

bye that afternoon, saying that I did not see how it was possible for me to remain any longer, as the order of the commanding officer was positive, and must be obeyed. He said to me "Good-bye" most affectionately, with a very complimentary additional remark; and then we parted. That parting I never shall forget.

Subsequently, I saw General Escobedo again, and said to him that I was one of the Emperor's counsel, and that it was his wish that I should remain with him. He replied, "Foreigners cannot practice in our courts." I might further add, that if he had the control of the nation, and the law-making power, he would not allow a foreigner to live in the country. He did say, that were it in his power to govern the rights of foreigners, he would not permit them to live in Mexico, unless they became citizens of the country. The following morning I left the city for Tacubaya.

CHAPTER XIII.

Court-martial—Accusations—Defence—Trial and judgment—Maximilian's decree of October 3d, 1865—Law of Juarez, 1862—Treaty of Miramar—Correspondence between United States and Mexico—Parts of the Mexican Constitution—Comments on the law.

BY an order of Señor Don Benito Juarez, as President of the Republic of Mexico, General Mariano Escobedo, chief of the forces at Queretaro, was commanded to form an Ordinary Council of War, which should be authorized and required to try His Majesty Maximilian, and his generals, Miramon and Mejia.

The Government of Mexico recognized Maximilian only as Archduke of Austria, and the other two prisoners as mere citizens, not acknowledging their titles as generals, but as the "*so called generals.*"

They were thus entered on the records.

General Escobedo telegraphed to the Minister of War on the 27th of May, 1867, that, in answer to his note of the 21st, he had the honor to say that proceedings had been taken toward the trial of the three mentioned persons.

In accordance with the foregoing order, General Escobedo appointed the following persons as members of that Council of War: Lieutenant-Colonel Platon Sanchez (President), Captain José Vicente Ramirez, Emilio Lojero, Ignacio Jurado, Juan Rueday Auza, José Verastigui, and Lucas Villagran.

Lieutenant-Colonel Manuel Aspiroz was appointed by the general as Fiscal, and Joaquin M. Escoto as Asesor. Both are law-officers of the Government. The Fiscal's duty is to write the accusations, take the evidence, and

manage the cause on the part of the Government; in short, he is the attorney for the Government. The Assessor's duty is to examine the cause after the court shall have passed judgment, and to render his opinion thereupon, in favor or against the legality thereof; which opinion governs the commanding-officer, in his approval or disapproval of the judgment.

The Minister of War sent instructions to the Fiscal containing the main points of complaint; upon which the latter drew the accusations, which were based on the alleged violations of the provisions of the law bearing date January 25th, A. D. 1862, created by the President of the Liberal party alone.

The three prisoners were tried together, although upon separately-written charges.

The first proceeding, on the part of the Government, after the formation of the Court, was a preparatory writing, drawn by the Fiscal, containing interrogatories addressed to the Emperor, demanding of him to answer whether he was Ferdinand Maximilian, Archduke of Austria, the so-called Emperor; and for what purpose he came to Mexico. To which he answered that he was the aforesaid Archduke, and was born July 6th, 1832: that he came to Mexico at the solicitation of a large number of Mexican citizens; and that he believed that he was so called by a majority of said citizens.

A Protest, bearing date May 29th, was drawn by Señor Vasquez, the resident lawyer of His Majesty at Queretaro, signed by Maximilian, wherein was set forth that various Mexicans were desirous of establishing an empire in Mexico, and to elect him Emperor thereof; that he answered them that he wished proof that a majority of the Mexican people were of that opinion: that subsequently an Assembly of Notables presented him a document which evidenced that the people of Mexico had already adopted that form of government;

and that believing, after an examination, that the principles therein laid down were in accordance with the will of the Mexican people, he then consented to their proposition to accept the crown; that, accordingly, he governed Mexico for more than two years, recognized by the nations of Europe. Also that other facts presented themselves in favor of his cause, namely: Jesus G. Ortega proclaimed himself President of the Republic of Mexico; that he had been arrested and not yet tried, but was waiting for a high tribunal, vested with competent authority; and that he, Maximilian, was chosen Emperor while he was at Miramar, and did not, like Ortega, proclaim himself the head of the Government. Finally, the Protest closed, asking: first, that the Council of War be declared incompetent; second, that orders be given to suspend all summary proceedings against him, based upon the said law of January 25th, 1862; third, that no Ordinary Council of War be formed or installed, based upon the said law of January, the competency of which he did not recognize. The Protest had subjoined thereto the following:

"Finally, I say, that in conformity with the frankness of my character, I ought not to keep it as a secret from you, General, that a true copy of this writing is in the hands of the Hamburg Consul, in order that he may transmit the same, when he may be able, to the Diplomatic Corps, accredited near my person.

"QUERETARO May twenty-ninth, one thousand eight hundred and sixty-seven.

"MAXIMILIAN.

"JESUS M. VASQUEZ, *Counsel.*"

The foregoing Protest was handed me for examination, and for an opinion as to the points raised in favor of the defendant. I do not think it was satisfactory to

the lawyers who came from the city of Mexico on behalf of the Emperor, nor to the Emperor himself.

The objections to the jurisdiction made therein were overruled by General Escobedo; and thereupon the Fiscal prepared the accusations against Maximilian in the form of interrogatories, and propounded the same in the presence of the notary appointed to take down the answers that might be given thereto.

The accusations, answers of the defendant, and statements of the notary therein, constituted the charges in full, and were embraced in one document, which was in the following language:

“Maximilian being asked if he would promise to speak the truth as to all he knew upon which he might be interrogated, responded that he would answer all questions which were not of a political nature.

“Being asked concerning the charge of having offered himself as the principal instrument of the French Intervention, to carry out the plans of said Intervention, which were to disturb the peace of Mexico, by means of a war, unjust in its origin, illegal in its form, disloyal and barbarous in its execution; and of arousing in Mexico, the political faction that has sacrificed the national rights and interests in order to satisfy their particular interest; and which faction was already reduced and unable to offer further resistance without the assistance of foreign arms: in order to destroy the constitutional Government of the nation established by the people, who were in the exercise of all its powers, and recognized by foreign nations, and even by the very powers which brought on the Intervention; in order to transform the Republic into a monarchy, which would favor the policy of Napoleon III., in opposing American democracy, and favor the base interests of the French Government and

such men as Jecker, who had no other object in view than that of obtaining so base and iniquitous advantages from a war which has been called a War of Intervention, the records of which constitute the *First Charge*, and others, which are of public notoriety.

“To this Maximilian replied, that this question being a political one, he would refer them to what he had before answered.

“The Fiscal, after admonishing the defendant, repeated the charge twice to him, without receiving any other answer than the former one.

“Being asked and warned to answer to the charge of having come to second and put in practice the plans above referred to of the French Government, without any other title than that which the armed force of the same Government gave him, and a few votes, which he pretended to call the national will, notwithstanding that pretended expression of the national will is false in form and substance, as no one can deny; since the Mexican Republic being established as it was and as it is on the fundamental charter of 1857, the only legitimate expression of the will of the people is that which is defined in the same charter, and regulated by the electoral laws in conformity with the same, it being the form established by the same supreme law and respective regulations; and the only legitimate one through which the sovereign will of the Mexicans can be made known; and not the votes of a few persons, cast in a few particular towns, and those of an incompetent minority of the ‘Assembly of Notables,’ who pretended, maliciously, to represent the genuine will of the people; pretending to make their acts to express the consent of the people, and transforming the Republic into the so-called Mexican Empire. And whatever might have been the cause for the proclamation of the monarchy

and Maximilian, the votes obtained in the presence of an armed force cannot be considered the deliberate and spontaneous will of the people.

"The false representation of said national will was already proclaimed by native Mexican traitors and foreigners at the beginning of the War of Intervention, as it was known to the world, and protested against by the press of Europe and America; and also the plans of a few wicked Mexicans, such as Almonte, Gutierrez Estrado, and the diplomatic efforts of the cabinet of the Tuilleries, which arrived to destroy, at all costs, the Republican Government, and to found, by force, a Mexican Monarchy, at the head of which the French Government had resolved to place a prince who would accept the crown, and did, in effect, place the Prince who is present.

"Maximilian responded as he did to the prior charge, stating that his answer to other charges which might be made would be no other than already given, if they were questions of a political character. The Fiscal then repeated twice the foregoing question and charge last made, and passed on to the

"*Third Charge:* That the Archduke Maximilian accepted voluntarily the responsibilities of an usurper of the Sovereignty of a people constituted as a nation free and independent; for the acceptance of which responsibilities he is severely condemned by the legislation of all nations and various previously made laws of the Republic of Mexico, among which last is that of the twenty-fifth of January, one thousand eight hundred and sixty-two, which has ever since been in force.

"The Fiscal repeated the said charge twice, and passed on to the

"*Fourth Charge:* That of having, with an armed force, disposed of the lives, rights, and interests of the Mexican people.

"The Fiscal repeated this charge twice, and passed on to the

"*Fifth Charge:* That of having made war against the Mexican Republic, and by and in many cases under the direction of the Commander-in-chief of the French army in Mexico. Consenting to, authorizing, and committing molestations and atrocities of all kinds which could be put into practice to oppress the Mexican people, and to impose upon them the will of a Prince elected by the French Government to govern Mexico.

"Here the Fiscal caused to be read a list of the frightful number of executions by court-martial of Maximilian, of the Mexican who defended the cause of the Republic, and also of the pillage and burning of entire towns throughout the Mexican Territory, and especially in the States of Coahuila, Michoacan, Sinaloa, Chihuahua, Nuevo Leon, and Tamaulipas.

"The Fiscal here repeated this last charge twice, and passed on to the

"*Sixth Charge:* That of having made, in his own name, a filibustering war, inviting and enlisting foreigners from all nations, principally Austrians and Belgians, subjects of Powers who were not at war with the Mexican Republic.

"The Fiscal repeated this twice, and passed on to the

"*Seventh Charge:* That of having published and of having carried into effect against the Mexicans who did not submit to his authority, the barbarous decree of October third, one thousand eight hundred and sixty-five, which gave power to all commanding officers of the so-called Imperial army to execute on the spot all prisoners, without regard to the rank or the denomination of the organized body which they formed, or the cause which they defended, and without excluding those who followed them unarmed, or citizens who aided them directly or indirectly.

“The Fiscal repeated this last charge twice, and passed on to the

“*Eighth Charge:* That of having the audacity to assume in his manifesto of the second of October, which served as a preamble to the said barbarous decree, that the person at the head of the Constitutional Republican Government had abandoned the Mexican Territory; deducing from this entirely false fact extraordinary consequences in favor of his tyranny, and for the persecution and disdaining the true patriots who were defending the flag of the Republic.

“The Fiscal repeated this last charge twice, and passed on to the

“*Ninth Charge:* That of having attempted to sustain his false title of Emperor of Mexico after the French army had withdrawn from Mexico, and when he saw the Republic rising by his side against the pretended Empire; and in support of which he surrounded himself with some of the men who, during the civil war of Mexico, became famous for their crimes; that of employing means of violence, of death, and desolation; that of shutting himself in this plaza of Queretaro, in order to check the victorious Republicans from the frontiers of the north to this place; and that he did not deliver his sword until the plaza was taken by the besiegers, and then to the Colonel of the Campana near by, and on being also assaulted, and in the fort of which Campana he took refuge with two of his Generals, and a handful of other officers, and until after his forces had been imprisoned or dispersed, leaving him no elements to prolong his defence.

“The Fiscal repeated this charge, and passed on to the

“*Tenth Charge:* That of having abdicated the false title of Emperor, so that the abdication should not take

effect immediately, but only when he should be conquered; that is, at a time when he would not be able to do so by his will, but when he found himself overcome and compelled to abdicate by force of arms.

“The Fiscal repeated this, and passed on to the

“*Eleventh Charge:* That of pretending to be entitled to the consideration due to a Sovereign conquered in war, when for the Mexican nation he has not been such; not by law, because of the illegality of his title of Emperor, which he abrogated to himself, not, in fact, because he was unable to sustain his title by his own forces.

“In respect to the foregoing charge, the Fiscal read the following facts to him:

“That Maximilian was unable to establish peace under his rule, even with the assistance of the French army; that from the complete evacuation of Mexico by the French army to the time of his fall, not even three months had elapsed; that the Republican Government had sustained itself without interruption, notwithstanding the strenuous efforts of the French and Maximilian to destroy it; that the war of Mexico against the French intervention, and against the so-called Empire, the ideal of said intervention, has been maintained without cessation for more than five years, always in the name of the Republic, by the authority and under the direction of the Government of the same.

“The Fiscal repeated this charge, and passed on to make the

“*Twelfth:* That of not recognizing the competency of the Council of War, which the law of the twenty-fifth of January, one thousand eight hundred and sixty-two, establishes to try offenders guilty of the crimes therein specified; which crimes, almost in their totality, Maximilian committed, and which law he understood, and is

applicable to him, because it was already in force before he came to Mexico to commit the specified crimes against the independence and security of the people, against the law of nations, against public peace and order, against individual guaranties; and which law is now in force, and has been applied, being used as an incontestable right as inherent in the sovereignty of the country, and by which law the government of the Republic has sustained itself in the defence of the national independence against the French intervention, and that of its internal sovereignty against the usurpation of Maximilian; without which there might be some reason that the law was insufficient in this case.

"The Fiscal repeated the charge twice, and passed on to the

"*Thirteenth Charge:* That of protesting against the competency of the Council of War and that of the General-in-chief to try him, when the nation has by its ancient and modern laws deposited in said council the administration of justice in time of war, in order to try those who have been conquered during it, or who, for some other reason, are subject to military law.

"The Fiscal called his attention to the consequences which he would incur by persisting in denying the jurisdiction of the General-in-chief over him, to whom he had surrendered at discretion. This was repeated twice, and Maximilian was required to answer it, as well as the rest of the foregoing charges. The Fiscal notified him again that, by the laws of the country, all the charges preferred against him would be taken as confessed, if he refused to answer and defend himself. And not having obtained any answer from Maximilian, except the one which he had previously given—that he could not answer any question of a political character, because he thought he ought not to recognize the competency of a military judge to try him—the present confession was finished

and terminated, with the charges which the Fiscal and Maximilian will sign, with the notary who subscribes to the same.

"MANUEL ASPIROZ.

"MAXIMILIAN.

"Before me, JACINTO MELENDEZ."

It will not be surprising to the professional man, nor even to the layman, that the reading of such trash as the foregoing accusations and charges should have produced the remark which the Emperor made to me. He observed, "I had to put my hand over my mouth when they were read to me, to prevent laughing."

We could not expect to see such a document as that issue from among men where jurisprudence is taught as a science. And the face of Maximilian will not be the only one on which the reading thereof will have produced a smile. It will likewise cause surprise to those, at least, who have been nurtured under the benign institutions of a free government, to behold the trial of a man, for his life, under a rule of law that compels him to be a witness against himself, and if silent thereon, every accusation and charge shall be taken to be true. The humane doctrine advanced and adhered to in England and the United States is, that a man shall be deemed innocent until proved guilty; and that the temptation to perjury shall be held out to no man where his life or person is in jeopardy. And frequently in those two countries a defendant has been allowed to withdraw a plea of guilty, and to enter one of "not guilty."

What civilized country authorizes its officers to prefer charges against a man for raising a plea to the jurisdiction of its tribunals? Where Justice reigns, is a man to be chastised for presenting every point which his counsel may think valid in law? Suppose the points

are overruled, is that evidence of a crime or misdemeanor?

Such a proceeding is enough to make a Republican blush, as he is told that it has been carried out under his form of government.

The Emperor desired that I should set forth my views of the law, in order that the world might know his true legal position, so far as I was able to state it, even although the Mexican authorities should overrule the positions. I did so, somewhat hurriedly. He requested me to send copies of that defence to the United States, so that it might be read by the distinguished men of that country. That defence was in the following words:

"Whereas, Maximilian is now a prisoner in the city of Queretaro, Mexico, by virtue of his surrender to the Mexican forces, heretofore, to wit, on the 15th of May, A. D. 1867; and whereas certain criminal proceedings have been ordered on certain charges and accusations against him by the Mexican authorities; and whereas the said Maximilian has, heretofore, made his solemn protest, denying the jurisdiction of the court established for the purpose of trying him on said accusations and charges: Therefore, be it known, that the said Maximilian hereby further protests against the jurisdiction of said military court or tribunal, and against the right of any military tribunal to try him; that he is only a *prisoner of war*, and was so considered and declared so to be by the Commander-in-chief of the Mexican Liberal Army, to whom he surrendered himself, as aforesaid.

"1st. He contends that he is only a *prisoner of war*, and that, according to the generally recognized usages and rules of war, that if he is to be tried by any court, or by any law, the trial should be before a competent

court, and in accordance with *International Law*, as understood among civilized nations; which consists of those rules of conduct which reason deduces as consonant to justice from the nature of the society existing among independent nations, with such definitions and modifications as has been established by general consent.

"2d. That, according to the generally recognized usages and rules of *International Law*, no use of force is lawful *except* so far as it is necessary. A belligerent has therefore no right to take away the lives of those subjects of the enemy whom he can subdue by any other means. Those who are actually in arms, and continue to resist, may be lawfully killed; but those who, being in arms, submit and surrender themselves, may not be slain, because their destruction is not necessary for obtaining the just ends of war. The killing of prisoners can only be justified in those extreme cases where resistance on their part, or on the part of others who came to their rescue, renders it impossible to keep them. Both reason and general opinion concur in showing that nothing but the strongest necessity will justify such an act. See *Wheaton on the Law of Nations*, Part 4th, Chapter 2d, Section 2d.

"3d. That, if it be lawful to try him by a court-martial, the officers who compose the court established by the order of the Mexican authorities of the Liberal Party are of too low a rank, according to the usage and rules of civilized nations.

"4th. That the *internal sovereignty* of a State does not, in any degree, depend upon the recognition by other States. The existence of the State *de facto* is sufficient, in this respect, to establish its sovereignty *de jure*. It is a State because it exists. Upon this principle, the Supreme Court of the United States held, in 1808, that the *internal sovereignty* of the United

States of America was complete from the time they declared themselves 'free, sovereign, and independent States,' on the 4th of July, 1776. The same principle was recognized in the treaty with Great Britain and the United States, in 1782. See *Wheaton on the Law of Nations*, Part 1st, Chapter 2d, Section 6th.

"5th. That he, Maximilian, was Emperor and Sovereign head of Mexico for a long time, and as such Sovereign head exercised jurisdiction and control over the greater part of the territory of Mexico.

"6th. That he, Maximilian, being the Sovereign head of Mexico, and so recognized by nearly all of the nations of the world, was not and is not subject to any laws or decrees made by the President of the Liberal or any other party, although said President was recognized by the United States as President of Mexico, because said Liberal party was not the government *de facto* of Mexico, and therefore he ought not to be adjudged by any such laws or decrees.

"7th. That, according to the rules and principles of *International Law*, the Sovereign head of a government *de facto* cannot be tried or punished for making or issuing any decree or law; and while within his own government, is not amenable to the municipal laws of any other government or party. Therefore, Maximilian, upon legal principles, cannot be tried or condemned for issuing the decree known as the 'Decree of October 3d,' whatever may be the character of said decree. Every State has certain *absolute* sovereign rights; one of the most important is the right of self-preservation. This right necessarily involves all the incidental rights which are essential as means to give effect to the principal end. See *Wheaton on the Law of Nations*, Part 2d, Chapter 1st, Sections 1, 2 and 3.

"8th. The law of President Juarez of 1862, January 25th, is unconstitutional. 1st. Because it was made by

the President alone, who has no authority to legislate. See *Mexican Constitution*, Title 3d, Art. 50, under the 'Division of Powers,' which says that the supreme power of the federation is divided into legislative, executive, and judicial powers; that no two of said powers can ever be united in one person; and that *legislative* power shall *never* be deposited in *one individual*. Therefore *any law* not made by the *legislative* power is unconstitutional. 2d. Said law is unconstitutional, because it punishes a man with death for *political* crimes, contrary to Art. 23d, Title 1st, Section 1st.

"9th. The powers given to the President in Art. 29, Title 1st, Section 1st, Mexican Constitution, to *suspend* certain *guarantees* mentioned in said Constitution, do not extend to those guarantees that *secure* the *life* of man.

"10th. The word '*guarantees*' in the Constitution means *individual* guarantees or rights, and the power to *suspend* them does not *give the power* to the President to *make* laws. If the President can *make laws*, he can destroy the *form* of the government, and it would become monarchical rather than constitutional. If the President can exercise legislative power, he can likewise exercise *judicial* power, and he would then be an autocrat.

"11th. That the Congress of Mexico have no power to declare that the President can make laws. Congress cannot delegate its power to any one. If it can delegate its powers to the President, then it can do so to any other individual. Neither Congress nor the President can destroy the *form* of government by giving each other a part of their respective constitutional powers. All the powers of Congress are mentioned in Title 3d, Section 1st, Paragraph 3d, Art. 72; and there is no authority given to *delegate* the powers of Congress to the President. According to Title 6th, Art. 117, the powers

which are not *expressly* conceded in the Constitution to the federal functionaries are understood to be reserved to the States. Art. 126th, Title 6th, says that 'This Constitution, the laws of the Congress of the Union which emanate from it, and all treaties made, or which may be made by the President of the Republic, with the approbation of Congress, shall be the *supreme law* of the Union.' It does not say that the laws of the President shall be the supreme law of the land, but, on the contrary, *none but the laws of the Congress of the Union*. And, further, under the head 'Of the Inviolability of the Constitution,' Title 8th, Art. 128th, it says, 'This Constitution shall not lose its force and vigor *even in time of rebellion*.'

"12th. The late or present war being a *civil war*, the punishment of death cannot be awarded for *political* crimes, according to the said Art. 23d.

"13th. That there is a distinction between an executive regulation and a *law*. The executive can only provide for the *execution* of the law; consequently a regulation or *decree* of the President conflicting with any existing *law*, or the Constitution, is void. *Lares*, in his *Derecho Administrativo*, page 19, says: 'Neither the judicial nor administrative tribunals are under any obligation to *obey illegal reglamentos*' (regulations). Such is the opinion of the writers on the Civil law which is in force in Mexico.

"14th. That if the said war is a *foreign* one, then Maximilian is not guilty of *treason*, as he is an Austrian.

"15th. That whilst a civil war, involving the contest for the government, continues, other States may remain indifferent spectators of the controversy, or may espouse the cause of either. The positive law of nations make no distinction between a just and an unjust war in this respect; and the intervening State becomes entitled to all the rights of war against the opposite party. And

the fact that foreign States in Europe furnished him, Maximilian, troops and munitions of war, or whether such troops rendered him aid voluntarily, does not, according to the law of nations, change his rights as a contestant in the struggle for the supremacy of government.

"16th. That the general usage of nations regards a civil war as entitling both the contending parties to all the rights of war against each other, and even as respects neutral nations. And therefore, if the decree of Juarez, of January 25th, 1862, was legally made which punished with death prisoners of war, then Maximilian was justified in issuing the decree of October 3d, 1865, in retaliation, it being only equal in severity.

"17th. That, as a fact, the French forces under Marshal Bazaine were not subject to the control of Maximilian in regard to their military regulations, orders, and movements, as will appear by the treaty of Miramar; but only so in regard to their political government while in the Empire of Mexico.

"18th. That the said decree of October 3d, 1865, was drawn by instructions, and according to the direction of Marshal Bazaine; and that he, Maximilian, was informed that the said Marshal Bazaine enforced a part of said decree *before* it was signed by said Maximilian.

"19th. That at the time said Maximilian signed said decree, Marshal Bazaine stated to him, Maximilian, that ex-President Juarez had positively left the territorial jurisdiction of Mexico, and that he was then in the State of Texas, in the United States of North America.

"20th. That the said Maximilian, after he left the city of Mexico for Orizaba, at the Hacienda Zoquiapam, on the 21st of October, 1866, annulled said decree; but that said annulment thereof was secreted by the said Marshal Bazaine for three weeks before the same was published, although he, the said Maximilian, sent three