Besides these, the people of the State elect the judges and the clerk of the supreme court. Other officials are either elected by the people in districts, counties, or cities, or appointed by the governor or legislature.

Of the subordinate civil service of a State there is little to be said. Though it is not large, for the sphere of administrative action which remains to the State between the Federal government on the one side, and the county, city, and township governments on the other, is not wide, it increases daily, owing to the eagerness of the people (especially in the West) to have State aid rendered to farmers, to miners, to stock-keepers, and generally in the material development of the country. Much is now done in the way of collecting statistics and issuing reports. However, these administrative bureaux are seldom well manned, for the State legislatures are parsimonious, and do little, by good salaries or otherwise, to induce able men to enter it: while the so-called "Spoils System," which has been hitherto applied to State no less than to Federal offices, too often makes places the reward for electioneering and wirepulling. Efforts are now being made in some States to introduce reforms similar to those begun in the Federal administration, whereby certain walks of the civil service shall be kept out of politics, at least so far as to secure competent men against dismissal on party grounds. Such reforms would in no case apply to the higher officials chosen by the people, for they are always elected for short terms and on party lines.

Every State, except Oregon, provides for the impeachment of executive officers for grave offences. In all, save two, the State House of Representatives is the impeaching body; and in all but Nebraska the State Senate sits as the tribunal, a two-thirds majority being generally required for a conviction. Impeachments are rare in practice.

There is also in many States a power of removing officials, sometimes by the vote of the legislature, sometimes by the governor on the address of both houses, or by the governor either alone, or with the concurrence of the Senate. Such removals must of course be made in respect of some offence, or for some other sufficient cause, not from caprice or party motives; and when the case does not seem to justify immediate removal, the governor is frequently empowered to suspend the officer, pending an investigation of his conduct.

CHAPTER XLII

THE STATE JUDICIARY

The Judiciary in every State includes three sets of courts: — A supreme court or court of appeal; superior courts of record; local courts; but the particular names and relations of these several tribunals and the arrangements for criminal business vary greatly from State to State. We hear of courts of common pleas, probate courts,[1] surrogate courts, prerogative courts, courts of oyer and terminer, orphans' courts, court of general sessions of the peace and gaol delivery, quarter sessions, hustings courts, county courts, etc. etc. All sorts of old English institutions have been transferred bodily, and sometimes look as odd in the midst of their new surroundings as the quaint gables of a seventeenth-century house among the terraces of a growing London suburb. As respects the distinction which Englishmen used to deem fundamental, that of courts of common law and courts of equity, there has been great diversity of practice. Most of the original thirteen colonies once possessed separate courts of chancery, and these were maintained for many years after the separation from England, and were imitated in a few of the earlier among the new States, such as Michigan, Arkansas, Missouri. In some of the old States, however, the hostility to equity jurisdiction, which marked the popular party in England in the seventeenth century, had transmitted itself to America. Chancery courts were regarded with suspicion, because thought to be less bound by fixed rules, and therefore more liable to be abused by an ambitious or capricious judiciary.[2] Massachusetts, for instance,

[1] Admiralty business is within the exclusive jurisdiction of the Federal courts.

[2] Note that the grossest abuses of judicial power by American judges, such as the Erie Railroad injunctions of Judge Barnard of New York in 1869, were perpetrated in the exercise of equitable jurisdiction. Equity in granting discretion opens a door to indiscretion, or to something worse.

would permit no such court, though she was eventually obliged to invest her ordinary judges with equitable powers, and to engraft a system of equity on her common law, while still keeping the two systems distinct. Pennsylvania held out still longer, but she also now administers equity, as indeed every civilized State must do in substance, dispensing it, however, through the same judges as those who apply the common law, and having more or less worked it into the texture of the older system. Special chancery courts were abolished in New York, where they had flourished and enriched American jurisprudence by many admirable judgments, by the democratizing constitution of 1846; and they now exist only in a few of the States, chiefly older Eastern or Southern States,[1] which, in judicial matters, have shown themselves more conservative than their sisters in the West. In four States only (New York, North Carolina, California, and Idaho) has there been a complete fusion of law and equity, although there are several others which have provided that the legislature shall abolish the distinction between the two kinds of procedure. Many, especially of the newer States, provide for the establishment of tribunals of arbitration and conciliation.

The jurisdiction of the State courts, both civil and criminal, is absolutely unlimited, *i.e.* there is no appeal from them to the Federal courts, except in certain cases specified by the Federal Constitution, being cases in which some point of Federal law arises. Certain classes of cases are, of course, reserved for the Federal courts and in some the State courts enjoy a concurrent jurisdiction.[2] All crimes, except such as are punishable under some Federal statute, are justiciable by a State court; and it is worth remembering that in most States there exist much wider facilities for setting aside the verdict of a jury finding a prisoner guilty, by raising all sorts of points of law, than are permitted by the law and practice of England, or indeed of any European country. Such facilities have been and are abused, to the great detriment of the community.

One or two other points relating to law and justice in the States require notice. Each State recognizes the judgments of the courts of a sister State, gives credit to its public acts

[1] District chancery courts remain in Delaware, New Jersey, Vermont, Tennessee, Alabama, Mississippi.

[2] See Chapter XXII. *ante*.

and records, and delivers up to its justice any fugitive from its jurisdiction, permitting him, moreover, to be (if necessary) tried for some other offence than that in respect of which his extradition was obtained. Of course the courts of one State are not bound either by law or usage to follow the reported decisions of those of another State. They use such decisions merely for their own enlightenment, and as some evidence of the common law, just as they use the English law reports. Most of the States have within the last half century made sweeping changes, not only in their judicial system, but in the form of their law. They have revised and codified their statutes, a corrected edition whereof is issued every few years. They have in many instances adopted codes of procedure, and in some cases have even enacted codes embodying the substance of the common law, and fusing it with the statutes. Such codes, however, have been condemned by the judgment of the abler and more learned part of the profession, as rendering the law more uncertain and less scientific.[1] A warm controversy has lately been raging in New York on the subject. But with the masses of the people the proposal is popular, for it holds out a prospect, unfortunately belied by the result in States which, like California, have tried the experiment, of a system whose simplicity will enable the layman to understand the law, and render justice cheaper and more speedy. A really good code might have these happy effects. But it may be doubted whether the codifying States have taken the steps requisite to secure the goodness of the codes they enact. And there is a grave objection to the codification of State law which does not exist in a country like England or France. So long as the law of a State remains common law, *i.e.* rests upon custom and decisions given by the judges, the law of each State tends to keep in tolerable harmony with that of other States, because each set of judges is enlightened by and disposed to be influenced by the decisions of the Federal courts and of judges in other States. But when the whole law of a State has been enacted in the form of a code all existing

[1] This is perhaps less true of Louisiana, where the civil law of Rome, which may be said to have been the common law of the State, offered a better basis for a code than the English common law does. The Louisiana code is based on the Code Napoleon.

divergences between one State and another are sharpened and perpetuated, and new divergences probably created. Hence codification increases the variations of the law between different States, and these variations may impede business and disturb the ordinary relations of life.

Important as are the functions of the American judiciary, the powers of a judge are limited by the State Constitutions in a manner surprising to Europeans. He is not generally allowed to charge the jury on questions of fact,[1] but only to state the law. He is sometimes required to put his charge in writing. His power of committing for contempt of court is often restricted. Express rules forbid him to sit in causes wherein he can have any family or pecuniary interest. In one Constitution his punctual attendance is enforced by the provision that if he does not arrive in court within half an hour of the time fixed for the sitting, the attorneys of the parties may agree on some person to act as judge, and proceed forthwith to the trial of the cause. And in California he is not allowed to draw his salary till he has made an affidavit that no cause that has been submitted for decision for ninety days remains undecided in his court.[2]

I come now to three points, which are not only important in themselves, but instructive as illustrating the currents of opinion which have influenced the peoples of the States. These are —

The method of appointing the judges.

Their tenure of office.

Their salaries.

The remarkable changes that have been made in the two former matters, and the strange practice which now prevails in the latter, are full of significance for the student of modern democracy, full of warning for Europe and the British colonies.

[1] A frequent form is that in the Constitution of Tennessee of 1870 (Art. vi. § 9) — "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Washington forbids even comments on facts. Several Constitutions are silent on the point.

[2] The Californian judges are said to have contrived to evade this. Idaho has a similar provision, but gives the judge only thirty days. Montana provides that any judicial officer who absents himself more than sixty consecutive days from the State shall be deemed to have forfeited his office.

In colonial days the superior judges were appointed by the Governors, except in Rhode Island and Connecticut, where the legislature elected them. When, in and after 1776, the States formed their first Constitutions, four States,[1] besides the two just named, vested the appointment in the legislature, five[2] gave it to the Governor with the consent of the council; Delaware gave it to the legislature and President (=Governor) in joint ballot, while Georgia alone entrusted the election to the people.

In the period between 1812 and 1860, when the tide of democracy was running strong, the function was in several of the older States taken from the Governor or the legislature to be given to the people voting at the polls; and the same became the practice among the new States as they were successively admitted to the Union. Mississippi, in 1832, made all her judges elected by the people. The decisive nature of the change was marked by the great State of New York, which, in her highly democratic Constitution of 1846, transferred all judicial appointments to the citizens at the polls.

At present we find that in thirty-one States, the judges are elected by the people. These include nearly all the Western and South-Western States, besides New York, Pennsylvania, and Ohio.

In five States[3] they are elected by the legislature.

In eight States[4] they are appointed by the Governor, subject however to confirmation either by the council, or by the legislature, or by one House thereof.

It will be observed that nearly all the thirteen States which do not appoint the judge by popular election either belong to the original thirteen colonies or are States which have been specially influenced by one of those thirteen (as, for instance, Maine was influenced by Massachusetts). It is these older commonwealths that have clung to the less democratic methods of choosing judicial officers; while the new democracies of the West, together with the most populous States of the East, New

[1] Virginia, New Jersey, North Carolina, and South Carolina.

[2] Massachusetts, New Hampshire, Pennsylvania, Maryland, New York.

[3] Rhode Island, Vermont, Virginia, South Carolina, Georgia.

[4] Massachusetts, Connecticut, New Hampshire, Delaware, Maine, Mississippi, New Jersey, Louisiana; in the last of which, however, district judges, and in Maine and Connecticut probate judges, are popularly elected.

York and Pennsylvania, States thoroughly democratized by their great cities, have thrown this grave and delicate function into the rude hands of the masses, that is to say, of the wire-pullers.

Originally, the superior judges were, in most States, like those of England since the Revolution of 1688, appointed for life, and held office during good behaviour, *i.e.* were removable only when condemned on an impeachment, or when an address requesting their removal had been presented by both houses of the legislature.[1] A judge may be removed upon such an address in thirty-six States, a majority of two-thirds in each house being usually required. The salutary provision of the British Constitution against capricious removals has been faithfully adhered to. But the wave of democracy has in nearly all States swept away the old system of life-tenure. Only four now retain it.[2] In the rest a judge is elected or appointed for a term, varying from two years in Vermont to twenty-one years in Pennsylvania. Eight to ten years is the average term prescribed; but a judge is always re-eligible, and likely to be re-elected if he be not too old, if he has given satisfaction to the bar, and if he has not offended the party which placed him on the bench.

The salaries paid to State judges of the higher courts range from $8500 (£1700), (chief-justice), in Pennsylvania, and $10,000 (£2000) in New York, to $2000 in Oregon and $2500 in Vermont. $4000 to $5000 (+$500 to the chief judge) is the average, a sum which, especially in the greater States, fails to attract the best legal talent. To the rule that justices of the inferior courts receive salaries proportionately lower, there are exceptions in large cities, where judges of lower tribunals, being more "in politics" can sometimes secure salaries quite out of proportion to their status.[3] In general the new Western States are the worst paymasters, their population of

[1] The power of impeachment remains but is not often used.

[2] Massachusetts, Rhode Island, New Hampshire, Delaware, all of them among the original thirteen. In Rhode Island the judges are in theory dismissible by the legislature. In Florida, though the three justices of the supreme court are now (Constitution of 1886) elected by the people, the seven circuit judges are appointed by the governor.

[3] *E.g.* the police justices of New York City and the circuit judges of Wayne County, Michigan, in which Detroit stands.

farmers not perceiving the importance of securing high ability on the bench, and deeming $4000 a larger sum than a quiet-living man can need. The lowness of the scale on which the salaries of Federal judges are fixed confirms this tendency.

Any one of the three phenomena I have described — popular elections, short terms, and small salaries — would be sufficient to lower the character of the judiciary. Popular elections throw the choice into the hands of political parties, that is to say, of knots of wirepullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become of political importance. Short terms, though they afford useful opportunities of getting rid of a man who has proved a failure, but done no act justifying an address for his removal, oblige the judge to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie. They induce timidity, they discourage independence. And small salaries prevent able men from offering themselves for places whose income is perhaps only one-tenth of what a leading barrister can make by private practice. Putting the three sources of mischief together, no one will be surprised to hear that in many of the American States the State judges are men of moderate abilities and scanty learning, inferior, and sometimes vastly inferior, to the best of the advocates who practise before them. It is less easy to express a general opinion as to their character, and particularly as to what is called, even in America where fur capes are not worn, the "purity of the judicial ermine." Pecuniary corruption seems, so far as a stranger can ascertain, to be rare, perhaps very rare, but there are other ways in which sinister influences can play on a judge's mind, and impair that confidence in his impartiality which is almost as necessary as impartiality itself. And apart from all questions of dishonesty or unfairness, it is an evil that the bench should not be intellectually and socially at least on a level with the bar.

The mischief is serious. But I must own that it is smaller than a European observer is prepared to expect. In most of the States where the elective system prevails the bench is respectable; and in some it is occasionally adorned by men of the highest eminence. Michigan, for instance, has during many

years had a strong and respected judiciary. One of its recent judges sat for thirty-two years, having been re-elected six times in succession. Not even in California or Arkansas are the results so lamentable as might have been predicted. New York City, under the dominion of the Tweed Ring, has afforded the only instance of flagrant judicial scandals; and even in those loathsome days, the Court of Appeals at Albany, the highest tribunal of the State, retained the respect of good citizens. Justice in civil causes between man and man is fairly administered over the whole Union, and the frequent failures to convict criminals, or punish them when convicted, are attributable not so much either to weakness or to partiality on a judge's part as to the tenderness of juries and the inordinate delays and complexity of criminal procedure.

Why then have sources of evil so grave failed to produce correspondingly grave results? Three reasons may be suggested: —

One is the co-existence in every State of the Federal tribunals, presided over by judges who are usually capable and always upright. Their presence helps to keep the State judges, however personally inferior, from losing the sense of responsibility and dignity which befits the judicial office, and makes even party wirepullers ashamed of nominating as candidates men either tainted or notoriously incapable.

Another is the influence of a public opinion which not only recognizes the interest the community has in an honest administration of the law, but recoils from turpitude in a highly placed official. The people act as a check upon the party conventions that choose candidates, by making them feel that they damage themselves and their cause if they run a man of doubtful character, and the judge himself is made to dread public opinion in the criticisms of a very unreticent press. Democratic theory, which has done a mischief in introducing the elective system, partly cures it by subjecting the bench to a light of publicity which makes honesty the safest policy. Whatever passes in court is, or may be, reported. The judge must give his reasons for every judgment he delivers.

Lastly, there is the influence of the bar, a potent influence even in the present day, when its *rôle* is less brilliant than in former generations. The local party leaders who select the

candidates and "run" the conventions are in some States mostly lawyers themselves, or at least in close relations with some leading lawyers of the State or district. Now lawyers have not only a professional dislike to the entrusting of law to incapable hands, the kind of dislike which a skilled bricklayer has to seeing walls badly laid, but they have a personal interest in getting fairly competent men before whom to plead. It is no pleasure to them to have a judge so ignorant or so weak that a good argument is thrown away upon him, or that you can feel no confidence that the opinion given to a client, or a point of law which you think clear, will be verified by the decision of the court. Hence the bar often contrives to make a party nomination for judicial office fall, not indeed on a leading barrister, because a leading barrister will not accept a place with $4000 a year, when he can make $14,000 by private practice, but on as competent a member of the party as can be got to take the post. Having constantly inquired, in every State I visited wherein the system of popular elections to judgeships prevails, how it happened that the judges were not worse, I was usually told that the bar had interposed to prevent such and such a bad nomination, or had agreed to recommend such and such a person as a candidate, and that the party had yielded to the wishes of the bar. Occasionally, when the wirepullers are on their good behaviour, or the bar is exceptionally public-spirited, a person will be brought forward who has no claims except those of character and learning. But it is perhaps more common for the lawyers to put pressure on one or other party in nominating its party candidates to select capable ones. Thus when a few years ago the Republicans of New York State were running bad candidates, some leading Republican lawyers persuaded the Democrats to nominate better men, and thereupon issued an appeal in favour of these latter, who were accordingly carried at the ensuing election.

These causes, and especially the last, go far to nullify the malign effects of popular election and short terms. But they cannot equally nullify the effect of small salaries. Accordingly, while corruption and partiality are uncommon among State judges, inferiority to the practising counsel is a conspicuous and frequent fault.

One is obliged to speak generally, because there are differences between the various States too numerous to be particularized. In some, especially in the North-West, the tone of the party managers and of the bar is respectable, and the sense of common interest makes everybody wish to have as good men as the salaries will secure. In others there are traditions which even unscrupulous wirepullers fear to violate. Pennsylvania, for instance, though her legislature and her city governments have been impure, and little under the influence of the bar, still generally elects capable judges.[1] The scandals of Barnard and Cardozo[2] were due to the fact that the vast and ignorant population of New York was dominated by a gang of professional politicians who neither feared the good citizens nor regarded the bar.

As there are institutions which do not work as well as they theoretically ought, so there are happily others which work better. The sale of offices under the old monarchy of France, the sale of commissions in the English army till 1871, the bribery of electors which in England was once so rife, the sale of advowsons and next presentations to livings which still exists in the Anglican Church Establishment, were or are all of them indefensible in theory, all mischievous in practice. But none of them did so much harm as a philosophical observer would have predicted, because other causes were at work to mitigate and minimize their evils.

The changes of the last twenty years have been on the whole for the better. Some States which had vested the appointment of judges in the legislature, like Connecticut, or in the people, like Mississippi, have by recent constitutional amendments or new Constitutions, given it to the governor with the consent of the legislature or of one house thereof.[3] Others have raised the salaries, or lengthened the terms of the judges, or, like New York, have introduced both these reforms. Between 1860 and 1891, although the eight Western new States admitted within that period have all vested the

[1] Pennsylvania, it is fair to say, pays better than most States, and gives long terms, so she can obtain better men than most.

[2] The notorious Tweed Ring judges of 1869–71.

[3] In Connecticut the change was made at the instance of the Bar Association of the State, which had seen with regret that the dominant party in the State legislature was placing inferior men on the bench.

choice of judges in the people, and although Kentucky in 1891 could not be induced, in spite of the decline of her Bench from its ancient fame, to restore the system of appointment by the Executive which had prevailed till 1850, no one of the older States except Florida, took appointments from legislature or governor to entrust them to popular vote. In this point at least, the tide of democracy which went on rising for so many years, seems, if not receding, at least to have touched high-water mark. The American people, if sometimes bold in their experiments, have a fund of good sense which makes them watchful of results, and not unwilling to reconsider their former decisions.