THE RELATION OF THE AMERICAN BAR AS AN ORDER OR BROTHERHOOD TO THE STATE.¹

I am not vain enough to take this invitation from the famous Bar of your famous Commonwealth as a mere personal compliment. I like better to think of it as a token of the willingness of Virginia to renew the old relations of esteem and honor which bound your people to those of Massachusetts when the two were the leaders in the struggle for independence, when John Adams and Sam. Adams sat in council with Jefferson and Henry and Lee, when the voice of Massachusetts summoned Washington to the head of the armies and Marshall to the judgment seat, when Morgan’s riflemen marched from Winchester to Cambridge in twenty-one days to help drive the invader from the Bay State, and when these two great States were seldom divided in opinion—never in affection.

These two States, so like in their difference, so friendly even in their encounters, so fast bound even when they seem most asunder, are, as I think, destined by God for leadership somewhere. I thank Him—we can all thank Him—that He permits us to believe that that leadership is hereafter to be exercised on a scale worthy of their origin and worthy of the training He has given them. Nothing smaller than a continent will hold the people who follow where they lead. When the Massachusetts

¹ Address before Virginia Bar Association, by George F. Hoar, at old Point Comfort, July 7, 1898.
authority of the United States, shall be the supreme law of the land; and the
judges in every State shall be bound thereby, anything in the constitution or
laws of any State to the contrary notwithstanding.¹

It is perceived that the primary object of this provision of the con-
stitution was to make the constitution, the Federal statutes and the
public treaties of the United States, obligatory upon the judges of the
States, notwithstanding anything to the contrary in the constitution
and laws of the States. It is also perceived that there is nothing in
the language which makes a treaty of the United States the supreme
law of the land in any different sense than the sense in which the laws
of the United States made in pursuance of the constitution are the
supreme law of the land. Now, it is a mooted question whether or not
Congress can repeal or override a treaty. If it is said that Congress
cannot do it, the answer is that it has done it. The Burlingame Treaty
between this country and China was abrogated by the Chinese Exclu-
sion Act, and the abrogation stands and the treaty is gone. It is
therefore not clear that our government involves the anomaly of a part
of the legislative power being greater than the whole.

FRENCH CRIMINAL PROCEDURE. — A good deal of astonishment and
some laughter have been excited by the Zola trial in Paris, and a very
large number of Frenchmen have been annoyed by the general disposi-
tion of the Anglo-Saxon world — that is, the public of America and
England — to sympathize with Zola, and condemn or ridicule the pro-
ceedure under which he has been convicted. This is not unnatural.
We probably do not completely understand French feeling in the
matter; but it is plain, on the other hand, that many excellent French-
men do not understand ours. A little explanation, therefore, may do
good.

In the first place, there is no use in trying to justify to an American
or Englishman a secret proceeding, by which a man is deprived of life,
liberty, property, or reputation. A large number of officers of high
standing pledged their word of honor in Paris that Dreyfus had been
properly convicted and was guilty. One general asked leave to address
a few remarks on this subject to the jury before he gave his testimony.
We are asked, in short, to believe that Dreyfus is guilty because so
many men of high character say so. Here is where the Anglo-Ameri-
can and the French public first part company. If in America or in

¹ Const. U. S., Art. 6, Cl. 2
England all the clergy and all the citizens of highest repute were to come forward and offer to swear that a man who had been secretly tried and convicted deserved his fate, they would be received, as the French generals have been received here, with shouts of laughter. The reason is that for three centuries, in Anglo-Saxon jurisprudence, a "fair trial" has meant a public trial, and the submission to the public, in the presence of the prisoner, of all the proofs against him. It is at least two hundred and fifty years since it was possible among English-speaking men "to go upon, or send upon" any one, to use the words of Magna Charta, upon evidence not produced in a court open to the public, or for any "reason of state." Therefore, there is for us no getting over the secrecy of Dreyfus' trial. No certificate of fairness from any one, were it the Pope of Rome, will satisfy the public that a man was lawfully ruined or executed if he was tried in secret. An offer of one by anybody sounds to us like a joke.

In the next place, we are startled by the fact that the French not only have no "rules of evidence" like ours, but have none at all. A trial like Zola's, therefore, without rules of evidence strikes us as comic. Here is Fitzjames Stephen's account of the difference in the matter of evidence between the French system and ours:—

"These leading rules, though qualified by important exceptions, are rigidly enforced in practice, and their enforcement gives to English trials that solid character which is their special characteristic. They seem to be quite unknown in French procedure. Witnesses say what they please and must not be interrupted, and masses of irrelevant, and often malicious hearsay, which would never be admitted into an English court at all, are allowed to go before French juries and prejudice their feelings. The old rules of evidence, which were in use before the Revolution, and were driven from the middle-age version of the Roman law, were exceedingly technical and essentially foolish. They were accordingly abolished absolutely, and nothing was put in their place. The essentially scientific though superficially technical rules of evidence which give their whole color to English trials, and which grew up silently and very gradually in our courts, seem to me to be just what is wanted to bring French trials into a satisfactory shape; but the evils of the old system were so strongly impressed on the authors of the 'Code d'Instruction Criminelle' that destruction was the only policy which presented itself to their minds." 1

In fact, the investigation in a French criminal trial is carried on just as investigations are carried on in private life. If a private individual

wants to form an opinion as to whether somebody, say in his own household, has done something, he gets information in any way he can from any quarter whatever. Hearsay, circumstantial evidence, the talk of interested persons, the gabble of children, are all collected by him, and on it all he forms his own theory of probability. Half of it would probably be rejected in a legal proceeding in our courts, but this is the way in which most men regulate their own conduct of life and carry on their own business. The French carry it into their legal proceedings for want of anything better. The dossier, which is made up by the juge d'instruction, about a prisoner when he is first apprehended is very like the "story" which, with us, would be collected by a newspaper reporter. Everything that he can get hold of, good, bad or indifferent, likely or unlikely, is tossed into the basket, and the prisoner is harassed by cross-examination on it by the judge. The consequence is that a French trial never seems to us fair or serious. The evidence of the generals in Zola's trial about the propriety of Dreyfus' conviction, sounds like a comedy.

Moreover — and this is the worst of it — the popular excitement which has attended the trial about "the honor of the army" and about the Jews, reminds us here painfully of some of the great judicial tragedies of French history. We think of other cases in which French courts were undeniably influenced by popular clamor. It was the clamor of the Catholic populace which led the Parliament of Toulouse to convict poor old Calas of the murder of his son, although this populace was in the habit of celebrating the massacre of St. Bartholomew as a public festival. There was neither evidence nor a shade of probability against Calas. But the Parliament, of more than twelve judges, took the popular view, summoned all sorts of witnesses who shared it, extracted Calas' guilt from them by leading questions, broke the old man on the wheel, and expected his confessions under torture to furnish evidence to convict his sons and wife. When this failed them, they were compelled to discharge them, and when, under Voltaire's whip of scorpions, they were compelled to reverse their finding, and do what could be done to rehabilitate the afflicted family, one of the arguments against this scanty justice was that to reverse was to acknowledge mistake, and this would injure the prestige of the court. The fate of the Chevalier de Labarre, a youth who was "roué" on evidence that would convulse one of our public schools, was a similar scandal. He was convicted of "irreverence" and "blasphemy" under popular and ecclesiastical clamor. In both these cases the courts convicted an innocent man mainly to safeguard some great
public interest, which happened in both these cases to be what was called "religion." Remembering these things, and others like them, our public naturally asks whether this clamor against the Jews and frantic concern about the "honor of the army" has not led to the sacrifice of an innocent man. It asks this question, and nothing but ample publicity will appease its suspicions.

Let us say finally that the French procedure is simply the old English procedure. The trials of Throckmorton, of the Duke of Norfolk, and of Raleigh, in the sixteenth century, were very much what goes on in a French court to-day. The judges, the Attorney-General, and the prisoner all "went for each other" as fiercely as they could, and with as little regard for rules. Most people remember the savage way in which Coke treated Raleigh. It was not till after the Revolution of 1688 that English criminal procedure became marked by the present order and decency, and that the presumption of innocence on the part of accused persons, got a secure lodgment in our jurisprudence. Stephen ascribes this to the growing strength of the government which gradually became so great, that it became easy to be indulgent towards prisoners and captives. Whether this theory be correct or not, it would go some way to account for the continuance down to our day of the French presumption that an accused man is probably guilty. Ever since the Revolution no French government has been sufficiently strong to give any indulgence to accused persons. The interests of the State seem to require that indicted men should be found guilty. And so deeply has this theory entered into the public mind that when "justice" gets hold of a man, there is little sympathy for him. His wrongs do not touch the popular imagination, and the judge and the procureur are allowed to harass without mercy. The supposition that he is being sacrificed to protect some body or person in authority, does not rouse popular indignation.—New York Evening Post.

An English View of the American Method of Treating Crime.—A report on the treatment of crime in America has been submitted to the Home Secretary by Mr. E. Ruggles-Brise. He was invited by the American delegates at the Prison Congress of Paris in 1895 to visit the United States and study the details of their penal system or systems. The report, a summary of which we take from the Daily Telegraph, shows that, on the whole, the greater leniency exhibited towards criminals in America brings out the notorious truth that public sentiment is far tenderer towards those who have been convicted