

## CHAPTER V.

### CHARGE OF JUDGE BINGHAM.

From the sixteenth to the twenty-seventh of June the time was consumed by the summing up of the several counsel for the prisoners on the facts disclosed by the evidence; and on the last mentioned day and the succeeding one, Special Judge-Advocate Bingham delivered his address in answer to all the foregoing pleas, both as to the jurisdiction of the Court and also as to the merits of the case.

This long, carefully prepared and yet impassioned speech may be fairly considered as embodying the very proof-charge of the prosecution. Indeed, under the rules of military procedure, it occupies the place and performs the functions of the judge's charge in the common-law courts. As such, it deserves a closer analysis and a more extended examination than can be given to it here. The briefest and most cursory review, however, will suffice to show its tone and temper.

After a solemn asseveration of his desire to be just to the accused, and a warning to the Court that "a wrongful and illegal conviction or a wrongful and illegal acquittal \* \* \* would impair somewhat the security of every man's life and shake the stability of the Republic," the learned advocate specifically declares, that the charge "is not simply the crime of murdering a human being" but a "combination of atrocities," committed as

charged upon the record, "in pursuance of a treasonable conspiracy entered into by the accused with one John Wilkes Booth, and John H. Surratt, upon the instigation of Jefferson Davis, Jacob Thompson, George N. Sanders and others, with intent thereby to aid the existing rebellion and subvert the constitution and laws of the United States."

A denunciation of the Rebellion as "itself simply a criminal conspiracy and a gigantic assassination"; the following glowing period--"Now that their battalions of treason are broken and flying before the victorious legions of the republic, the chief traitors in this great crime against your government secretly conspire with their hired confederates to achieve by assassination what they in vain attempt by wager of battle";--and the unequivocal announcement that "it is for this secret conspiracy in the interest of the rebellion, formed at the instigation of the chief in that rebellion, and in pursuance of which the acts charged and specified are alleged to have been done, and with the intent laid, that the accused are upon trial": finish the exordium.

The speaker then tackles the question of jurisdiction, which, he remarks by the way, "as the Court has already overruled the plea," he would pass over in silence, "but for the fact that a grave and elaborate argument has been made by the counsel for the accused, not only to show want of jurisdiction, but to arraign the President of the United States before the country and the world as a usurper of power over the lives and the liberties of the prisoners."

He dexterously evades the force of the argument that the civil courts of

the District were open when the crime was committed, by asserting that "they were only open \* \* \* and are only open at this hour by force of the bayonet;" and he claims that the President acting by a military force had as much right to try the co-conspirators of Booth, as to pursue, capture and kill the chief criminal himself; which, if true, leads us into the maintenance of the monstrous doctrine that the President by a summary order might have strung up the culprits without the interposition of any court. He then enters upon an argument to show that the Commission, from the very nature of its organization, cannot decide that it is no Court, and he ridicules the idea that these nine subordinate military officers could question the authority of their Commander-in-Chief.

In this connection, he gently rebukes Mr. Ewing for his bold statement to the Commission: "You, gentlemen, are no court under the Constitution!" reminding him that "not many months since he was a general in the service of the country and as such in his department in the West proclaimed and enforced martial law;" and asks him whether he is "quite sure he will not have to answer for more of these alleged violations of the rights of citizens than any of the members of the Court?"

He professes his high regard for General Ewing as a military commander who has made a "liberal exercise of this power," and facetiously wishes "to know whether he proposes, by his proclamation of the personal responsibility awaiting all such usurptions," that he himself shall be "drawn and quartered."

After disposing of General Ewing in this gingerly manner, he compensates

himself for the slight restraint by pouring the vials of his unstinted wrath upon Reverdy Johnson; representing him as "denouncing the murdered President and his successor," as making "a political harangue, a partisan speech against his government and country, thereby swelling the cry of the armed legions of sedition and rebellion that but yesterday shook the heavens." He characterizes one of the most temperate and dignified of arguments as "a plea in behalf of an expiring and shattered rebellion," and "a fit subject for public condemnation."

He calls upon the people to note,

"That while the learned gentleman [Mr. Johnson], as a volunteer, without pay, thus condemns as a usurpation the means employed so effectually to suppress this gigantic insurrection, the New York News, whose proprietor, Benjamin Wood, is shown by the testimony upon your record to have received from the agents of the rebellion \$25,000, rushes into the lists to champion the cause of the rebellion, its aiders and abettors, by following to the letter his colleague [Mr. Johnson], and with greater plainness of speech, and a fervor intensified doubtless by the \$25,000 received, and the hope of more, denounces the Court as a usurpation and threatens the members with the consequences."

And he interrupts his tirade against one of the greatest men this country has produced to burst forth into the following grandiloquent apostrophe:

"Youngest born of the Nations! Is she not immortal by all the dread

memories of the past--by that sublime and voluntary sacrifice of the present, in which the bravest and noblest of her sons have laid down their lives that she might live, giving their serene brows to the dust of the grave, and lifting their hands for the last time amidst the consuming fires of battle!"

After a brief defense of the secret sessions of the Commission, the learned advocate enters upon his circumstantial reply to the argument of Mr. Johnson, into which it is not worth while to follow him, as the main points of his contention have been rendered obsolete by the Supreme Court of the United States.

Suffice it to say, he holds that the President of the United States has the power, of his own motion, to declare martial law in time of war, over the whole United States, whether the States are within the theatre of the war or not; and that President Lincoln exercised this power by his proclamation of September, 1862, by virtue of which martial law prevailed over the whole North, including, of course, the District of Columbia, on the day of the assassination; and, farther, that certain subsequent acts of Congress, though not in express terms yet by fair implication, had ratified the proclamation.

He contends, in consequence, that "nothing can be clearer than that citizen and soldier alike, in time of civil or foreign war, are triable by military tribunals for all offences of which they may be guilty, in the interest of, or in concert with the enemy;" and that "these provisions, therefore, of your Constitution for indictment and trial by jury in civil

courts of all crimes are \* \* \* silent and inoperative in time of war when the public safety requires it."

Listen to this judicial expounder of constitutional law!

"Here is a conspiracy organized and prosecuted by armed traitors and hired assassins, receiving the moral support of thousands in every State and district, who pronounced the war for the Union a failure, and your now murdered but immortal Commander-in-Chief a tyrant.

"It is in evidence that Davis, Thompson, and others \* \* \* agreed and conspired with others to poison the fountains of water which supply your commercial metropolis, and thereby murder its inhabitants; to secretly deposit in the habitation of the people and in the ships in your harbor inflammable materials, and thereby destroy them by fire; to murder by the slow and consuming torture of famine your soldiers, captives in their hands; to import pestilence in infected clothes to be distributed in your capital and camps, and thereby murder the surviving heroes and defenders of the Republic.

"I claim that the Constitution itself \* \* \* by express terms, has declared whatever is necessary to make the prosecution of the war successful, may be done, and ought to be done, and is therefore constitutionally lawful.

"Who will dare to say that in the time of civil war no person shall be deprived of life, liberty and property, without due process of law?

This is a provision of your Constitution, than which there is none more just and sacred in it; it is, however, only the law of peace, not of war.

"In time of war the civil tribunals of justice are wholly or partially silent, as the public safety may require; \* \* \* the limitations and provisions of the Constitution in favor of life, liberty and property are therefore wholly or partially suspended."

He makes allusion to the recent re-election of President Lincoln, as ratifying any doubtful exercise of power by him:

"The voice of the people, thus solemnly proclaimed, by the omnipotence of the ballot \* \* \* ought to be accepted, and will be accepted, I trust, by all just men, as the voice of God."

He concludes his plea in favor of the jurisdiction of the Commission, by declaring that for what he had uttered in its favor "he will neither ask pardon nor offer apology," and by quoting Lord Brougham's speech in defence of a bill before the House of Lords empowering the Viceroy of Ireland to apprehend and detain all Irishmen suspect of conspiracy.

The Special Judge-Advocate then proceeds to sum up the evidence, in doing which he leaves nothing to the free agency of the Court. He, first, by a review of the testimony of the Montgomeries and Conovers, proves to his own and, presumably, to the Court's satisfaction, that "Davis, Thompson, Cleary, Tucker, Clay, Young, Harper, Booth and John H. Surratt did combine

and conspire together in Canada to kill and murder Abraham Lincoln, Andrew Johnson, Wm. H. Seward and Ulysses S. Grant."

"Surely no word further need be spoken to show that John Wilkes Booth was in this conspiracy; that John H. Surratt was in this conspiracy; and that Jefferson Davis, and his several agents named, in Canada, were in this conspiracy.

"Whatever may be the conviction of others, my own conviction is that Jefferson Davis is as clearly proven guilty of this conspiracy as is John Wilkes Booth, by whose hand Jefferson Davis inflicted the mortal wound upon Abraham Lincoln."

After such utterances as these, it is hardly necessary to state that this impartial Judge declares every single person on trial, as well as John H. Surratt, guilty beyond the shadow of a doubt.

"That John H. Surratt, George A. Atzerodt, Mary E. Surratt, David E. Herold, and Louis Payne entered into this conspiracy with Booth, is so very clear upon the testimony, that little time need be occupied in bringing again before the Court the evidence which establishes it.

"It is almost imposing upon the patience of the Court to consume time in demonstrating the fact, which none conversant with the testimony of this case can for a moment doubt, that John H. Surratt and Mary E. Surratt were as surely in the conspiracy to murder the President as was John Wilkes Booth himself."



He lets out the secret that the mother is on trial as a substitute for her son, whom the Secretary of War and the Bureau of Military Justice had failed to capture, by saying:

"Nothing but his conscious coward guilt could possibly induce him to absent himself from his mother, as he does, upon her trial."

After having reiterated over and over again, with all the authority of his office, what he had for hours endeavoured to enforce by all the resources of his intellect, that the guilt "of all these parties, both present and absent" is proved "beyond any doubt whatever," and "is no longer an open question;" he closes by formally, and with a very cheap show of magnanimity, leaving "the decision of this dread issue" to the Court.