CHAPTER II.

REVERSAL UPON THE MERITS.

The new trial was in fact at hand. In the summer of the year 1867, the interest excited by the investigation of the Judiciary Committee of the House of Representatives, referred to in the last chapter, suddenly became merged into the intenser and more widespread interest excited by the trial of John H. Surratt in the Criminal Court of the District of Columbia.

Surratt, after escaping from his captors in Italy by leaping down a precipice, fled to Malta and thence to Alexandria, where, on the 21st of December, 1866, he was recaptured and taken on board the United States vessel "Swatara." In this vessel, bound hand and foot, the prisoner arrived at Washington on the 21st of February following. Thus the radicals in Congress, impelled by their growing enmity to the President over the reconstruction contest, by scattering abroad sinister intimations that the cause of his remissness in bringing to punishment the accomplices of the convicted assassins was fear for himself of a full investigation of the assassination, succeeded at last in forcing the Executive Department, apprehensive, as it had good reason to be, of the shadows which any future trial in the civil courts was likely to reflect back upon the Military Commission, and aware of the breaking down of the case against the Canadian confederates and Jefferson Davis, face to face with the necessity of ratifying the conviction of the mother by securing the conviction of

the son. On the one hand, the radicals, in blind ignorance of the true inwardness of affairs, clamored for the trial, in the hope that the guilt of the prisoner's supposed accomplices, Davis and Company, and possibly of the President himself, might be detected. On the other hand, the administration, now that the man had been forced upon its hands, knowing the futility of the hope of its enemies, pushed on the trial in the hope that, with its powerful appliances, a result could be obtained which would vindicate the verdict of the Military Commission. No one on either side, however, so much as dreamed of renewing the iniquity of a trial by court-martial. Amid the silence of the Holts and the Binghams and the Stantons, Surratt was duly indicted by a grand jury for the murder of "one Abraham Lincoln," and for conspiring with Booth, Payne, Atzerodt, Herold and Mary E. Surratt to murder "one Abraham Lincoln," which conspiracy was executed by Booth. There was no averment about the traitorous conspiracy to murder the heads of Government, in aid of the rebellion; nor were the names of Dr. Mudd, O'Laughlin, Arnold or Spangler, then undergoing punishment on the Dry Tortugas, inserted as parties to the conspiracy; nor was any mention made of Seward or Johnson or Grant, as among the contemplated victims. All was precise and perspicacious, as is required in pleadings in the civil courts. The loose, vague, indefinite and impalpable charges permissible, seemingly, on military trials, gave place to plain and simple allegations, such as an accused person might reasonably be expected to be able to meet. On Monday, June 10, 1867, while the investigation before the Judiciary Committee of the House was still going on, while the sensation produced by the sight of Booth's diary and by Matthews' disclosures was still fresh, while the echoes of the encounter of Bingham and Butler still lingered in the air, the momentous trial came

on. Great and unprecedented preparations had been made by the prosecution. Again the country was ransacked for witnesses, as in the palmy days of Baker and his men. Again the Montgomeries and other Canada spies haunted the precincts of the District Attorney's office, willing as ever to swear to anything necessary to make out the case for the prosecution. Even the voice of Conover was heard, de profundis clamavi, from his dungeon cell. The Bureau of Military Justice started into active life, and Holt and his satellites bestirred themselves as though fully conscious of the impending crisis. Indeed, every one of these officials, from the President and the Secretary of War down to the meanest informer and hired hangman, who had had anything to do with the trial and execution of Mary E. Surratt, felt as if he, too, was to be put on trial in the trial of her son. A Court recognized in, and drawing its life and jurisdiction from, the Constitution was to act as a court of appeal to review the process and judgment of that extra-constitutional tribunal, which had, summarily and without legal warrant, put a free American woman to a felon's death. A Daniel in the shape of a jury--a common law jury--a jury of civilians--unadorned by sword, epaulette or plume--a jury guaranteed by the Bill of Rights--a Daniel had come to judgment! The Shylocks of the days of arbitrary power dropped their sharpened knives and ejaculated, "Is that the law?"

Great, assuredly, must have been the flurry of the once omnipotent Bureau, when it was ascertained that the tribunal before which it must come could not be "organized to convict;" that there could be no soldiery around the Court, no shackles on the prisoners or the witnesses for the defense, no prosecuting officers in the jury room. Everything must be done decently

and in order, with the same calm dignity, unruffled composure, the same presumption of the innocence of the accused, as though the murdered man had been the humblest citizen of the land. One great advantage, however, the prosecution managed to secure. A Judge was selected to preside whom they could rely on, as "organized to convict." But this was the sole reminiscence of the unbridled reign of the military only two years before. A jury of twelve intelligent men, some of them the best citizens of the District, was speedily obtained to the evident satisfaction of both the people and the prisoner,--and the succeeding Monday, the 17th, the struggle began.

As we have given the names of the members of the Court which tried the mother, we may be pardoned for giving the names of the jurors who tried the son. Although there were no major-generals among them, they are entitled to the honor of being within, and not without, the ægis of the Constitution.

The jurors were W. B. Todd, Robert Ball, J. Russell Barr, Thomas Berry, George A. Bohrer, C. G. Schneider, James Y. Davis, Columbus Alexander, William McLean, Benjamin Morsell, B. E. Gittings, W. W. Birth.

They were thus spoken of by the District Attorney:

"It is a matter of mutual congratulation that a jury has been selected agreeable to both parties; the representatives of the wealth, the intelligence, and the commercial and business character of this community; gentlemen against whose character there cannot be a whisper of suspicion.

I would trust you with my life and my honor; and I will trust you with the honor of my country."

The scene which the court-room presented, when the Assistant District Attorney arose to open the case for the United States, afforded a speaking contrast to the scene presented at the opening of the Military Commission. The Court was not held in a prison, and there was an entire absence of the insignia of war. The doors of the court-room were wide open to the entrance of the public, not locked up in sullen suspicion, and the keys in the hands of the prosecuting officer. The counsel for the prisoner confronted the jury and the witness-stand upon an equal line with the counsel for the United States; and there was neither heard, seen, nor surmised, in the words or bearing of Edwards Pierrepont, the leading counsel for the prosecution, any of the insolence and supercilious condescension shown in the words and bearing of John A. Bingham.

As the prisoner entered the court and advanced to the bar, no clank of fetters jarred upon the ear; and, as he sat at his ease by the side of his counsel, like a man presumed to be innocent, the recollection of that wan group of culprits, loaded down with iron, as they crouched before their imperious doomsmen, must have aroused a righteous wrath over the barbarous procedure of the military, in comparison with the benign rules of the civil, tribunals. The atmosphere surrounding the court and the trial seemed, also, to be free from passion and prejudice, when contrasted with the tremendous excitement and the thirst for blood, which permeated the surroundings of the Military Commission. Although the Bureau of Military Justice had busied itself in the prosecution, and thrust its aid on the

office of the District Attorney; although the whole weight of the federal administration was thrown in the same direction to vindicate, if possible, the signature of the President to the death warrant of the victims of his military court; and notwithstanding the presence upon the bench of a judge "organized to convict:" still, so repellant to partial passion were the precincts of what might fitly be styled a temple of justice, a neutral spectator might feel reliance that in that chamber innocence was safe.

But there was one sentiment hovering over the trial and dwelling in all bosoms, which clothed the proceedings with a peculiar awfulness. All felt that the dead mother was on trial with the living son. She had been executed two years before for the same crime with which he was now charged. And, as he stood in the flesh, with upraised hand, looking at the jury which held his life in its hands, it required no great effort of fancy to body forth the image of his mother, standing beside him, murmuring from shadowy lips the plea of not guilty, amid the feeble repetitions of which, to her priest, she had died upon the scaffold. To convict her son, now, by the unanimous verdict of twelve men, and punish him according to law, would go far to condone the unconstitutional trial and illegal execution of the mother. Whereas, on the other hand, the acquittal of her son of the same crime, by the constitutional tribunals of the country, would forever brand the acts of the Military Commission as murder under the forms of military rule. This dread alternative met the prosecution at the threshold of the trial, oppressed them with its increasing weight during its progress, and tarried with them even at its close. It appeared in the indictment, where the name of the mother, as one of the conspirators, was associated with the name of her son. It appeared

in the examination of the jurors, when Judge Pierrepont endeavored to extract from them whether they had formed or expressed an opinion as to the guilt or the innocence of the prisoner, not only, but also as to the guilt or the innocence of his mother. It appeared during the taking of testimony, where evidence bearing upon the guilt of Mrs. Surratt alone was admitted at all times as evidence against her son. It appeared in the argument of the District Attorney, when he compares the mother of the prisoner to Herodias and Lucrezia Borgia, and "traces her connection with the crime" and "leaves it to the jury to say whether she was guilty;" where he pleads, like Antony, in behalf of the members of the Military Commission that they were "all honorable men," and were not to be blamed for obeying the orders of the President. It appeared in the arguments of the counsel for the prisoner, when Mr. Merrick taunted the Government that they were pressing for a verdict to "vindicate the fearful action they had committed;" when he appealed to the jury to "deal fairly by this young man," "even if the reputation of Joseph Holt should not have the vindication of innocent blood;" when he invoked the spirit of Mrs. Surratt as a witness for her son, and rebuked the prosecution for objecting to the admission of her dying declaration when they were putting her again on trial though dead; when Mr. Bradley charged that for four weeks and more they had been trying Mrs. Surratt and not her son, and denounced Weichman and Lloyd, avowing that "the proof against her was not sufficient to have hung a dog" and was "rotten to the core." It appeared in the speech of Judge Pierrepont, when he flourished the record of the Military Commission before the jury, and asserted that the recommendation of Mrs. Surratt to mercy was attached to it; in his avowal of his belief in her guilt; in his extolling the jury as a tribunal far more fit for the trial of such crimes

than any military court; and in his covert threat that the people would punish the City of Washington by the removal of the Capitol, if the jury, by their verdict, did not come up to the high standard erected for them. And, lastly, it appeared in the charge of the Judge, which is a model of what a one-sided charge ought to be. It opens with the words of the Old Testament: "Whoso sheddeth man's blood, by man shall his blood be shed." Then follows a sneer at the "sentimental philosophers," who were opposed to capital punishment. Then the Court inveighs against some imaginary advocates, who argued that to kill a king was a greater crime than to kill a president; and then casts an imputation upon the integrity of the decision in the Milligan Case, as "predicated upon a misapprehension of historic truth," and that therefore "we could not perhaps have looked for a more rightful deduction," "all loyal hearts" being "unprepared for such an announcement." The Judge, then, holds that the Court will take judicial cognizance that the crime charged was the murder of the President of the United States, and a more heinous offense than the murder of a simple individual. He, then, complacently sets aside the rule of Sir Matthew Hale, implicitly followed since, as he himself admits, by "writers and judges seeming contented with his reasons or indisposed to depart from his principles," as "not very satisfactory to my (the Judge's) mind;" and accordingly he declares that, in felonies of such high grade, as in cases of treason, there can be no accessories before the fact, but all are principals; and, to support this conclusion, he then cites and details at length two cases, apparently overruling Sir Matthew beforehand; (as he says) "reported in that book of highest authority known among Christian nations, decided by a judge from whose decision there can be no appeal and before whose solemn tribunal all judges and jurors will in the great day

have their verdict and judgments passed in review." One, the case "of Naboth and Ahab, contained in the 21st chapter of the First Book of Kings," the other, "that of David and Uriah, recorded in the 11th chapter of Second Samuel;" at the end of the statement of which case the Judge remarks, "this judgment of the Lord was not that David was accessory before the fact of this murder, but was guilty as the principal, because he procured the murder to be done. It was a judgment to the effect that he who does an act by another does it himself, whether it be a civil or a criminal act." This extraordinary deliverance closes with an echo of Judge Pierrepont's warning to the jury, to uphold by their verdict the District of Columbia, as a place for "the public servants, commissioned by the people of the nation, to do their work safe and sacred from the presence of unpunished assassins within its borders."

It would be foreign to our purpose, as well as tedious to the reader, to examine in detail the testimony given on this trial. One conclusion--and that is the important thing--is certain. It is true, beyond the shadow of a doubt, that the prosecution made an incomparably stronger case against Surratt than was made against his mother. They had but one culprit at whom to direct their aim, and they made a far more desperate and thorough-going effort to convict, because of the known unreliability of a jury to do what the prosecution might tell them to do without the aid of proof. Before a Military Commission, tossed about by the passions of its members and steered by Judge-Advocates, the accusers could afford to be careless of gaps in their scheme of proof, missing links in the chain of circumstantial evidence. Not so now and here. Vehement affirmation without evidence availed nothing. Curses against treason, traitors, disloyalty,

apostrophes to the imperiled Union, tears over the beloved Commander-in-Chief, could fill no void in the testimony. Of course, there was no such outrage against not only the elementary rules of evidence, but against ordinary decent fairness, as an attempt to introduce testimony of the horrors of Libby Prison and Andersonville; but the door looking in that direction was opened as wide as possible by the eager Judge. All the material testimony given upon the "Conspiracy Trial" against Mrs. Surratt, not only, but also against Payne, Herold, Atzerodt, Arnold and O'Laughlin, was reproduced here. The direct testimony on the part of the United States occupied from June 17th to July 5th, and in that period eighty-five witnesses were examined. On the Conspiracy Trial, the direct case consumed the time from May 12th to May 25th, and about one hundred and thirty witnesses were examined against the eight accused persons, not only, but also against the eight accessories, headed by Jefferson Davis, included in the charge, the testimony ranging over the whole rebellion and including Libby, Andersonville, Canada, St. Albans, and projected raids on New York, Washington and other cities. Every witness, whose testimony on the former trial had the remotest bearing upon the question of the guilt or innocence of Mrs. Surratt, once more showed his face and retold his story.

Lloyd was there, compelled, despite his superstitious reluctance to speak against a woman now she was dead, to rehearse the tale which his terrors had evolved out of his drunken imagination. This time, however, his sottish memory or failure of memory, his fright at the time of his arrest, his repeated denials of the visit of Booth and Herold, his temptations and bribes to accuse his landlady, were, under the keen cross-examination of the counsel for the prisoner, fully exposed.

Weichman "came also:" this time with his story carefully elaborated, touched and retouched here and there, and written down beforehand. He had been engaged for three or four months in aiding the prosecution, had prepared a carefully detailed statement for the use of the Assistant District Attorney, and now openly acknowledged that "his character was at stake" in this trial, and that he "intended to do all he could to help the prosecution." He had conned over and over again the report of his evidence on the Conspiracy Trial, had corrected it to meet objections subsequently made and to eliminate discrepancies and contradictions, and had thus brought its several disjointed parts into some logical sequence; he then had added to it the incidents and conversations disclosed for the first time in the affidavit sent to Colonel Burnett, which was appended to the published report of the trial, to which allusion has been made; and, now, in the final delivery of his deadly charge, coolly averring that his memory was much more distinct now than at the time of the former trial two years ago, he, with a superadded concentrated venom, flavored his narrative with a few damning incidents never heard of before--one, the most poisonous of all, that on the evening of the fatal 14th, while Booth was about his murderous work, Mrs. Surratt was pacing her parlor floor begging her pious boarder "to pray for her intentions." This time, however, the witness did not escape unscathed. When he emerged from the skillful hands of Mr. Bradley, his malicious and sordid animus laid bare,--his self-contradictions, his studied revisions, his purposeful additions to his testimony, exposed--his intimacy with the conspirators, his terrified repentance, his abject self-surrender and his cowardly eagerness to shift his peril upon the head of his protectress,--and then

his simulated remorse and his later recantation--all made clear--he was an object of loathing to gentlemen; a stumbling block to the philanthropist; to the indifferent, an enigma; and to the common man, a perpetual provocation to a breach of the peace.

Twelve witnesses testified that they saw John H. Surratt in Washington on the 14th of April, only one of whom had testified to that effect on the other trial. It is curious now to discern how the memory of the witnesses, it may be unconsciously, swerved under pressure toward the mark of identification. The witnesses for the defense established that the prisoner was in Elmira on the afternoon of the 13th, made it more than probable he was there on the 14th, and almost certain he was there on the 15th. The prosecution, under the force of this proof, suddenly conceded his presence in Elmira on the 13th, and then, by the accident of a special train and the testimony of a ferryman whom the notorious Montgomery unearthed in the very crisis of the emergency, contrived with much straining to land him in Washington at 10 o'clock on the morning of the fatal day. Any calm observer, reading the account of the trial now, can see plainly that the truth is, the prisoner had not been in Washington since the 3rd of April.

The production of Booth's diary by the prosecuting officers was forced upon them by the popular indignation over its suppression before the Military Commission; otherwise, it is clear they would not have been guilty of such a mistake in tactics as its introduction as a part of the case for the United States. Its opening sentences--"Until to-day nothing was ever thought of sacrificing to our country's wrongs. For six months we

had worked to capture. But our cause being almost lost something decisive and great must be done"--settled the question of a plot to kidnap suddenly given up; and the testimony of Weichman indicated the hour of abandonment.

That every conceivable effort to obtain the conviction of the prisoner was made, and that a most formidable array of circumstances was marshalled against him, compared to which the two disconnected pieces of evidence which were so magnified against his mother seem weak indeed, will be controverted by no sane person. From June 10th to August 7th--nearly two months--the contest went on. On the last-mentioned day, which was Wednesday, Judge Fisher delivered his remarkable charge, and a little before noon the jury retired. At one o'clock in the afternoon of Saturday, the 10th, after a session of three days and three nights, a communication was received from the jury to the effect that they stood as at first, nearly equally divided, that they could not possibly agree, and the health of several of their numbers was becoming seriously impaired. The Court, notwithstanding the protest of the prisoner, discharged the jury, and the prisoner was remanded to jail.

There he did not long remain, however. Every one recognized the futility of another trial. The strength of the proof of the prisoner's presence in Elmira on the day of the assassination wrought a reaction of public opinion in his favor. The administration was glad to escape with less than an unequivocal condemnation. The Bureau of Military Justice was silent. John H. Surratt was quietly let go.

This obscure occurrence, the discharge of John H. Surratt, which caused not a ripple on the surface of human affairs, nevertheless constituted a cardinal event; for it worked a national estoppel. When that young man stepped forth from the threshold of the prison, to which the United States had brought him in irons from Egypt across the Mediterranean and the Atlantic, not to follow his mother to the scaffold and a felon's grave, but to walk the earth a living, free man,--the innocence of the mother was finally and forever established by the universal acknowledgment of all fair men. No condemnation of the Military Commission could be so heavy, and at the same time so indubitably final, as the simultaneous conviction arrived at by all men, that if the son had been tried by such a tribunal he would assuredly have been put to death, and that if the mother had been reserved to calmer times and the tribunal guaranteed by the Constitution to every man and woman, she would now have been living with her daughter, instead of lying, strangled to death, beneath the pavement of a prison.