Being pressed to name the amount and by what officers, he answered:

"At this moment, I cannot tell you the particular names of shoulder-straps, &c.

"Q.--Do you remember any occasion--some dinner occasion?

"A.--I can tell you this: I heard a citizen make the remark once, that he would give from his private purse $10,000, in addition to the Confederate amount, to have the President assassinated; to bring him to Richmond dead or alive, for proof.

"Q.--I understood you to say that it was a subject of general conversation among the rebel officers?

"A.--It was. The rebel officers, as they would be sitting around their tent doors, would be conversing on such a subject a great deal. They would be saying they would like to see his head brought there, dead or alive, and they should think it could be done; and I have heard such

things stated as that they had certain persons undertaking it."

In the introduction of evidence against Mrs. Surratt, as well as the others on trial, the Judge-Advocates allowed themselves the most unlimited range.

Narrations of all sorts of events connected with the progress of the War--historical, problematical or fabulous--having no relevancy to the particular charge against her, or them, but deadly in their tendency to steel the minds of the Court against her, were admitted without scruple or hesitation.

Seven soldiers who had been prisoners of war at Libby Prison, Belle Island or Andersonville were called and testified, in all its ghastly details, to the terrible treatment they and their fellow-prisoners had undergone. Three witnesses were sworn to prove that the rebel government buried a torpedo under the centre of Libby Prison, to be fired if the U. S. troops entered Richmond. Letters found in the Richmond Archives were read, offering to rid the world of the Confederacy's deadliest enemies, and projecting wholesale destruction to property in the North. Testimony was allowed to be given of the burning of U. S. transports and bridges by men in the Confederate service; of the raids from Canada into the United States; of the alleged plot in all its horrible features to introduce the yellow-fever into Northern cities by infected clothing, testified to by the villain who swore he did it for money. It is scarcely to be credited, yet it is a fact, that the confession of Robert Kennedy, hung in March previous for attempting to burn the City of New York, was read in

evidence; as was also a letter from a Confederate soldier, detailing the blowing up of vessels by a torpedo and the killing of Union men at City Point, indorsed by a recommendation of the operator to favor.

On June 27th, after the testimony had been closed and the summing up of counsel for the defense ended, the case was reopened and there was introduced an advertisement clipped from the "Selma Dispatch" of December 1st, 1864, wherein some anonymous lunatic offered, if furnished $1,000,000, to cause the lives of Lincoln, Seward and Johnson to be taken before the first of March.

The prosecution closed its direct testimony on May 25th, reserving the right (of which we have seen they availed themselves from time to time) thereafter to call further witnesses on the character of the Rebellion and the complicity of its leaders in the assassination.

Out of about one hundred and fifty witnesses sixty-six gave testimony of that kind. Of the remaining eighty-four about fifty testified to the circumstances attending the assassination, the pursuit and capture of Booth and Herold, and the terrific assault of Payne on William H. Seward and his household. Of the remaining thirty-four there were nine whose testimony was directed to the incrimination of Mrs. Surratt.

The important witnesses against her were three soldiers testifying under the eye of their superior officers as to her non-recognition of Payne, and two informers who had turned state's evidence to save their own necks, who connected her with Booth.

The witnesses for the defense, for the most part, were treated by the Special Judge-Advocate as virtual accomplices of the accused; and, as soon as, by a searching cross-examination, he had extorted from them a reluctant admission of the slightest sympathy with the South (as in almost every case he was able to do), he swept them aside as impeached, and their testimony as unworthy of a moment's consideration. A former slave, who announced himself or herself as ready to give evidence against his or her former master, was a delicious morsel for the Bureau of Military Justice; and several such were sworn for the prosecution. While, on the other hand, nothing so exasperated the loyal Bingham or so astonished the Court as the apparition of an old slave-woman, summoned by the defense, eagerly endeavoring to exculpate her former master.

Several priests testified as to the good character of Mrs. Surratt as a lady and a christian, but the effect of their testimony was immediately demolished in the eyes of the Court, when, on cross-examination, although they refused to substantiate what the Judge-Advocate called "her notorious intense disloyalty," they could not remember that they had ever heard her "utter one loyal sentiment."