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JOHN A. BINGHAM

(1815-)

THE trial of the assassins of President Lincoln was, in many respects, the most important State case in the history of English-speaking peoples since the discovery of America. As often happens where the occasion demands much, its very dignity may excite disappointment with the result, but it would be hard to overestimate the importance of such arguments as those of Bingham, Reverdy Johnson, and others, who handled the law and the evidence before the military commission which tried the conspirators. However great the disadvantage under which the attorneys for the defense were placed their arguments lose nothing in value with the passage of time, while on several points the argument for the prosecution has been outlawed by time. When Guiteau murdered President Garfield no one questioned the genuineness of the indignation of those he insanely claimed to represent, and the murderers of President Lincoln have long ago come to be regarded not as traitors but merely as assassins. The charges and the arguments supporting them as far as they are intended to suggest treason rather than murder are now universally looked upon as the result of a mistake of judgment excusable enough in the excitement of the times, but not justified by any evidence or any argument presented in connection with the evidence.

AGAINST THE ASSASSINS OF PRESIDENT LINCOLN

MAY it please the Court: It only remains for me to sum up the evidence, and present my views of the law arising upon the facts in the case on trial. The questions of fact involved in the issue are:—

First, did the accused, or any two of them, confederate and conspire together, as charged? and,

Second, did the accused, or any of them, in pursuance of such conspiracy, and with the intent alleged, commit either or all of the several acts specified?

If the conspiracy be established, as charged, it results that whatever was said or done by either of the parties thereto, in the furtherance or execution of the common design, is the declaration or act of all the other parties to the conspiracy; and this, whether the other parties, at the time such words were uttered or such acts done by their confederates, were present or absent—here, within the entrenched lines of your capital, or crouching behind the entrenched lines of Richmond, or awaiting the results of their murderous plot against their country, its Constitution and laws, across the border, under the shelter of the British flag.

The declared and accepted rule of law in cases of conspiracy is that:—

“In prosecutions for conspiracy it is an established rule that where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and in reference to the common object, is, in the contemplation of law as well as in sound reason, the act of the whole party; and, therefore, the proof of the act will be evidence against any of the others who were engaged in the same general conspiracy, without regard to the question whether the prisoner is proved to have been concerned in the particular transaction.” (Phillips on Evidence, p. 210.)

The same rule obtains in cases of treason:—

“If several persons agree to levy war, some in one place and some in another, and one party do actually appear in arms, this is a levying of war by all, as well those who were not in arms as those who were, if it were done in pursuance of the original concert, for those who made the attempt were emboldened by the confidence inspired by the general concert, and, therefore, these particular acts are in justice imputable to all the rest.” (1 East., Pleas of the Crown, p. 97; Roscoe 84.)

In *Ex parte* Bollman and Swartwout, 4 Cranch, 126, Marshall, Chief-Justice, rules:—

“If war be actually levied—that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose—all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.”

In the United States *versus* Cole *et al.*, 5 McLean, 601, Mr. Justice McLean says:—

“A conspiracy is rarely, if ever, proved by positive testimony. When a crime of high magnitude is about to be perpetrated by a combination of individuals, they do not act openly, but covertly and secretly. The purpose formed is known only to those who enter into it. Unless one of the original conspirators betray his companions and give evidence against them, their guilt can be proved only by circumstantial evidence. It is said by some writers on evidence that such circumstances are stronger than positive proof. A witness swearing positively, it is said, may misapprehend the facts or swear falsely, but that circumstances cannot lie.

“The common design is the essence of the charge; and this may be made to appear when the defendants steadily pursue the same object, whether acting separately or together, by common or different means, all leading to the same unlawful result. And where *prima facie* evidence has been given of a combination, the acts or confessions of one are evidence against all. It is reasonable that where a body of men assume the attribute of individuality, whether for commercial business or for the commission of a crime, that the association should be bound by the acts of one of its members in carrying out the design.”

It is a rule of the law, not to be overlooked in this connection, that the conspiracy or agreement of the parties, or some of them, to act in concert to accomplish the unlawful act charged, may be established either by direct evidence of a meeting or consultation for the illegal purpose charged, or more usually, from the very nature of the case, by circumstantial evidence. (2 Starkie, 232.)

Lord Mansfield ruled that it was not necessary to prove the actual fact of a conspiracy, but that it might be collected from collateral circumstances. (Parson's Case, 1 W. Blackstone, 392.)

“If,” says a great authority on the law of evidence, “on a charge of conspiracy, it appear that two persons by their acts are pursuing the same object, and often by the same means, or one performing part of the act, and the other completing it, for the attainment of the same object, the jury may draw the conclusion there is a conspiracy. If a conspiracy be formed, and a person join in it afterward, he is equally guilty with the original conspirators.” (Roscoe, 415.)

“The rule of the admissibility of the acts and declarations of any one of the conspirators, said or done in furtherance of the common

design, applies in cases as well where only part of the conspirators are indicted, or upon trial, as where all are indicted and upon trial. Thus, upon an indictment for murder, if it appear that others, together with the prisoner, conspired to commit the crime, the act of one done in pursuance of that intention will be evidence against the rest." (2 Starkie, 237.)

They are all alike guilty as principals. (Commonwealth *versus* Knapp, 9 Pickering, 496; 10 Pickering, 477; 6 Term Reports, 528; 11 East, 584.) . . .

Was there co-operation between the several accused in the execution of this conspiracy? That there was is as clearly established by the testimony as is the fact that Abraham Lincoln was killed and murdered by John Wilkes Booth. The evidence shows that all of the accused, save Mudd and Arnold, were in Washington on April 14th, the day of the assassination, together with John Wilkes Booth and John H. Surratt; that on that day Booth had a secret interview with the prisoner, Mary E. Surratt; that immediately thereafter she went to Surrattsville to perform her part of the preparation necessary to the successful execution of the conspiracy, and did make that preparation; that John H. Surratt had arrived here from Canada, notifying the parties that the price to be paid for this great crime had been provided for, at least in part, by the deposit receipts of April 6th, for \$180,000, procured by Thompson, of the Ontario Bank, Montreal, Canada; that he was also prepared to keep watch, or strike a blow, and ready for the contemplated flight; that Atzerodt, on the afternoon of that day, was seeking to obtain a horse, the better to secure his own safety by flight, after he should have performed the task which he had voluntarily undertaken by contract in the conspiracy—the murder of Andrew Johnson, then Vice-President of the United States; that he did procure a horse for that purpose at Naylor's and was seen about nine o'clock in the evening to ride to the Kirkwood House, where the Vice-President then was, dismount, and enter. At a previous hour Booth was in the Kirkwood House, and left his card, now in evidence, doubtless intended to be sent to the room of the Vice-President, and which was in these words: "Don't wish to disturb you. Are you at home? J. Wilkes Booth." Atzerodt, when he made application at Brooks's in the afternoon for the horse, said to Weichmann, who was there, he was going to ride in the country, and that "he was going to get a horse and send for

Payne." He did get a horse for Payne, as well as for himself; for it is proven that on the twelfth he was seen in Washington, riding the horse which had been procured by Booth, in company with Mudd, last November, from Gardner. A similar horse was tied before the door of Mr. Seward on the night of the murder, was captured after the flight of Payne, who was seen to ride away, and which horse is now identified as the Gardner horse. Booth also procured a horse on the same day, took it to his stable in the rear of the theatre, where he had an interview with Spangler, and where he concealed it. Herold, too, obtained a horse in the afternoon, and was seen between nine and ten o'clock riding with Atzerodt down the avenue from the Treasury, then up Fourteenth and down F Street, passing close by Ford's Theatre.

O'Laughlin had come to Washington the day before, had sought out his victim, General Grant, at the house of the Secretary of War, that he might be able with certainty to identify him, and at the very hour when these preparations were going on was lying in wait at Rullman's, on the avenue, keeping watch, and declaring as he did, at about ten o'clock P. M., when told that the fatal blow had been struck by Booth, "I don't believe Booth did it." During the day, and the night before, he had been visiting Booth, and doubtless encouraging him, and at that very hour was in position, at a convenient distance, to aid and protect him in his flight, as well as to execute his own part of the conspiracy by inflicting death upon General Grant, who happily was not at the theatre nor in the city, having left the city that day. Who doubts that Booth having ascertained in the course of the day that General Grant would not be present at the theatre, O'Laughlin, who was to murder General Grant, instead of entering the box with Booth was detailed to lie in wait, and watch and support him?

His declarations of his reasons for changing his lodgings here and in Baltimore, after the murder, so ably and so ingeniously presented in the argument of his learned counsel [Mr. Cox], avail nothing before the blasting fact that he did change his lodgings, and declared "he knew nothing of the affair whatever." O'Laughlin, who lurked here, conspiring daily with Booth and Arnold for six weeks to do this murder, declares "he knew nothing of the affair." O'Laughlin, who said he was "in the oil business," which Booth and Surratt, and Payne and Arnold, have

all declared meant this conspiracy, says he "knew nothing of the affair." O'Laughlin, to whom Booth sent the dispatches of the thirteenth and twenty-seventh of March—O'Laughlin, who is named in Arnold's letter as one of the conspirators; who searched for General Grant on Thursday night, and laid in wait for him on Friday; who was defeated by that Providence "which shapes our ends," and laid in wait to aid Booth and Payne,—this man declares "he knows nothing of the matter." Such a denial is as false and inexcusable as Peter's denial of our Lord.

Mrs. Surratt had arrived at home, from the completion of her part of the plot, about half-past eight o'clock in the evening. A few moments afterwards she was called to the parlor, and there had a private interview with some one unseen, but whose retreating footsteps were heard by the witness, Weichmann. This was doubtless the secret and last visit of John H. Surratt to his mother, who had instigated and encouraged him to strike his traitorous and murderous blow against his country.

While all these preparations were going on, Mudd was awaiting the execution of the plot, ready to faithfully perform his part in securing the safe escape of the murderers. Arnold was at his post at Fortress Monroe, awaiting the meeting referred to in his letter of March 27th, wherein he says they were not "to meet for a month or so," which month had more than expired on the day of the murder, for his letter and the testimony disclose that this month of suspension began to run from about the first week in March. He stood ready with the arms which Booth had furnished him to aid the escape of the murderers by that route, and secure their communication with their employers. He had given the assurance in that letter to Booth, that although the government "suspected them," and the undertaking was "becoming complicated," yet "a time more propitious would arrive" for the consummation of this conspiracy in which he "was one" with Booth, and when he would "be better prepared to again be with him."

Such were the preparations. The horses were in readiness for the flight; the ropes were procured, doubtless, for the purpose of tying the horses at whatever point they might be constrained to delay, and to secure their boats to their moorings in making their way across the Potomac. The five murderous camp knives, the two carbines, the eight revolvers, the Deringer, in court and identified, all were ready for the work of death.

The part that each had played has already been in part stated in this argument, and needs no repetition.

Booth proceeded to the theatre about nine o'clock in the evening, at the same time that Atzerodt, Payne, and Herold were riding the streets, while Surratt, having parted with his mother at the brief interview in her parlor, from which his retreating steps were heard, was walking the avenue, booted and spurred, and doubtless consulting with O'Laughlin. When Booth reached the rear of the theatre, he called Spangler to him (whose denial of that fact, when charged with it, as proven by three witnesses, is very significant), and received from Spangler his pledge to help him all he could, when with Booth he entered the theatre by the stage door, doubtless to see that the way was clear from the box to the rear door of the theatre, and look upon their victim, whose exact position they could study from the stage. After this view, Booth passes to the street in front of the theatre, where, on the pavement, with other conspirators yet unknown, among them one described as a low-browed villain, he awaits the appointed moment. Booth himself, impatient, enters the vestibule of the theatre from the front and asks the time. He is referred to the clock and returns. Presently, as the hour of ten approached, one of his guilty associates called the time; they wait; again, as the moments elapsed, this conspirator upon watch called the time; again, as the appointed hour draws nigh, he calls the time; and, finally, when the fatal moment arrives, he repeats in a louder tone, "Ten minutes past ten o'clock." Ten minutes past ten o'clock! The hour has come when the red right hand of these murderous conspirators should strike, and the dreadful deed of assassination be done.

Booth, at the appointed moment, entered the theatre, ascended to the dress circle, passed to the right, paused a moment, looking down, doubtless to see if Spangler is at his post, and approached the outer door of the close passage leading to the box occupied by the President, pressed it open, passed in, and closed the passage door behind him. Spangler's bar was in its place, and was readily adjusted by Booth in the mortise, and pressed against the inner side of the door, so that he was secure from interruption from without. He passes on to the next door, immediately behind the President, and there stopping, looks through the aperture in the door into the President's box and deliberately observes the precise position of his victim, seated in the chair which had

been prepared by the conspirators as the altar for the sacrifice, looking calmly and quietly down upon the glad and grateful people whom, by his fidelity, he had saved from the peril which had threatened the destruction of their government, and all they held dear this side of the grave—whom he had come upon invitation to greet with his presence, with the words still lingering upon his lips which he had uttered with uncovered head and uplifted hand before God and his country, when on the fourth of last March he took again the oath to preserve, protect, and defend the Constitution, declaring that he entered upon the duties of his great office "with malice toward none, with charity for all." In a moment more, strengthened by the knowledge that his co-conspirators were all at their posts, seven at least of them present in the city, two of them, Mudd and Arnold, at their appointed places, watching for his coming, this hired assassin moves stealthily through the door, the fastenings of which had been removed to facilitate his entrance, fires upon his victim, and the martyr spirit of Abraham Lincoln ascends to God.

"Treason has done his worst; nor steel nor poison,
Malice domestic, foreign levy, nothing
Can touch him further."

At the same hour when these accused and their co-conspirators in Richmond and Canada, by the hand of John Wilkes Booth, inflicted this mortal wound which deprived the Republic of its defender, and filled this land from ocean to ocean with a strange, great sorrow, Payne, a very demon in human form, with the words of falsehood upon his lips, that he was the bearer of a message from the physician of the venerable Secretary of State, sweeps by his servant, encounters his son, who protests that the assassin shall not disturb his father, prostrate on a bed of sickness, and receives for answer the assassin's blow from the revolver in his hand, repeated again and again; rushes into the room, is encountered by Major Seward, inflicts wound after wound upon him with his murderous knife; is encountered by Hansell and Robinson, each of whom he also wounds; springs upon the defenseless and feeble Secretary of State, stabs him first on one side of his throat, then on the other, again in the face, and is only prevented from literally hacking out his life by the persistence and courage of the attendant Robinson. He turns to flee; and his giant arm and murderous hand for a moment paralyzed

by the consciousness of guilt, he drops his weapons of death, one in the house, the other at the door, where they were taken up, and are here now to bear witness against him. He attempts escape on the horse which Booth and Mudd had procured of Gardner—with what success has already been stated. . . .

If this conspiracy was thus entered into by the accused; if John Wilkes Booth did kill and murder Abraham Lincoln in pursuance thereof; if Lewis Payne did, in pursuance of said conspiracy, assault, with intent to kill and murder, William H. Seward, as stated, and if the several parties accused did commit the several acts alleged against them, in the prosecution of the said conspiracy, then it is the law that all the parties to that conspiracy, whether present at the time of its execution or not, whether on trial before this court or not, are alike guilty of the several acts done by each in the execution of the common design. What these conspirators did in the execution of this conspiracy by the hand of one of their co-conspirators they did themselves; his act, done in the prosecution of the common design, was the act of all the parties to the treasonable combination, because done in execution and furtherance of their guilty and treasonable agreement.

As we have seen, this is the rule, whether all the conspirators are indicted or not, whether they are all on trial or not. "It is not material what the nature of the indictment is, provided the offense involve a conspiracy. Upon indictment for murder, for instance, if it appear that others, together with the prisoner, conspired to perpetrate the crime, the act of one, done in pursuance of that intention, would be evidence against the rest." (1 Wharton, 706.) To the same effect are the words of Chief-Justice Marshall, before cited, that whoever leagued in a general conspiracy, performed any part, however minute, or however remote, from the scene of action, are guilty as principals. In this treasonable conspiracy to aid the existing armed rebellion by murdering the executive officers of the United States and the commander of the armies, all the parties to it must be held as principals, and the act of one in the prosecution of the common design the act of all.

I leave the decision of this dread issue with the court, to which alone it belongs. It is for you to say, upon your oaths, whether the accused are guilty.

I am not conscious that in this argument I have made any erroneous statement of the evidence, or drawn any erroneous

conclusions; yet I pray the court, out of tender regard and jealous care for the rights of the accused, to see that no error of mine, if any there be, shall work them harm. The past services of the members of this honorable court give assurance that without fear, favor, or affection, they will discharge with fidelity the duty enjoined upon them by their oaths. Whatever else may befall, I trust in God that in this, as in every other American court, the rights of the whole people will be respected, and that the Republic in this its supreme hour of trial will be true to itself and just to all, ready to protect the rights of the humblest, to redress every wrong, to avenge every crime, to vindicate the majesty of law, and to maintain inviolate the Constitution, whether assailed secretly or openly, by hosts armed with gold or armed with steel.