THE
AMERICAN LAW REVIEW.

MARCH-APRIL, 1898.

THE LEGAL RELATIONS BETWEEN BENCH AND BAR.¹

I. Whether an Attorney is "an Officer of the Court."
II. The Power of Disbarment.
III. The Power to Punish Contempts.
IV. General Considerations.

Mr. President and Gentlemen of the Association:

What are the true legal relations between the bench and the bar? Has the bench any arbitrary power of control over the conduct of the bar? Has it any powers which are not defined and limited by rules of law? Are these rules adequate to secure the rights and the independence of the bar?

In responding to your invitation, I have selected the topic suggested by these questions principally for a reason which your own experience will help to approve. A lawyer in active practice has little time to deal with any subject outside the field of his work, and it happens that a professional call lately required me to give this subject some attention. While it may be of more speculative interest than practical importance, I trust that an hour devoted to it will be found not wholly unprofitable.

The ordinary intercourse between the judges and the members of the bar is governed by the common rules of courtesy and civility which prevail among men of good breeding. The occasion for the application of legal principles to this relation, or for crit-

¹ An address delivered before the Southern New Hampshire Bar Association, at Concord, February 26, 1898, by ex-Attorney-General Albert E. Pillsbury, of Boston, Mass.
THE TRIAL OF M. ZOLA.

I. *Salus populi suprema lex* was the cardinal maxim of the ancient Romans. The trial which has just ended before the Jury de la Seine by a sentence of one year's imprisonment and a fine of three thousand francs, is the clearest illustration, in modern times, of that famous political principle ruling people and nations.

The libel of M. Emile Zola, the well-known French writer, resumes itself into the following:—

"The officers of the court-martial (*conseil de guerre*), in acquitting Captain Esterhazy, only submitted to orders from their superiors."

At the time of the publication of the "*Lettre à la France*" by M. Zola, the Prime Minister, M. Méline and General Billot, Minister of War, inclined to the revision of the Dreyfus case, but that only after * * * the general elections.

Hence their hesitation to try M. Zola for libel and the explanation of the lapse of five days, before the Minister of War made up his mind to prosecute.

But, in the meantime, the Chief of the French Etat-Major, General de Boisdeffre, informed the Minister of War that the whole High-Staff would resign and retire, unless M. Zola were taken up for libel; and, if report be true, confirming even the above determination by letter.

Under those circumstances an indictment was issued.

II. As a result of the trial, one fact stands out in great prominence and certainty.

In 1894, during the trial of Captain Dreyfus, there was put before the court-martial, an important document without the knowledge and consent of the accused officer and his counsel, M. Demange, and which appears to have been the condemning evidence.
Whilst this fact was being clearly proved before the jury, General Billot was declaring, for the sixth time, in full parliament (Chambre des Députés) that Dreyfus had been justly and legally sentenced, and that, so long as he, General Billot, should be the Minister of War, no revision of the case would be authorized to take place.

III. Again, General de Pellieux, one of the prominent officers of the High-Staff, cross-examined by M. Labori (M. Zola's counsel), stated openly that Dreyfus was guilty of high treason and that his guilt was further established by a document found after the traître had been tried.

Being pushed by the defense, the witness insisted upon having General de Boisdeffre himself appear before the jury in order to make, as he expected, most startling declarations.

On that account, the court retired to permit of the General making his appearance, and, to the profound astonishment of everybody, at the very moment General de Boisdeffre arrived in court, the jury was dismissed for the day.

The evidence was therefore awaited with great eagernèss. The following day, at noon, the court opened and General de Boisdeffre was introduced as witness.

He made only a short and insignificant statement:—

"I confirm, on every point, the evidence of General de Pellieux, as authentic and exact. His words are absolutely true. I again confirm them, but I do not consider myself authorized to say more. My jury is the nation, and, if the nation has lost confidence in the chiefs of its army, we are willing to retire and leave our heavy task to others."

When M. Labori rose to cross-examine the witness, the president of the court refused him a hearing, whereupon General de Boisdeffre retired.1

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1 According to French Criminal Procedure, counsel has no right to examine or cross-examine directly any witness; he must first apply to the president of the court, who judges whether the question be relevant, and, in such case, interrogates himself the witness about the facts on which the defense desires information.
IV. At this point, Captain Esterhazy was examined and began by stating that, although desirous of answering every question put by the president of the court or the jury, he refused emphatically to give any reply to "those people there," pointing to M. Zola and his counsel.

The president then asked M. Labori which questions he desired to have put.

"I am just writing out," was the answer, "a formal protest against the refusal of the court to cross-examine General de Boisdeffre and I shall not cross-examine this witness before the court has dealt with my written protest."

"Put your questions at once, or you will not have another opportunity of so doing."

"For the present, in such case, I have nothing to say, and I strongly protest against your proceeding."

Captain Esterhazy, in his turn, then walked out of court.

V. One remark made by M. Delegorgue, president of the court, is worthy of special notice. When M. Labori questioned the manner in which the president conducted the trial, M. Delegorgue said:

"The security of our country and l'amour de la patrie are first to be considered and ought to give place to all other rights."

Now we are led to explain the grave and serious causes, for the rulers of France and the president of the court, to apply to an accused and his counsel proceedings which, in an ordinary case, would be pronounced as unjustifiable and illegal.

If report be true, discreetly in diplomatic circles the most serious revelations are hinted at, regarding the means by which the documents were obtained to establish the treason of Dreyfus. Had the officers been allowed by the president of the court to comply with counsel's request and to speak the whole truth, their answer would undoubtedly have involved not only diplomatic difficulties, but real and immediate war with a powerful neighbor.

According to an undisputed principle of public international law, the person and the residence of a foreign ambassador are inviolable. This immunity and great privilege extend also to
other persons charged with diplomatic missions and to all persons associated with the performance of the duties of an embassy or legation.

Therefore, any violation of such immunities would be regarded as a high breach of public international law, and would involve immediate war.

Could any European power resist the outburst of indignation of the nation itself, when the public became aware that, through a romanesque intrigue and most unlawful means, documents were taken from pockets and out of the residence of one of their representatives abroad?

It appears that these documents had been secretly photographed and were probably restored to the owner without his having had any suspicion of their temporary disappearance. They constituted the only evidence of treason.

VI. Here arises the question whether all ordinary laws of morality and justice must give way before the higher law, the salus republicæ.

In France, the eighteenth century, the century of conception and philosophical speculation, ended with the conviction that principles ought to prevail over everything, notwithstanding consequences. Périssent les colonies plutôt que les principes was the universal sentiment.

The nineteenth century,—the century of adaptation and of progress, which, after all, is nothing else but an improved or a better adaptation,—has reversed that sentiment. Périssent les principes plutôt que les colonies stands out most conspicuously by the present trial.

VII. Before ending this short article, we cannot refrain from putting before the reader the difference between the code of morality which regulates the conduct of individuals and the rules of morality governing the intercourse between nations. We recall the words of Lord Lytton, when addressing the Glasgow University in 1888: "First of all, the subjects of private morals, that is, individuals, differ from the subjects of public morals, that is, nations, so widely, that hardly a proposition applicable to the one can be properly applied to the other."
The question has been put, whether it is, after all, wrong for a nation — as we are generally agreed it would be for an individual — to do a little evil that a great good may come?

Lord Wolseley apparently thinks not, not even for an individual acting on behalf of the nation; for, in his Soldiers’ Pocket Book, instructing spies how to lie with audacity and success, he remarks that some people “keep hammering away that honesty is the best policy and truth always wins in the long run;” but “these pretty little sentences do well for a copy-book, but a man who acts upon them had better sheath his sword forever.”

In fact, does international morality exist? ¹

Emile Stocquart,
Avocat à la Cour d’Appel de Bruxelles.

¹ Mr. Thomas Graves Law, the learned librarian of the Edinburg Signet Library, has written a most interesting article on the subject. See The New Review, October, 1897, p. 456.
brief and informal, the Chief Justice merely remarking that the court was happy to meet Mr. Griggs.

It might be added that the late Chief Justice Waite had never had any business in that court at the time when he was appointed by President Grant to be its presiding officer, though he was formally enrolled as a member of its bar on his return from the Geneva Arbitration, where he was one of the counsel of the United States.

**English Comments on the Dreyfus Case.** — The controversy which is now raging in the French press as to the justice of the conviction of ex-Captain Dreyfus suggests two observations. One is that a secret inquiry is a worse evil than any mischief that can result from a public trial. The most contradictory statements are being made as to the evidence on which the prisoner was convicted, and on the question whether evidence was submitted to the court behind his back and that of his counsel. If the trial had taken place in the light of day, much of what is now said on one side or the other, perhaps on both sides, would have been kept out of the discussion. In this country, when the nauseous details of some unsavory case have been reported at length, the opinion has sometimes been expressed that judges should have the power to try cases *in camera* or exercise some control over the reports published in the newspapers. Those who hold this opinion will find food for reflection in the sequel to the Dreyfus case. The other observation is that in forbidding comments on a case while it is *sub judice* our legal system shows itself much superior to that of our French neighbors. When the Dreyfus trial was pending, the organs of the Anti-Semitic party in France did their utmost to excite prejudice against the accused; and many people think that his judges, however honorable and desirous to be just they may have been, were perhaps biased against him by the invectives of his enemies. Now, again, when a new judicial inquiry is probable, every circumstance, whether relevant or not, that may tell against the prisoner, against other suspected persons, or against anyone interested in the affair, is published and passionately discussed. — *Law Journal* (London).

**The Late Baron Pollock.** — The late Baron Pollock, who died in November last, was, with the exception of Sir Nathaniel Lindley, the last representative on the bench of the ancient fraternity of Serjeants-at-Law. He was the son of that patriarchal judge, Chief Baron Sir