CHAPTER CII

THE BENCH

So much has already been said regarding the constitution and jurisdiction of the various courts, Federal and State, that what remains to be stated regarding the judicial bench need refer only to its personal and social side. What is the social standing of the judges, the average standard of their learning and capacity, their integrity and fidelity in the discharge of functions whose gravity seems to increase with the growth of wealth?

The English reader who wishes to understand the American judiciary ought to begin by realizing the fact that his conception of a judge is purely English, not applicable to any other country. For some centuries Englishmen have associated the ideas of power, dignity, and intellectual eminence with the judicial office; a tradition, shorter no doubt, but still of respectable length, has made them regard it as incorruptible. The judges are among the greatest permanent officials of the state. They have earned their place by success, more or less brilliant, but most always considerable, in the struggles of the Bar; they are removable by the Crown only upon an address of both Houses of Parliament; they enjoy large incomes and great social respect. Some of them sit in the House of Lords; some are members of the Privy Council. When they traverse the country on their circuits, they are received by the High Sheriff of each county with the ceremonious pomp of the Middle Ages, and followed hither and thither by admiring crowds. The criticisms of an outspoken press rarely assail their ability, hardly ever their fairness. Even the Bar, which watches them daily, which knows all their ins and outs (to use an American phrase) both before and after their elevation, treats them with more respect than is commonly shown by the

clergy to the bishops. Thus the English form their conception of the judge as a personage necessarily and naturally dignified and upright; and, having formed it, they carry it abroad with them like their notions of land tenure and other insular conceptions, and are astonished when they find that it does not hold in other countries. It is a fine and fruitful conception, and one which one might desire to see accepted everywhere, though it has been secured at the cost of compelling litigants to carry to London much business which in other countries would have been dealt with in local courts. But it is peculiar to England; the British judge is as abnormal as the British Constitution, and owes his character to a not less curious and complex combination of conditions. In most parts of the Continent the judge, even of the superior courts, does not hold a very high social position. He is not chosen from the ranks of the Bar, and has not that community of feeling with it which England has found so valuable. Its leaders outshine him in France; the famous professors of law often exert a greater authority in Germany. His independence, and even purity, are not always above suspicion. In no part of Europe do his wishes and opinions carry the same weight, or does he command the same deference as in England. The English ought not, therefore, to be surprised at finding him in America different from what they expect, for it is not so much his inferiority there that is exceptional as his excellence in England.

In America, the nine Federal judges of the Supreme court retain much of the dignity which surrounds the English Supreme Court of Judicature. They are almost the only officials who are appointed for life, and their functions are of the utmost importance to the smooth working of the Constitution. Accordingly great public interest is felt in the choice of a judge, and the post is an object of ambition. Though now and then an eminent lawyer may decline it because he is already making by practice five times as much as the salary it carries, still there has been no difficulty in finding first-rate men to fill the court. The minor Federal judges are usually persons of ability and experience. They are inadequately paid, but the life tenure makes the place desired and secures respect for it.

Of the State judges it is hard to speak generally, because

there are great differences between State and State. In six or seven commonwealths, of which Massachusetts is the best example among Eastern and Michigan among Western States, they stand high — that is to say, the post attracts a prosperous barrister though he will lose in income, or a law professor though he must sacrifice his leisure. But in some States it is otherwise. A place on the bench of the superior courts carries little honour, and commands but slight social consideration. It is lower than that of an English county court judge or stipendiary magistrate, or of a Scotch sheriff-substitute. It raises no presumption that its holder is able or cultivated or trusted by his fellow-citizens. He may be all of these, but if so, it is in respect of his personal merits that he will be valued, not for his official position. Often he stands below the leading members of the State or city bar in all these points and does not move in the best society.[1] Hence a leading counsel seldom accepts the post, and men often resign a judgeship, or when their term of office expires do not seek re-election, but return to practice at the bar.[2] Hence, too, a judge is not expected to set an example of conformity to the conventional standards of decorum. No one is surprised to see him in low company, or to hear, in the ruder parts of the South and West, that he took part in a shooting affray. He is as welcome to be "a child of nature and of freedom" as any private citizen.

The European reader may think that these facts not only betoken but tend to perpetuate a low standard of learning and capacity among the State judges, and from this low standard he will go on to conclude that justice must be badly administered, and will ask with surprise why an intelligent and practical people allow this very important part of their public work to be ill discharged. I shrink from making positive statements on so large a matter as the administration of justice

[1] A prominent New Yorker once said to me, speaking of one of the chief judges of the city, "I don't think him such a bad fellow; he has always been very friendly to me, and would give me a midnight injunction or do anything else for me at a moment's notice. And he's not an ill-natured man. But, of course, he's the last person I should dream of asking to my house." Things are better in New York to-day.

[2] Most States are full of ex-judges practising at the bar, the title being continued as a matter of courtesy to the person who has formerly enjoyed it, and sometimes even extended to an elderly counsel who has never sat on the bench. For social purposes, once a judge, always a judge.

over a vast country whose States differ in many respects. But so far as I could ascertain, civil justice is better administered than might be expected from the character which the Bench bears in most of the States. In the Federal courts and in the superior courts of the six or seven States just mentioned it is equal to the justice dispensed in the superior courts of England, France, and Germany. In the remainder it is inferior, that is to say, civil trials, whether the issue be of law or of fact, more frequently give an unsatisfactory result; the opinions delivered by the judges are wanting in scientific accuracy, and the law becomes loose and uncertain.[1] This inferiority is more or less marked according to the general tone of the State, the better States taking more pains to secure respectable men. That it is everywhere less marked than *a priori* reasonings would have suggested, may be ascribed partly to the way shrewd juries have of rendering substantially just verdicts, partly to the ability of the Bar, whose arguments make up for a judge's want of learning, by giving him the means of reaching a sound decision, partly to that native acuteness of Americans which enables them to handle any sort of practical work, roughly perhaps, but well enough for the absolute needs of the case. The injury to the quality of State law is mitigated by the fact that abundance of good law is produced by the Federal courts, by the highest courts of the best States, and by the judges of England, whose reported decisions are frequently referred to. Having constantly questioned those I met on the subject, I have heard comparatively few complaints from commercial men as to the inefficiency of State tribunals, and not many even from the leading lawyers, though their interest in the scientific character of law makes them severe critics of current legislation, and opponents of these schemes for codifying the common law which have been dangled before the multitude in several States. It is otherwise as regards criminal justice. It is accused of being slow, uncertain, and unduly lenient both to crimes of violence and to commercial frauds. Yet the accusers charge the fault less on the judges than on the weakness of juries,[2] and on the

[1] The last Constitution of California requires the judges of the higher courts to give their decisions in writing.

[2] There are places where the purity of juries is not above suspicion. New

facilities for escape which a cumbrous and highly technical procedure, allowing numerous opportunities for interposing delays and raising points of law, provides for prisoners.[1] Indulgence to prisoners is now as marked as harshness to them was in England before the days of Bentham and Romilly. The legislatures must bear the blame of this procedure, though stronger men on the Bench would more often overrule trivial points of law and expedite convictions.

The causes which have lowered the quality of the State judges have been referred to in previous chapters. Shortly stated they are: the smallness of the salaries paid, the limited tenure of office, often for seven years only, and the method of appointment, nominally by popular election, practically by the agency of party wirepullers. The first two causes have prevented the ablest lawyers, the last often prevents the most honourable men, from seeking the post. All are the result of democratic theory, of the belief in equality and popular sovereignty pushed to extremes. And this theory has aggravated the mischief in withdrawing from the judge, when it has appointed him, those external badges of dignity which, childish as they may appear to the philosopher, have power over the imagination of the mass of mankind, and are not without a useful reflex influence on the person whom they surround, raising his sense of his position, and reminding him of its responsibilities. No American magistrate, except the judges of the

York has recently created a new office, that of Warden of the Grand Jury. As a distinguished lawyer observed in mentioning this, *Quis custodi et ipsum custodem?*

[1] Even judges suffer from this misplaced leniency. I heard of a case which happened in Kentucky a few years ago. A decree of foreclosure was pronounced by a respected judge against a defendant of good local family connections. The judge could not do otherwise than pronounce it, for there was practically no defence. As the judge was walking from the court to the railway station the same afternoon the defendant, who was waiting near the road, shot him dead. It was hard to avoid arresting and trying a man guilty of so flagrant an offence, so arrested he was, tried, and convicted; but on an allegation of lunacy being put forward, the Court of Appeals ordered a new trial; he was acquitted on the ground of insanity, under instructions based on the opinion of an appellate court, and presently allowed to escape into Ohio from the asylum to which he had been consigned. There was, I was told, a good deal of sympathy for him.

Cheisly of Dalry, the father of the famous Lady Grange, got into trouble in Scotland early in last century for shooting a judge who had decided against him, but was not so indulgently dealt with.

Supreme court when sitting at Washington, and those of the Intermediate Federal Courts of Appeal, the judges of the New York Court of Appeals at Albany, and those of the Supreme court of Pennsylvania, wears any robe of office or other distinctive dress, or has any attendant to escort him,[1] or is in any respect treated differently from an ordinary citizen. Popular sentiment tolerates nothing that seems to elevate a man above his fellows, even when his dignity is really the dignity of the people who have put him where he is. I remember in New York under the reign of Boss Tweed to have been taken into one of the courts. An ill-omened looking man, flashily dressed, and rude in demeanour, was sitting behind a table, two men in front were addressing him, the rest of the room was given up to disorder. Had one not been told that he was a judge of the highest court of the city, one might have taken him for a criminal. His jurisdiction was unlimited in amount, and though an appeal lay from him to the Court of Appeals of the State, his power of issuing injunctions put all the property in the district at his mercy. This was what democratic theory had brought New York to. For the change which that State made in 1846 was a perfectly wanton change. No practical object was to be gained by it. There had been an excellent Bench, adorned, as it happened, by one of the greatest judges of modern times, the illustrious Chancellor Kent. But the Convention of 1846 thought that the power of the people was insufficiently recognized while judges were named by the Governor and Council, and held office for life, so theory was obeyed. The Convention in its circular address announced, in proposing the election of judges for five years by the voters of the district, that "the happiness of the people of this State will henceforth, under God, be in their own hands." But the quest of a more perfect freedom and equality on which the Convention started the people gave them in twenty-five years Judge Barnard instead of Chancellor Kent.

The limited attainments of the Bench in many States, and its conspicuous inferiority to the counsel who practise before it, are, however, less serious evils than the corruption with

[1] Save that in the rural counties of Massachusetts and possibly of some other New England States, the sheriff, as in England, escorts the judges to and from the Court-house.

which it is often charged. Nothing has done so much to discredit American institutions in Europe as the belief that the fountains of justice are there generally polluted; nor is there any point on which a writer treating of the United States would more desire to be able to set forth incontrovertible facts. Unluckily, this is just what from the nature of the case cannot be done as regards some parts of the country. There is no doubt as to the purity of most States, but as to others it is extremely hard to test the rumours that are current. I give such results as careful inquiries in many districts have enabled me to reach.

The Federal judges are above suspicion. I do not know that any member of the Supreme court or any Circuit judge has been ever accused of corruption; nor have the allegations occasionally made against some of the southern District Federal judges been, except in one instance, seriously pressed.

The State judges have been and are deemed honest and impartial in nearly all the Northern and most of the Southern and Western States. In a few of these States, such as Massachusetts, Pennsylvania, and Michigan, the Bench has within the present generation included men who would do credit to any court in any country. Even in other States an eminent man is occasionally found, as in England there are some County Court judges who are sounder lawyers and abler men than some of the persons whom political favour has of late years been unhappily permitted to raise to the bench of the High Court.

In a few States, perhaps six or seven in all, suspicions have at one time or another within the last twenty years attached to one or more of the superior judges. Sometimes these suspicions may have been ill-founded.[1] But though I know of only

[1] A recent Western instance shows how suspicions may arise. A person living in the capital of the State used his intimacy with the superior judges, most of whom were in the habit of occasionally dining with him, to lead litigants to believe that his influence with the Bench would procure for them favourable decisions. Considerable sums were accordingly given him to secure his good word. When the litigant obtained the decision he desired, the money given was retained. When the case went against him, the confidant of the Bench was delicately scrupulous in handing it back, saying that as his influence had failed to prevail, he could not possibly think of keeping the money. Everything was done in the most secret and confidential way, and it was not till after the death of this judicious dinner-giver that it was discovered that he had never spoken to the judges about law-suits at all, and that they had lain under a groundless suspicion of sharing the gains their friend had made.

one case in which they have been substantiated, there can be little doubt that in several instances improprieties have been committed. The judge may not have taken a bribe, but he has perverted justice at the instance of some person or persons who either gave him a consideration or exercised an undue influence over him. It would not follow that in such instances the whole Bench was tainted; indeed I have never heard of a State in which more than two or three judges were the objects of distrust at the same time.[1]

In one State, viz. New York, in 1869–71, there were flagrant scandals which led to the disappearance of three justices of the superior courts who had unquestionably both sold and denied justice. The Tweed Ring, when masters of New York City and engaged in plundering its treasury, found it convenient to have in the seat of justice accomplices who might check inquiry into their misdeeds. This the system of popular elections for very short terms enabled them to do; and men were accordingly placed on the Bench whom one might rather have expected to see in the dock — bar-room loafers, broken-down Tombs[2] attorneys, needy adventurers whose want of character made them absolutely dependent on their patrons. Being elected for eight years only, these fellows were obliged to purchase re-election by constant subservience to the party managers. They did not regard social censure, for they were already excluded from decent society; impeachment had no terrors for them, since the State legislature, as well as the executive machinery of the city, was in the hands of their masters. It would have been vain to expect such people, without fear of God or man before their eyes, to resist the temptations which capitalists and powerful companies could offer.

To what precise point of infamy they descended I cannot

[1] For instance, there is a Western State in which a year or two ago there was one, but only one, of the superior judges whose integrity was doubted. So little secret was made of the matter, that when a very distinguished English lawyer visited the city, and was taken to see the Courts sitting, the newspapers announced the fact next day as follows: —

"Lord X. in the city,
He has seen Judge Y."

A statute of Arizona prescribes a change of venue, where an affidavit is made alleging that a judge is biassed.

[2] The Tombs is the name of the city prison of New York, round which lawyers of the lowest class hover in the hope of picking up defences.

attempt, among so many discordant stories and rumours, to determine. It is, however, beyond a doubt that they made orders in defiance of the plainest rules of practice; issued, in rum-shops, injunctions which they had not even read over; appointed notorious vagabonds receivers of valuable property;[1] turned over important cases to a friend of their own stamp, and gave whatever decision he suggested. There were members of the Bar who could obtain from these magistrates whatever order or decree they chose to ask for. A leading lawyer and man of high character said to me in 1870, "When a client brings me a suit which is before —— (naming a judge), I feel myself bound to tell him that though I will take it if he pleases, he had much better give it to So-and-So (naming a lawyer), for we all know that he owns that judge." A system of client robbery had sprung up, by which each judge enriched the knot of disreputable lawyers who surrounded him; he referred cases to them, granted them monstrous allowances in the name of costs, gave them receiverships with a large percentage, and so forth; they in turn either at the time sharing the booty with him, or undertaking to do the same for him when he should have descended to the Bar and they have climbed to the Bench. Nor is there any doubt that criminals who had any claim on their party often managed to elude punishment. The police, it was said, would not arrest such an offender if they could help it; the District Attorney would avoid prosecuting; the court officials, if public opinion had forced the attorney to act, would try to pack the jury; the judge, if the jury seemed honest, would do his best to procure an acquittal; and if, in spite of police, attorney, officials, and judge, the criminal was convicted and sentenced, he might still hope that the influence of his party would procure a pardon from the governor of the

[1] "In the minds of certain New York judges," said a well-known writer at that time, "the old-fashioned distinction between a receiver of property in a Court of Equity and a receiver of stolen goods at common law may be said to have been lost." The abuses of judicial authority were mostly perpetrated in the exercise of equitable jurisdiction, which is no doubt the most delicate part of a judge's work, not only because there is no jury, but because the effect of an injunction may be irremediable, whereas a decision on the main question may be reversed on appeal. In Scotland some of the local courts have a jurisdiction unlimited in amount, but no action can be taken on an interdict issued by such a court if an appeal is made with due promptness to the Court of Session.

State, or enable him in some other way to slip out of the grasp of justice. For governor, judge, attorney, officials, and police were all of them party nominees; and if a man cannot count on being helped by his party at a pinch, who will be faithful to his party?

Although these malpractices diverted a good deal of business from the courts to private arbitration, the damage to the regular course of civil justice was much less than might have been expected. The guilty judges were but three in number, and there is no reason to think that even they decided unjustly in an ordinary commercial suit between man and man, or took direct money bribes from one of the parties to such a suit. The better opinion seems to be that it was only where the influence of a political party or of some particular persons came in that injustice was perpetrated, and the truth, I believe, was spoken by another judge, an honest and worthy man, who in talking to me at the time of the most unblushing among these offenders, said, "Well, I don't much like ——; he is certainly a bad fellow, with very little delicacy of mind. He'll give you an injunction without hearing what it's about. But I don't think he takes money down from everybody." In the instance which made most noise in Europe, that of the Erie Railroad suits, there was no need to give bribes. The gang of thieves who had gained control of the line and were "watering" its stock were leagued with the political "ringsters" who ruled the city and nominated the judges; and nobody doubts that the monstrous decisions in these suits were obtained by the influence of the Tammany leaders over their judicial minions.

The fall of the Tammany Ring was swiftly followed by the impeachment or resignation of these judges, and no similar scandal has since disgraced the Empire State, though it must be confessed that some of the criminal courts of the city would be more worthily presided over if they were "taken out of politics." At present New York appoints her chief city judges for fourteen years and pays them a large salary, so she gets fairly good if not first-rate men. Unhappily the magnitude of this one judicial scandal, happening in the greatest city of the Union, and the one which Europeans hear most of, has thrown over the integrity of the American Bench a shadow which does great injustice to it as a whole.

Although judicial purity has of late years come to be deemed an indispensable accompaniment of high civilization, it is one which has been realized in very few times and countries. Hesiod complained that the kings who heard the cause between himself and his brother received gifts to decide against him. Felix expected to get money for loosing St. Paul. Among Orientals to this day an incorruptible magistrate is a rare exception.[1] In England a lord chancellor was removed for taking bribes as late as the time of George I. In Spain, Portugal, Russia, parts of the Austro-Hungarian monarchy, and even in Italy, the judges, except perhaps those of the highest court, are not assumed by general opinion to be above suspicion. Many are trusted individually, but the office is not deemed to guarantee the honour of its occupant. Yet in all these countries the judges are appointed by the government, and hold either for life or at its pleasure,[2] whereas in America suspicion has arisen only in States where popular election prevails; that is to say, where the responsibility for a bad appointment cannot be fixed on any one person. The shortcomings of the Bench in these States do not therefore indicate unsoundness in the general tone either of the people or of the profession from whom the offenders have been taken, but are the natural result of a system which, so far from taking precautions to place worthy persons on the seat of justice, has left the choice of them in four cases out of five to a secret combination of wirepullers. Thus we may note with satisfaction that the present tendency is not only to make judges more independent by lengthening their term of office but to withdraw their appointment from popular vote and restore it to the governor, from whom, as a responsible officer, the public may exact the utmost care in the selection of able and upright men.

[1] In Egypt I was told in 1888, that there might be here and there among the native judges a man who did not take bribes, but probably not more than two or three in the whole country. Things are, however, now mending there.

[2] There is the important difference between these countries and England that in all of them not only is little or no use made of the civil jury, but public opinion is less active and justice more localized, *i.e.* a smaller proportion of important suits are brought before the supreme courts of the capital. The centralization of English justice, costly to suitors, has contributed to make law more pure as well as more scientific.

CHAPTER CIII

RAILROADS

No one will expect to find in a book like this a description of that prodigy of labour, wealth, and skill — the American railway system. Of its management, its finance, its commercial prospects, I do not attempt to speak. But railroads, and those who own and control them, occupy a place in the political and social life of the country which requires some passing words, for it is a place far more significant than similar enterprises have obtained in the Old World.

The United States are so much larger, and have a population so much more scattered than any European state that they depend even more upon means of internal communication. It is these communications that hold the country together, and render it one for all social and political purposes as well as for commerce. They may indeed be said to have made the West, for it is along the lines of railway that the West has been settled, and population still follows the rails, stretching out to south and north of the great trunk lines wherever they send off a branch. The Americans are an eminently locomotive people. Were statistics on such a point attainable, they would probably show that the average man travels over thrice as many miles by steam in a year as the average Englishman, six times as many as the average Frenchman or German. The New Yorker thinks of a journey to Chicago (900 miles) as a Londoner of a journey to Glasgow (400 miles); and a family at St. Louis will go for sea-bathing to Cape May, a journey of thirty-five or forty hours, as readily as a Birmingham family goes to Scarborough. The movements of goods traffic are on a gigantic scale. The greatest branch of heavy freight transportation in England, that of coal from the north and west to London, is not to be compared to the weight of cotton, grain,