tion on the table. Yet as some observations have been made calculated to excite sensibility not here, but abroad; as they appear to have been made with a view to that end; and as an alarm has been attempted to be excited on constitutional ground, I think the observations ought not to go unnoticed.

I agree with gentlemen that it is important in a well regulated government that the judicial department should be independent. But I have never been among those who have carried this idea to the extent, which seems at this day to be fashionable. Though of opinion that each department ought to discharge its proper duties free from the fear of the others, yet I have never believed that they ought to be independent of the nation itself. Much less have I believed it proper, or that our constitution authorizes our courts of justice, to control the other departments of the government.

All the departments of a popular government must depend in some degree on popular opinion. None can exist without the affections of the people, and if either be placed in such a situation as to be independent of the nation, it will soon lose that affection which is essential to its durable existence.

Without, however, going into an enquiry of what kind of organisation is most fit for our tribunals, without enquiring into the fitness of making the judges independent for life, I am willing to enter into a consideration, not of what ought to be, but of what is.—Whatever opinion I may individually entertain of the provisions of the constitution, relative to the judiciary, sitting here under that constitution, I am bound to observe it as the charter under which we are assembled.

When I view the provisions of the constitution on this subject, I observe a clear distinction between the Supreme Court, and other courts. I am sensible that when we come to make verbal criticisms, any gentleman of a sportive imagination may amuse our fancies by a play upon words. But this is not the way to get rid of a genuine construction of the constitution. With regard to the institution of the Supreme Court the words are imperative; while with regard to inferior tribunals they are discretionary. The first *shall*; the last *may* be established. And surely we are to infer from the wise sages that formed that constitution, that nothing was introduced into it in vain. Not only sentences, but words and even points elucidate its meaning. When, therefore, the constitution, using this language, says a supreme court *shall* be established, are we not justified in considering it as of constitutional creation; and on the other hand, from the language applied to inferior courts, are we not equally justified in considering their establishment as dependent upon the legislature, who *may* from time to time ordain them, as the public good requires. Can any other meaning be applied to the words "from time to time?" And nothing can be more important on this subject than that the legislature should have power from time to time, to create, to annul, or to modify the courts, as the public good may require—not merely to-day, but forever; and whenever a change of circumstances may suggest the propriety of a different organization. On this point, there is great force in the remark of the gentleman from Georgia, that among the enumerated powers given to Congress, while there is no mention made of the supreme court, the power of establishing inferior courts is expresly given. Why this difference, but that the supreme court was considered by the framers of the constitution as established by the constitution; while they considered the inferior courts as dependent upon the will of the legislature.

We find the phrase from *time to time* in another part of the constitution. The 3d sect. of the 2nd art. says the President shall, from *time to time*, give to the Congress information of the state of the union. That is he shall occasionally, as he sees fit, give such information. So shall Congress occasionally, as they see fit, establish, annul or regulate inferior courts, accordingly as the public welfare requires.

The arguments of gentlemen go upon a mistaken principle. They express the liveliest sympathy and commiseration for this *poor, this weak* department of the government. They tell us the judges have a vested right to their offices, a right not *now* derived from the law, but from the constitution; and they assimilate their case to that of a public debt; to the right of a corporation; a turnpike company, or a toll bridge. But is not all this reasoning predicated on the principle that the courts are established, not for the public benefit, but for the emolument of the judges; not to promote the interests of the people, but to further the interests of the judges; not to administer justice, but for their personal aggrandizement. I believe that a government ought to proceed upon different principles. It ought to establish only those institutions which the good of the community requires; when that good ceases to need them, they ought to be put down, and of consequence the judges should hold their appointments so long and no longer, than the public welfare requires.

If the arguments now urged be correct, that a court once established cannot be vacated, we are led into the greatest absurdities. Congress might deem it expedient to establish a court for particular purposes limited as to its objects or duration. For instance the United States has taken possession of the Mississippi Territory, rightfully or not I will not pretend to say. This territory has been heretofore in the hands of various masters, viz. France, England, Spain and Georgia; and it is now possessed by the United States. All these governments except the U. States, made certain grants of land in the territory, and certain settlers spread their conflicting patents over the country. These different titles will open a wide field for litigation, which will require able tribunals to decide upon. Suppose then Congress should establish special tribunals to continue for three, four, or five years, to settle these claims. Judges would be appointed. They would be the judges of an inferior court. If the construction of the constitution now contended for be established, what would the judges say, when the period for which they were appointed expired? Would they not say we belong to inferior courts? Would they not laugh at you when you told them their term of office was out? Would they not say, in the language of the gentleman from New-York, though the law that creates us is temporary, *we are in by the constitution?* Had we not heard this doctrine supported in the memorable case of the mandamus, lately before the supreme court? Was it not there said that though the law had a right to establish the office of a justice of the peace, yet it had not a right to abridge its duration to five years; that it was right in making the justices, but unconstitutional in limiting their periods of office; that being a *judicial* officer he had a right to hold his office during life (or what is about the same thing) during good behaviour, in despite of the law which created him, and in the very act of creation limiting his offical life to five years.

I may notice another case, more likely to happen, to shew the absurdity of this construction. Congress have assumed jurisdiction over the Mississippi Territory, and have established a court composed of three judges, which court is as much an inferior court, as the circuit or district courts. Of this jurisdiction Georgia denies the validity. The contest is in a train of settlement. Suppose it shall turn out that the United States are convinced of the injustice of their claim, relinquish it, and restore the territory to Georgia, what becomes of the judges? Their offices, their duties are gone! Yet they will tell you we are vested with certain constitutional rights of which you cannot deprive us. It is true the territory is no longer yours. You have no jurisdiction, and we have no power; yet we are judges by the constitution. We hold our offices during good behaviour, and we will behave well as long as you will let us. Is not this a strange situation? You have judges in a territory over which you have no jurisdiction; and you have officers which are perfect sinecures, pensioners for life. Such an absurdity I am sure the constitution never meant to justify. It is an absurdity equally repugnant to the letter and the genius of the constitution.

Suppose another case. Suppose what I trust will never happen, a war should take place. Suppose that a part of the United States should be conquered, and that we should be compelled to cede it to a foreign nation. In this district your jurisdiction is gone; your power is gone; the office of a judge is destroyed, and yet the officer holds his appointment for life: This case may be considered as inapplicable to the United States. It may be said that we have no right to cede a state or a part of a state.—But I believe a different sentiment has been entertained, and perhaps in this house.

But suppose this event to occur in relation to territory not attached to a State. Suppose the government should find it necessary to establish an inferior court in an island of Lake Superior? Suppose it should be the fortune of war to place in the possession of the enemy, one of the States; and the question shall be, will you give up this territory in the frozen regions of the lakes, or suffer the State to remain in the possession of the enemy, you being unable to take it from him? If you give up the territory, your court it annihilated, yet the judges claim a tenure in their offices for life; and this in a country that no longer belongs to you—does not such a result strike every mind as absurd? Is it not apparent, that whatever claim such men might have upon the generosity of the government, they can have no claim to offices that do not exist. Nay, further; it might upon the construction now contended for be insisted, that the Constitution forbids you to make a peace upon those terms; that by ceding an inconsiderable territory which you did not want to secure a whole state, you would abolish the office of a judge, which the legislature had there erected; that this would be an express violation of your Constitution; and therefore you must leave a whole State in the possession of the enemy, unless this judge would give you leave to make terms by resigning his office.

I believe, sir, that we should not differ much, if we came to a proper understanding of the true principle on which this question depends. If we establish the principle, that from the nature and essence of public institutions, they are made for the good of the people, and not for that of the individual who administers them, we shall experience no difficulty. Gentlemen, in speaking of a judge, had emphatically called it *his* office. But, it is not *his* office, but the office of the people. He is only the person appointed to perform certain services required by the public good, and when those services are no longer necessary for that public good, his duties are at an end, his services may be dispensed with, and he ought to retire to private life.

The case had been assimilated to a bridge. But he who builds a bridge does a public good, that entitles him to a growing remuneration for ever. But here the good is temporary. The truth is, the judge is more like the man who collects the toll, and who receives the promise of an annual payment, as long as he discharges his duties faithfully. But a flood comes, and sweeps away the bridge; will the toll gatherer, like the judge contend, that though the bridge is gone, and the owner ruined, that he shall notwithstanding receive his compensation for life, though he cannot continue those services for which his annual stipend was to be the compensation and reward.

But it would seem, that the argument urged on this occasion, and the general course of our legislation had been grounded more on the convenience and emoluments of those appointed to office, than on grounds of public utility. First we appointed six judges of the supreme court, divided the United States into three circuits, two judges to ride each circuit, in which with the district judge to form a court. The law fixed the duties and the compensation, and gentlemen of the first character were ready to accept the places. The salaries indeed had been then thought high; in some parts of the Union they were thought enormous. But a little time passed before they complained of the hardships of their duties; and the law was altered, not so much for public good, as for their personal convenience. Where two judges were required to hold a court, one was now declared sufficient. Thus you continued their full salaries, while you lopped off half their duties. Shortly after you assigned them under the pension law, inconsiderable duties; and they refused to perform them. Thus while they shewed themselves ready to abate of their duties, they adhered to their salaries. Next came the law of last session which takes away all their duties. It leaves them simply a court of appeals. And what have they got to do? To try 10 suits; for such is the number now on their docket, as appears from a certificate just put into my hands; and the average number on their docket amounts to from 8 to 10. Thus for the trial of the immense number of 8 or 10 suits, you have 6 judges, one with a salary of 4,000, and 5 others with salaries of 3,500 dollars each.

I fear that if you take away from these judges, that which they ought officially to do, they will be induced from the want of employment, to do that which they ought not to do; and if they have no good to do, they may do harm. They may be induced, perhaps to set about that work gentlemen seem so fond of. They may as gentlemen have told us, hold the Constitution in one hand, and the Law in the other, and say to the departments of the government; so far shall you go and no farther. This independence of the judiciary, so much desired, will I fear, Sir, if encouraged or tolerated, soon become something like supremacy. They will, indeed, form the main pillar of this goodly fabric; they will soon become the only remaining pillar, and they will presently become so strong, as to crush and absorb all the others into their solid mass.

We have been told, that no State in the Union has presumed to touch the judiciary establishment, excepting the State of Maryland. I will not answer for others; but with respect to Virginia, I will answer that she has touched it. Her constitutional provision for the independence of the Judges is nearly similar to that of the United States, and yet she has established, modified, and entirely put down particular departments of her system.

[Here general Mason went into a particularisation of the different changes the judiciary system of Virginia had undergone.]

After the particularisation, general Mason proceeded:—

And yet our judges who are extremly tenacious of their rights, did not complain. They thought, as I think, that they should not be removed from their offices that others might be placed in them, and that while they did continue in office, their salaries should be preserved to them. And I believe the whole of our constitutional provision amounts to this; that unlike other officers appointed by the President, they shall not be removed by him; that their salaries shall not be diminished by the legislature; and that while the legislature may continue, any particular judicial establishment under which a judge is appointed, he shall hold that appointment in defiance of both the other departments of government. A judge may say, I am not to be turned out of office by the President on the one hand, or starved by the legislature on the other. He may say to the legislature or the President, and to both of them combined; you shall not turn me out of this office as long as it exists, to gratify your enmity to me or your favouritism to another person; so long as the interest and convenience of the people require this institution, they are entitled to my services, they shall have them, and I will be paid for them to the utmost farthing in spite of your displeasure or caprice.

Notwithstanding the remarks of gentlemen, I am inclined to think these ideas of the extreme independence of the judges, and the limited powers of the legislature, are not very old, but that they are of modern origin, and have grown up since the last session of Congress. For in the law passed last session, that very law which it is now proposed to repeal, is to be found a practical exposition in direct hostility with the principle now contended for, which does not betray that sacred regard for the office of a judge, that is, on this occasion professed: in that very law will be found a clause which abolishes two district courts. The 24th Sec. says expresly "the district courts of Kentucky and Tennessee shall be and hereby are abolished." Will gentlemen tell this House how this express provision came into the act of the last session; and will they say that though they voted for this law, yet no power exists in the legislature to abolish a court. It is true, that it has been said, that though you put down two district courts, you promoted the officers by increasing their salaries and making them judges of the circuit courts, but the fact is, you have abolished their offices; they are judges no longer of the districts of Kentucky and Tennessee; and they are to every purpose, whatever may be their name, in reality circuit judges. Though you have not lessened their salaries, you have deprived them of their offices. However, therefore, gentlemen may calculate as to the benefit or injury done these two judges, the principle is not affected by any result—their offices are gone.

It is not enough to say, that though you destroyed their offices you offered them others with higher salaries. You took away from them, in express terms, their offices by abolishing the offices.—You had stripped them of their offices, you had robbed them of their *vested right*, and then to make friends, offered them a compensation; but whether the compensation thus offered for the deprivation they had suffered, was really equivalent to their loss, is a mere matter of calculation, and does not affect the constitutional principle. It is proper, however to observe, that they were no parties to the proposed compromise, and that indeed they had no choice left them. They were obliged to accept of what you offered them or have nothing. If they did not agree to become judges of the newly organized circuit courts, they could not remain judges of the district courts, for these courts were abosutlely and completely abolished.

Were I, Mr. President, to make a calculation on the comparative increase of duties and additional salary, in the case of one of those gentlemen (Judge Innes, of Kentucky) I should have no hesitatio to say, that the bargain which has been made without his consent, and without his being a party to it, is a very bad one for him. Knowing too his particular situation, I am persuaded that if the law had left him any election between his former and new situation, he would have preferred remaining where he was, and without a moment's hesitation, he would have rejected your profered promotion, as it is called. This gentleman resides within a very few miles of Frankfort, where as district judge of Kentucky he held his court. Attached to domestic life, and enjoying all its felicities, engaged in and pleased with agricultural pursuits, he was never under the necessity even during the sessions of the courts, to sleep out of his own bed one night, or to be separated a single day from his family. He could every morning give direction for the management of his farm, and return early enough in the evening to see whether his orders were executed.

How is he situated under the change which has been forced upon him? Instead of attending one court almost at his door, your late law requires him to attend four. The nearest at Baird's town, fifty or sixty miles from home. You oblige him to travel through dreary and inhospitable regions to the North-Western territory, something short of an hundred miles; and much greater distances to, and through still worse countries, Knoxville, and Nashville, in Tennessee. In going from one to the other of those last mentioned places, he will have to pass through the country of the Cherokee Indians, nearly one-hundred miles over the Cumberland mountains, where he will be exposed to every inclemency of weather, without a shelter to retire to, for there is not a house or a hut in the whole journey: a journey in which all travellers are obliged at all times, and of unavoidable necessity, to sleep *one* night at least, and from the fall of rains, and rise of water courses, often many nights without a roof to cover them from the beating of the storm; and moreover where they are liable at every step to be robbed by the Indians, as I myself experienced passing through that wilderness. Can it be supposed, that the five hundred dollars added to the salary of judge Innes, should by a person situated as he was, be deemed a sufficient compensation for the additional duties, the toils, the dangers and the deprivations, to which that law subjected him? In continuing to serve his country, I am sure he must have been influenced more by a sense of duty, than a regard to private interest; or, a belief. that the change was in any respect advantageous to him.

By the 7th Section of the law of the last session, which transforms the district into circuit courts, which melts down the judges, and recoins them, it is enacted, That there shall be a circuit court composed of one new circuit judge and two old district judges, to be called the 6th circuit. Have you not then established a new office by the destruction of the old one? Have you not done more? Have you not violated the Constitution by declaring *by law*, who shall fill this new office; though the constitution declares, Art. 2d Sect. 2d, That the President shall nominate, and by and with the advice and consent of the Senate shall appoint all officers which shall be established by *law*.

Where were these guardians of the Constitution—these vigilant sentinels of our rights and liberties, when this law passed? Were they asleep upon their post? Where was the gentleman from New-York, who had on this debate made such a noble stand in favor of a violated Constitution? Where was the *Ajax Talemon* of his party, or to use his own more correct expression, the *faction* to which he belonged? Where was the hero with his seven fold shield? Not of bull's hide—but of brass—prepared to prevent or to punish this Trojan rape which he now sees meditated upon the constitution of his country by a wicked *faction?* Where was Hercules, that he did not crush these den of robbers that broke into the sanctuary of the constitution? Was he forgetful of his duty? Were his nerves unstrung? Or was he the very leader of the band that broke down these constitutional ramparts?

[Mr. Mason's speech, to be concluded in our next.]

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