

CHAPTER IV.

ARGUMENTS FOR THE DEFENSE.

The testimony for the several defenses of the eight accused closed on the 7th of June, and the testimony in rebuttal ended on the 14th, with the evidence of the physicians on the sanity of Payne.

Thereupon, General Ewing endeavored to extract from the Judge-Advocate an answer to the two following questions: First.--Whether his clients were on trial for but one crime, viz.: Conspiracy, or four crimes, viz.: Conspiracy, Murder, Attempt at murder, Lying in wait? and

Second.--By what statute or code of laws the crimes of "traitorously" murdering, or "traitorously" assaulting with intent to kill, or "traitorously" lying in wait, were defined, and what was the punishment affixed?

The Judge-Advocate's reply to the first question was, in substance, that all the accused were charged with conspiring to assassinate the President and the other members of the Government named, and further, with having executed that conspiracy so far as the assassination of the President and the assault on the Secretary of State were concerned, and "to have attempted its execution so far as concerns the lying in wait and other matters."

Assistant Judge-Advocate Bingham added:

"The act of any one of the parties to a conspiracy in its execution is the act of every party to that conspiracy; and therefore the charge and specification that the President was murdered in pursuance of it by the hand of Booth, is a direct and unequivocal charge that he was murdered by every one of the parties to this conspiracy, naming the defendants by name.

"Mr. Ewing.--I understand * * * but I renew my inquiry, whether these persons are charged with the crime of conspiracy alone, and that these acts of murdering, assaulting, and lying in wait, were merely acts done in execution of that conspiracy.

"Mr. Bingham (interrupting).--And not crimes?

"Mr. Ewing.--Or whether they are charged with four distinct crimes in this one charge?

"Mr. Bingham.--'Where parties are indicted for a conspiracy, and the execution thereof, it is but one crime at the common law. And that as many * * * overt acts in the execution of the conspiracy as they are guilty of, may be laid in the same count.'

"Mr. Ewing.--It is then, I understand, one crime with which they are charged.

"Mr. Bingham.--One crime all round, with various parts performed.

"Mr. Ewing.--The crime of conspiracy.

"Mr. Bingham.--It is the crime of murder as well. It is not simply conspiring but executing the conspiracy treasonably and in aid of the Rebellion.

"Mr. Ewing.--I should like an answer to my question, if it is to be given: How many crimes are my clients charged with and being tried for? I cannot tell.

"Mr. Bingham.--We have told you, it is all one transaction."

General Ewing, not being able to get an answer intelligible to himself to the first question, then respectfully asked an answer to the second: By what code or statute the crime was defined and the punishment provided?

"The Judge-Advocate.--I think the common law of war will reach that case. This is a crime which has been committed in the midst of a great civil war, in the capital of the country, in the camp of the Commander-in-Chief of our armies, and if the common law of war cannot be enforced against criminals of that character, then I think such a code is in vain in the world.

"Mr. Ewing.--Do you base it, then, only on the law of nations?

"The Judge-Advocate.--The common law of war.

"Mr. Ewing.--Is that all the answer to the question?

"The Judge-Advocate.--It is the one I regard as perfectly appropriate to give.

"Mr. Ewing.--I am as much in the dark now as to that as I was in reference to the other inquiry."

It is significant that the ready Special Judge-Advocate rendered no aid to his colleague on the latter branch of the inquiry.

According to the theory of the prosecution, then, Mary E. Surratt was tried, as a co-conspirator of Jefferson Davis and seven of his agents, of the seven men tried with her, and of Booth and her own son, for the crime of "traitorous conspiracy" to murder the President, Vice-President, Secretary of State and Lieutenant-General, of the United States; and for the following crimes committed in pursuance thereof:

1. Assassination of the President, with Booth.
2. Attempt to murder the Secretary of State, his two sons and two attendants (five crimes instead of one), with Payne.
7. Lying in wait to kill the Vice-President, with Atzerodt.

8. Lying in wait to kill the Lieutenant-General, with O'Laughlin.

Eight separate species of crimes, beside the generic one of "traitorous conspiracy." And she, a citizen, a non-combatant, a woman, was tried on this nine-fold, omnibus charge, jointly with seven men, under "the common law of war"!

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On the 16th of June (Friday), Mr. Clappitt read the argument of Reverdy Johnson against the jurisdiction of the Commission--one of the most cogent and convincing ever delivered in a court of justice.

The Supreme Court of the United States, subsequently (December, 1866), in deciding the Milligan case, did but little more than reiterate the propositions maintained by this great lawyer.

He opened his address by reminding the Court that the question of their jurisdiction to try and sentence the accused was for the Court alone to decide, and that no mandate of the President, if in fact and in law the Constitution did not tolerate such tribunals in such cases, could protect any member of the Commission from the consequences of his illegal acts. He then advanced and proved the following propositions: that none but military offenses are subject to the jurisdiction of military courts, and that the offenders when they commit such offenses must be subject to military jurisdiction--in other words, must belong to the army or navy;

that the President himself had no right to constitute military courts of his own motion, but that such power must first be exercised by Congress under the constitutional grant to that body to make rules for the government and regulation of the land and naval forces; that, by the fifth and sixth amendments of the constitution, every person, except those belonging to the land or naval forces or to the militia in active service in time of war, and, being such, committing a military or naval crime, is guaranteed an investigation by a grand jury as a preliminary to trial, and a speedy and public trial by an impartial jury. He then took up and examined the grounds on which the jurisdiction of the Commission was sought to be maintained. Calling the Court's attention to the constitutional provision that, if the institution of such Commission was an incident to the war power, that power was lodged exclusively in Congress and not at all in the President, and, therefore, Congress only could authorize such tribunals, he showed that, neither by the articles of war nor by the two acts, relied on, passed during the Rebellion, had Congress ever authorized any such tribunal; and that a military commission like the present and under present circumstances "is not to be found sanctioned, or the most remotely recognized, or even alluded to, by any writer on military law in England or the United States, or in any legislation of either country."

And, in this connection, he pronounced the suggestion that the civil courts and juries of the District of Columbia could not safely be relied upon for the trial of these cases, "an unjust reflection upon the judges, upon the people, upon the marshal, an appointee of the President, by whom the juries were summoned, and upon our civil institutions themselves;" and

he closed his remarks upon this branch of his subject by saying that the foregoing suggestion,

"upon another ground, is equally without force. It rests on the idea that the guilty only are ever brought to trial; that the only object of the Constitution and laws in this regard is to afford the means to establish alleged guilt; that accusation, however made, is to be esteemed prima facie evidence of guilt, and that the Executive should be armed, without other restriction than his own discretion, with all the appliances deemed by him necessary to make the presumption from such evidence conclusive. Never was there a more dangerous theory. The peril to the citizen from a prosecution so conducted, as illustrated in all history, is so great that the very elementary principles of constitutional liberty, the spirit and letter of the Constitution itself repudiated it."

After depicting the peril to the rights of the citizen of confiding to the option of the Executive the power of substituting a secret for a public tribunal for the trial of offenses, he established the following propositions: That the creation of a Court is an exclusively legislative function; that constitutional guarantees are designed for times of war as well as times of peace; that the power to suspend the writ of Habeas Corpus carries with it only the temporary suspension of the right to inquire into the cause of the arrest, and does not extend in any way over the other rights of the accused. The distinguished advocate then further maintained that, conceding the articles of war provide for a military court like this, yet the offense charged in the present case being nothing

less than treason could not under the provision of the constitution, regulating the trial of treason, be tried by a military commission; and, also, that under the articles of war persons who were not and never had been in the army were not subject to military law. And, in order to illustrate this branch of his argument as forcibly as possible, passing in review the guaranteed and historic rights of accused persons on trials before civil courts, he arrayed the open and flagrant violations of these rights which had been permitted by the Commission on the present trial: First, in the character of the pleadings, which for indefiniteness and duplicity would not have been tolerated by any civil tribunal. Second, as to the rules of evidence, which, according to the Judge-Advocate, allowed proof of separate and distinct offenses alleged to have been committed, not only by the parties on trial, but by other persons, and which the accused, however innocent, could not be supposed able to meet. Third, he quoted Lord Holt to show that in a civil court "these parties could not have been legally fettered during their trial." Referring to the row of miserable beings weighed down with shackles as they had entered the court-room, as they confronted their epauletted judges, and as they departed to their solitary cells, day by day, for more than a month, he repeated the words of the great jurist, then 200 years old:

"Hearing the clanking of chains, though no complaint was made to him, he said, 'I should like to know why the prisoner is brought in ironed. Let them be instantly knocked off. When prisoners are tried they should stand at their ease.'"

Then, characterizing the claim, that martial law prevailing in the

District of Columbia therefore warranted the Commission, as alike indefensible and dangerous, and at the same time irrelevant because martial law had never been proclaimed and the civil courts were in the full and undisturbed exercise of all their functions, the counsel drove this point home as follows:

"We learn, and the fact is doubtless true, that one of the parties, the very chief of the alleged conspiracy, has been indicted, and is about to be tried before one of those courts. If he, the alleged head and front of the conspiracy, is to be and can be so tried, upon what ground of right, of fairness or of policy, can the parties who are charged to have been his mere instruments be deprived of the same mode of trial?"

At the close of his speech he recurs to the warning that the President's command can furnish no justification to the members of the tribunal. If their function were only to act as aides to the President to enable him to discharge his prerogative of punishment, and is to that extent legal, then it is only so because the President might have dispensed with the Court altogether, and ordered the punishment of the culprits without any formal trial.

No, he warned them, in the most courtly and courteous manner, they could not shield themselves behind the President.

"Responsibility to personal danger can never alarm soldiers who have faced * * * death on the battle-field. But there is a responsibility

that every gentleman, be he soldier or citizen, will constantly hold before him and make him ponder--responsibility to the constitution and laws of his country and an intelligent public opinion--and prevent his doing anything knowingly that can justly subject him to the censure of either. I have said that your responsibility is great. If the Commission under which you act is void and confers no authority, whatever you may do may involve the most serious personal liability."

He then cited the case of Governor Wall, hung in London in 1802 for murder--a soldier, under his government in the island of Goree, having been whipped to death by sentence of a regimental court-martial, twenty years before.

"In that instance want of jurisdiction in the court-martial was held to be fatal to its judgment as a defense for the death that ensued under it. In this, if the Commission has no jurisdiction, its judgment for the same reason will be of no avail, either to Judges, Secretary of War, or President, if either shall be called to a responsibility for what may be done under it."

The learned counsel then added:

"The opinion I have endeavored to maintain is believed to be the almost unanimous opinion of the profession and certainly is of every judge or court who has expressed any."

And he cited the then recent charge of Judge Bond to the grand jury at

Baltimore, in which the Judge declared in reference to such military commissions as the present, that,

"Such persons exercising such unlawful jurisdiction are liable to indictment by you as well as responsible in civil actions to the parties."

And he quoted to the Court that portion of the charge of Judge Rufus W. Peckham to a grand jury in New York City, delivered during the progress of this very trial, wherein the right of a military commission to try was denied:

"A great crime has lately been committed that has shocked the civilized world. Every right-minded man desires the punishment of the criminals, but he desires that punishment to be administered according to law, and through the judicial tribunals of the country. No star-chamber court, no secret inquisition, in this nineteenth century, can ever be made acceptable to the American mind.

* * * * *

"Grave doubts, to say the least, exist in the minds of intelligent men, as to the constitutional right of the Military Commission at Washington to sit in judgment upon the prisoners now on trial for their lives before that tribunal. Thoughtful men feel aggrieved that such a commission should be established in this free country, when the war is over, and when the common law courts are open and accessible to

administer justice according to law, without fear or favor. * * *

"The unanimity with which the leading press of our land has condemned this mode of trial ought to be gratifying to every patriot."

On the twenty-third, General Ewing, too, assailed the jurisdiction of the Court in a short but powerful speech from which are taken the following extracts:

"The jurisdiction of the Commission has to be sought de hors the Constitution, and against its express prohibition. It is, therefore, at least of doubtful validity. If that jurisdiction do not exist; if the doubt be resolved against it by our judicial tribunals, when the law shall again speak, the form of trial by this unauthorized Commission cannot be pleaded in justification of the seizure of property or the arrest of persons, much less the infliction of the death penalty. In that event, however fully the recorded evidence may sustain your findings, however moderate may seem your sentences, however favorable to the accused your rulings on the evidence, your sentence will be held in law no better than the rulings of Judge Lynch's courts in the administration of lynch law.

"Our judicial tribunals, at some future day * * * will be again in the full exercise of their constitutional powers, and may think, as a large proportion of the legal profession think now, that your jurisdiction in these cases is an unwarranted assumption; and they may treat the judgment which you pronounce and the sentence you cause to

be executed, as your own unauthorized acts.

"Conviction may be easier and more certain in this Military Commission, than in our constitutional courts. Inexperienced as most of you are in judicial investigation, you can admit evidence which the courts would reject, and reject what they would admit, and you may convict and sentence on evidence which those courts would hold to be wholly insufficient. Means, too, may be resorted to by detectives, acting under promise or hope of reward, and operating on the fears or the cupidity of witnesses, to obtain and introduce evidence, which cannot be detected and exposed in this military trial, but could be readily in the free, but guarded, course of investigation before our regular judicial tribunals. The Judge-Advocate, with whom chiefly rests the fate of these citizens, is learned in the law, but from his position he can not be an impartial judge, unless he be more than a man. He is the prosecutor in the most extended sense of the word. As in duty bound, before this court was called, he received the reports of detectives, pre-examined the witnesses, prepared and officially signed the charges, and, as principal counsel for the Government, controlled on the trial the presentation, admission and rejection of evidence. In our courts of law, a lawyer who has heard his client's story, if transferred from the bar to the bench, may not sit in the trial of the cause, lest the ermine be sullied through the partiality of counsel. This is no mere theoretical objection--for the union of prosecutor and judge works practical injustice to the accused. The Judge-Advocate controls the admission and rejection of evidence--knows what will aid and what will injure the case of the prosecution, and

inclines favorably to the one and unfavorably to the other. The defense is met with a bias of feeling and opinion on the part of the judge who controls the proceedings of the Court, and on whom, in great measure, the fate of the accused depends, which morals and law alike reject."

Whatsoever else may be pleaded in excuse or palliation of the acts of the Commission, it can never be said that its members were driven on by an overpowering sense of their duty as soldiers, in blind ignorance of the Constitution and the law. Each and every officer was made fully aware of his awful responsibility and apprised of the precarious footing of his authority.