SPEECH

OF

JOHN SERGEANT

ON THE

JUDICIAL TENURE.

DELIVERED IN THE

CONVENTION OF PENNSYLVANIA,

On the 7th and 8th November 1837.

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SPEECH, ETC.

Tuesday Nov. 7, *A.M.*—Mr Sergeant rose and addressed the Committee as follows:

Mr Chairman: If the proposition submitted by the gentleman from Beaver (Mr Dickey) shall be adopted, then when it comes up again in Convention, we shall have fairly before us the question between a tenure for a term of years and a tenure during good behaviour, and we shall all have an opportunity of voting directly on that question. In the meantime, the question is not between a tenure for a term of years and a tenure during good behaviour, but between a tenure of fifteen and ten years, as applied to the Judges of the Supreme Court, and a tenure of ten and seven years, as applied to the President Judges of the Court of Common Pleas, and in like manner of the associates. It is simply a question of more or less time, and it is the only question on which we can vote, in the manner in which the subject has now come before us. When I vote, as I intend to do, in favour of the proposition of the gentleman from Beaver, I shall vote for it because it contemplates the longest time; and although, in my judgment, the tenure should not be for any limited term of years, but during good behaviour; yet the proposition for the longest time, accompanied with the condition of good behaviour, approaches nearer to the tenure which I think the most perfect, and which I wish to have continued. Therefore, I shall vote in favour of it. But when the question between the tenure for a term of years and the tenure for good behaviour shall come before us, as it will do on second reading, I shall have the opportunity of voting in favour of that principle which I believe to be right.

Mr Chairman, no opportunity has yet been presented of taking the sense of this Convention directly on the question of tenure during good behaviour—I mean, of testing how many members of this body are in favour of that principle. The opportunity, nevertheless, will hereafter arise, as I have already intimated, and I am myself satisfied to have an opportunity of voting on the question at a future time; voting, in the meantime, in the manner I have stated. As it is probable, however, that

I shall not have another opportunity of submitting the reasons why I entertain the views at which I have just hinted—I mean, that the tenure of good behaviour is the best possible judicial tenure—but that if it must be limited to a term of years, accompanied with the condition of good behaviour, the longer term is best calculated to attain the desired purpose, I will, with the permission of the Committee, avail myself of the present occasion to offer my views. I am aware, Mr Chairman, how much this Committee has been fatigued, by its long attention to the discussion of this question; and that I am probably about to do a thing not very acceptable to them, in offering, at this time of day, any remarks on the subject. And, sir, probably it is not necessary that I should offer any remarks: necessary, I mean, with reference to the discussion on either side, for I have no hope that I shall be able to add to the arguments which have been already presented to the Convention in favour of the tenure of good behaviour, nor to remove any of the doubts or objections of those gentlemen who are arrayed against us on the other side. But, sir, if the members of the Convention feel themselves fatigued by the discussion they have heard on this question, let me ask them whether the severity of the exercise which their minds have undergone, has not been ascribable as much to the importance as to the length of the debate? If this had been an ordinary question, of little moment, during the discussion of which the members of this body could have been quiet in their places, pursuing the other avocations which claim their attention, independently of the business of the Convention—if they had been able to read, write, or otherwise occupy or amuse themselves, without giving constant attention to the arguments which were going on at the time, there would have been, comparatively, little labour in this discussion. But I do this Convention the justice to believe—I do sincerely believe—that, throughout the whole of this discussion, they have felt the importance of the question on which they were called to decide, and that it has not only rested on their minds here, but that it has accompanied them wherever they have gone, and has engrossed their deepest and most anxious considerations. If such is the case, I would again say to them that, whatever the length of this discussion may have been, and it has not yet been as long as the discussion on several other articles of the Constitution, nor even as long as we had anticipated it might be—whatever fatigue the members of this Convention may feel, must be attributed to the fact, that they know and feel this to be a question of vast interest and magnitude.

I do verily believe, Mr Chairman, that upon the right settlement of these questions in relation to the judiciary, the maintenance and support of republican government entirely depend. Yes, Sir, I go the whole length of this. Sir, there are successive questions, which must be separately stated, and, in some degree, separately considered. The first

is, Do you, in a republican government, require a judiciary as a part of the government? If not, you can dispense with it altogether. If you are to have a judiciary, then the next question is, What is the nature of the functions which that judiciary has to perform? And, having ascertained these two points, then comes the inquiry, which is now occupying our attention—In what way can we best secure the right performance of those functions? I have not, as yet, heard any one deny that, in a republican government, as well as in all others, a judiciary is indispensable. You cannot do without a tribunal to expound and administer your law. Without such a tribunal, your government is good for nothing. Keep your Legislature! your Executive! retain them, but cut off your Judiciary, and what is your government? What is it with reference to the thousands (hereafter to become millions), who constitute the body of your citizens? How are their purposes of peace, protection and security to be attained, if you have not an administration of justice? Sir, it is the end of all government. Yes, and, by and by, I may probably take occasion to show to you, that every argument used, here or elsewhere, that has gone to prove that the judiciary is to be placed in subordination to any power in the republic, is contrary to reason—because the administration of justice is the first end of all government. And if you can ascertain in what manner justice can be administered, you have then ascertained in what manner the whole end of government can be answered. If you can obtain a perfect administration of justice by means of a monarchy, then, so far as that goes, a monarchy would be a superior form of government; and if you can obtain it by means of a republican government, as no doubt you can, then a republican government achieves its title, in this respect, to an equality with a monarchical government in the particular I have mentioned, and its superiority over such a government in a vast many other respects. But if you can have a republican government, as in my conscience I believe you can, and now have, in which this great end of all government is accomplished, you have then a government of the most perfect kind, and one in which you attain, in the most perfect way, the end of all government. Sir, do I exaggerate in this? Let me put you a case. Conceive, for a moment, if you can so conceive! the condition of a government without an administration of justice! It is a despotism, whatever may be its form. Suppose the case of our own government without the administration of justice! Your people can overthrow it; undoubtedly they can, and they would do so, and they would give you only one single reason for so doing—and what is that? They would tell you that the great want of civilized and social man is not attended to and provided for in this government of yours. Gentlemen have spoken here as if this were a question, whether the judge was to be made subordinate to the power of the government—whether the judge

was to be made subordinate to the power of the legislature—whether the judge was to be made subordinate to any one, or to any number of ones that we can estimate. But, sir, it is not so. The judge is the man through whom the administration of the law is to be effectuated; he is the man to whom we must look whenever we are wronged; he is the man to whom we are to appeal for the exposition of the law, and for the application of its power when our lives are in danger; when there is an attempt to take from us our liberty or our property; when our reputation is assailed. And when we have put together life, liberty, property and reputation, what have we got but the mass of all that an individual can possess on earth? Is there any exaggeration in this? What is the value of a legislature—what is the value of an executive, in comparison with a judiciary in this point of view? It is the very motive for entering into society; it is the very object of all law; it is the final purpose, the ultimate end that all government has to accomplish. Sir, government is free, government is good, exactly in the proportion in which it does accomplish this great end; and it is bad exactly in the proportion in which it leaves it undone. What do you mean by a despotism—no matter what form it may assume? What, I ask, do you mean by despotic authority? Is it legislative authority? Yes! Is it executive authority? Yes! Legislative authority and executive authority, unchecked and uncontrolled, are arbitrary and despotic, and do not deserve the name of government. Sir, when God made man, in the order of his good Providence, he established a paternal government; but when he established it, he planted with the power, the security for its exercise in the natural kindness of the parent for the offspring, equalling that for himself, and being, indeed, an extended selfishness. But when you pass from the paternal government of the household to the government of mankind, what do you find to supply the place of that check which thus exists in individuals? Your judiciary does not supply the feeling, but it supplies the judgment—and an invariable standard of judgment according to law, is that which will mete out justice to all. A government without it, would be like the head of a family without affection for his children, destitute of the natural, even animal feeling, existing throughout all animal creation, to guide, control, and prevent the inordinate indulgence of selfishness; I mean selfishness as applied to his own gratification, and so as to comprehend himself alone. Let any man imagine, if he can, the existence of a family in which there is no paternal feeling! We see it sometimes. We see an alienation of mind befalling a man, debasing his faculties, and destroying his understanding. Habits of vice and dissipation may produce the same unhappy effects, and, in some instances, they do so. And what do we then see? We see in a family precisely that which we should see in a government without a judiciary; disorder, cruelty, suffering—the greatest inhumanity.

We see a despotism established, and the order of Providence overturned. I not only maintain that this administration of justice is the proper end of all government, but, contrary to the idea which seems to have taken possession of the minds of many gentlemen here, I say it is not only the end of all government, but that it is to be attained in all governments precisely by the same means. Nay, I feel myself warranted in going still further, and in saying, as I shall hereafter be able to establish, if it should be necessary to establish it, that in every form of government, no matter what it is, the evils to be guarded against, and the good to be accomplished, by means of a judiciary, are precisely the same.

But now, to be able to present this view more distinctly, let me ask the attention of the Committee to the second of these questions. What is the nature of the functions which the judiciary has to perform? Are they in a popular government, popular functions? Are they in a monarchical government, monarchical functions? Are they in a representative government, representative functions? Just as much as justice, which comes from Heaven, is popular, is monarchical, is republican—It is one—it is an emanation of the Deity! Forms of government are but the contrivances of man—I deem it right to make this remark here, because it furnishes at once an answer to a great deal of what we have heard on the subject of our judiciary, as distinguished from the judiciary of England, or the judiciary of the different states of the continent of Europe, as, for example, of France, Spain, or Holland. If we look into the codes of jurisprudence of the different nations of the world, we shall be surprised to find that, like the proverbs of nations, they are nearly the same. We shall be surprised at first view; but we shall be still more surprised to find, that the very best codes are to be found in nations where it is notorious that the administration of justice is imperfect and venal. But with this resemblance in the jurisprudence of nations, I do not agree that the administration of justice is the same. The administration of justice in the Commonwealth of Pennsylvania is one thing—the administration of justice in Spain is another; and the administration of justice in France is still another. Yet their laws are, as remarked, in essentials the same. Does any one inquire how it happens that their civil laws are nearly the same? The answer is obvious—it is because justice is the same. As nations advance in civilization, they collect together—either from the wisdom of past times, from the changes which are continually going on, either by the application of new principles, or the new application of old principles—what the natural sense and justice of man knew to be right and proper—accumulated until they became maxims—laws—a system—a science. And a republican government is precisely that form of government which cannot dispense even with the science of the law, however complicated and inconvenient

it may seem to be. A despotism may dispense with it. An absolute monarchy, like that of Spain, where all authority, executive, legislative, and judicial, is finally in the hands of the king—where the king is the judge in the last resort, to whom the final appeal is to be made; there, too, it may be dispensed with. But can a republic dispense with it? Can a free monarchy dispense with it? No, neither of them, because this system of law, however complicated or scientific it may be, is the security to all for the peaceable enjoyment of those rights intended to be protected by law. Conceive, then, of an administration of justice—I care not in what age or country, or under what form of government—it is necessarily one—you cannot make two of it,—it may be bad, owing to the influence of bad government upon it,—it may be imperfect—but your conception of justice, and what its administration ought to be, is necessarily one thought, and is incapable of any division or diversity whatever.

In the book which I hold in my hand, I find what I consider to be a common error, set out by a traveller through the United States—a female traveller of respectability, who had acquired some literary, as well as scientific reputation, before she came to this country. And although she has fallen into an egregious error, yet I would not indulge that sort of remark, in reference to her, which has been employed in some of the reviews. Listen to her observations in relation to the judiciary. Speaking of the judiciary of the United States, she says:

"The appointment of the judges for life, is another departure from the absolute republican principles. There is no actual control over them. Theirs is a virtually irresponsible office. Much can be and is said in defence of this arrangement; and whatever is said, is most powerfully enforced by the weight of character possessed by the judiciary, up to this day. But all this does not alter the fact, that irresponsible offices are an inconsistency in a republic. With regard to all this compromise, no plea of expediency can alter the fact that, while the House of Representatives is mainly republican, the Senate is only partially so, being anomalous in its character, and its members not being elected immediately by the people; and that the judiciary is not republican at all, since the judges are independent of the nation, from the time of their appointment."—*Miss Martineau's Society in America.* Vol. I., pp. 41, 42.

Not republican! continued Mr Sergeant. Now, as this same idea of the want of republican character—the want of popular control and restraint has been dwelt upon here, I ask those who argue it, and I would appeal to Miss Martineau herself, if she were present,—to say, what is the difference between republican justice and any other justice? Sir, they would be compelled to answer, that it is one and the same thing. What then are the functions of a judge in a republican government? Why, to administer that justice which is one and the same thing through-

out. Besides, let any man follow this thing to a conclusion, and what an absurdity he would be led into. If it be true that, in a republican government, there must be a republican administration of justice!—then it follows that, in a monarchical government, there must be a monarchical administration of justice! and that, in a despotic government, there must be a despotic administration of justice! Sir, is not this (I speak with great respect, nevertheless, for Miss Martineau and those who seem to adopt such notions), is not this a palpable absurdity? Try it:—if we must go back to first principles, let us go to them strictly and carefully. What are those rights that are to be preserved and protected by the judiciary? They are rights which are anterior to the formation of society. Yes, sir, *anterior to the formation of society.* They are prior in existence to the establishment of any form of government; and they are the same through all changes which the forms of government can undergo. Take the Israelites, for example (as their history has been referred to), under their first leader, Moses. Take them under his successor Joshua! Take them under their government of judges! Take them when, Samuel's sons, associated with him in his old age, having violated their duty, they were cursed with a king, and a royal form of government was established. Follow them until the twelve tribes were divided—two under Rohoboam—and the ten rebelling tribes under Jeroboam. If I am mistaken in any part of my statement here, my friend on the right (Mr Cummin), who is much more familiar with this history than I am, will, no doubt, have the kindness to correct me. Was not right the same? Was not justice the same, and was not the object of the administration of justice the same? And ought not its administration to be the same? Yes sir, with this difference only—that wherever despotic authority is established, it seeks not to promote the administration of justice, but to bend it to its own will; in which it unhappily too often succeeds. Such, then, is the principle—invariable in its application.

[The hour of one o'clock having arrived, Mr Sergeant yielded the floor to Mr Coxe, on whose motion the Committee rose and reported progress. And the Convention adjourned.]

Tuesday, Nov. 7, *P.M.*—Mr Sergeant continued his remarks as follows:

Mr Chairman:—The Commonwealth of Pennsylvania is a State of great power, from her position, from her resources, from her strength of every kind, physical, moral and intellectual; and her example will have great influence, not only in relation to the other states of the Union, but even in relation to the United States themselves. It would be a matter deeply to be lamented, if this great commonwealth were to furnish the first instance of such a change as that now proposed for the action of this

Convention ; for if I do not misunderstand the history that we have had of the progress made in the science of government, and more especially in the United States and England, we find that this plan of a judiciary, which is established in Pennsylvania under the existing Constitution, has been considered as the final perfection of the administration of justice. England, for a century and a half, has continued to maintain it, and among all the plans of reform, of which, as we well know, there have been multitudes, no proposition, I believe, has ever been made to go back to the tenure, during pleasure, or to establish the tenure for a term of years. In the United States, I know there has been one instance of a state that has changed the tenure of her judges, from being a tenure for a term of years, to be a tenure during good behaviour. There may have been others. I know not of any instance in which a change has been made in a contrary direction. Rhode Island still maintains her ancient form of government under the royal charter ; she has never yet made a constitution for herself. The State of Vermont continues her elective judiciary, and some of the new states of the Union have also a judiciary for a term of years. The State of New Jersey retains the tenure of a judiciary for a term of years ; and, as I have said, some of the new states, in forming their constitutions, have adopted the same plan; but, so far as my recollection goes, there has been no instance in which a state, after having established the tenure of good behaviour, has gone back again to the tenure for a term of years. If, however, the Commonwealth of Pennsylvania should furnish an instance of a voluntary departure, after mature and careful deliberation, from this plan of a judiciary to that of re-appointment after a term of years, I know not but that it may have a powerful and a deleterious influence, even upon that constitution which is universally admitted to be right, I mean the Constitution of the United States. It is not only with reference to itself, therefore, but with reference to republican government generally throughout the Union—to the perpetuity of republican government, and even to the perpetuity of the Union itself, that this question is one of vast importance; inculcating great caution, and enjoining upon us not lightly to make a change, and not to make a change at all, unless on good and sufficient grounds. This, however, I mention, not with the intention of departing from the line of argument which I had laid down for myself, and which would soonest lead me to the end of my journey, but with a view to draw some portion of the attention of the Committee to the subject, and as a renewed apology for trespassing so long upon your time.

I was speaking, Mr Chairman, of the functions of a judiciary, or a judge. I have endeavored to show, what I believe no one has undertaken to controvert, that in every form of government professing to be civilized, and having any regard to the liberties and rights of individuals, there must

be judges. This is not all. Connected with this, presents itself a point which I earnestly beg every member of this Committee, and every man who shall ever have occasion to turn his thoughts to the judiciary, to bear constantly in mind—and that is, that the judge *must* decide. What is the oath of office of a judge in the Commonwealth of Pennslyvania? It is, to decide according to law and justice; and he not only must decide when the case is presented to him, but he must decide it according to law and justice, regardless of any thing else, to the best of his knowledge. Here, then, are two necessities created, which place your judiciary in a different attitude, in some degree, from that of any other persons of whom you can conceive. Your judiciary has not a particle of voluntary action about it; it has not a particle of power to withhold its action, whenever its action is demanded. Is this so with the legislature, individually or collectively? It is not; it acts on its own volition. Is it so in relation to the executive in many of his acts? Has he not volition? If he be obliged to act, he has at least the choice of the manner, by exercising all the discretion which the laws have conferred upon him. But how is it with your judges? They *must* act when called upon; and they *must* decide, without the exercise of any discretion, according to law and justice. If there is one form of government in which this necessity is more rigorously exacted than in any other, it is in a republican form of government. What is its essence? What is its sovereignty, properly speaking? Is it the sovereignty of a majority? Is it the sovereignty of the Legislature? Is it the sovereignty of an executive? No, sir, it is not; it is the *sovereignty of the law;* and that which constitutes a free government, as distinguished from a government that is not free, consists exactly, and entirely, and exclusively, in the establishment of the principle which your judiciary is to carry into effect. How is it that the government of Pennsylvania is a free government to every individual in the state? Is it not in this—that we all live under her law? What is that law? Our Constitution—our natural rights excepted by that Constitution from the power of the government; a legislature with limited authority; an executive and a judiciary, to secure to every man the peaceful enjoyment of his rights. In what does the difference between a free and a despotic government consist, but in this? If this be the character of the government, and its freedom consists in this, is it not essential to it—demonstrably so—has it not flashed upon the mind of every member of this Committee, that an independent judiciary is essential to freedom, and essential to those rights which constitute freedom in government? Sir, I put this question to every member of this Committee. We talk, in general terms, about dependence and independence in a government; just as we talk of sovereignty and freedom—very loosely. But if any man, or any set of men, can have power to remove a judge who is to decide a case—involving my property, my

liberties and my rights, he has power over my property, my liberties, and my rights, and I am no longer free. Sir, is it not so? When Charles the Second took away the charters of the corporations in England, for the purpose of establishing his own arbitrary power, what did he do? After consulting his counsel as to the mode of preparing pleadings, and getting every thing in order, when the trial came on, he made that counsel his chief justice. When, in the time of Lord Bacon, a royal object was to be accomplished, Bacon—to his shame be it spoken—went privately to the judges for the purpose of influencing them to make a decision conformably to the will of the crown. He found but little difficulty in overcoming three out of the four. One of them, Sir Edward Coke, more stubborn than the rest, resisted for a time, but bent himself at last to the royal will. Whoever might be the party engaged in that case, was he, I would ask, living in a free government? No, sir! and why was he not? Because the judge who decided his case, was dependent on another who had a feeling or an interest hostile to him. I know, and shall hereafter speak, of the distinctions that have been attempted to be drawn between that form of government and our own. They are undoubtedly very different, but in this particular point the difference amounts to nothing at all. I have alluded to a case—and my friend from the city of Philadelphia (Mr Hopkinson) who opened this discussion, has referred to a case which occurred in the time of Oliver Cromwell. But these, sir, it will be said, are extreme cases. Be it so, they are extreme in degree. Suppose, however, that something of the same kind, in a less degree, were to operate on a case. Is this not an impediment to the enjoyment of freedom, so far as freedom consists in the enjoyment of all our just rights? Let me put a case of a common, popular, inflamed opinion prevailing in a community, directly adverse to the rights of one of the parties engaged. Sir, have you never known of such instances? Do they not bear down the law, even in spite of all your judges can do? I have even now such a case before me; the account of which I cut from a newspaper, a day or two since. It is a case of a trial about property, between several individuals on the one side, and several individuals, constituting commercial firms, on the other. There was a question of property and a question of law—as to which, I will venture to say, there is not one out of the forty lawyers who are members of this body, who will not concur with me in saying, that it was a case in which the decision was to be left to the judge. The judge laid down the law to the jury, to be in favor of the defendant, to the whole extent of deciding the case. The jury, however, brought in a verdict for the plaintiffs, which was received by the spectators with the most tumultuous expressions of approbation.

The case is thus related in the newspapers:

"The action was brought by John B. Delaunay and others, to recover from Manice, Gould, & Co. the amount of a promissory note, and the defence set up was usury. It appeared that the defendants purchased from the plaintiff's their bills on France for $15,000, and gave in payment their own notes at sixty days. The then rate of exchange, as proved in evidence, was 5 francs 20 centimes, and the plaintiff's allowed the defendants only 5 francs 5 centimes, and charged them six per cent. interest on their notes, which made the amount of interest charged between 16 and 20 per cent. After two days' patient investigation of the facts, listening to the witnesses and lawyers, Judge Tallmadge charged that the transaction was *per se* usurious, or, in other words, that in point of law it was not a question on which a jury had any discretionary right in giving their verdict, but must, as a matter of course, find for the defendants. The jury, however, in spite of the judge's charge, on Friday morning brought in a sealed verdict for the plaintiffs, $15,705 and costs.

"*The announcement of it drew forth a loud and animated cheering from the audience, which the officers of the court were for a few minutes unable to suppress.*"

This case, continued Mr Sergeant, occurred before the Superior Court, in the city of New York, within a fortnight past. Here, then, is an instance of an audience in a court-house, who had made up their opinion in favour of one of the parties, and who became so inflamed as to forget what was due to decorum—pressing on the jury, in spite of themselves, the sympathy they felt with one of the parties—the judge holding his tenure during good behaviour, and firmly laying down the law of the land, yet unable to carry it into effect. Under such circumstances, sir, what is the duty of the judge? Is it not to set aside the verdict of that jury? Suppose, then, that the judge, instead of being made independent, by the tenure of his office, had been dependent on any sovereignty whatever for his continuance in it:—what must have been his course? Shall he fall in with the popular clamour, and sacrifice the just rights of one of the parties? In the case I have referred to, property only was at issue; but in another case it may be life itself. It may be that which, in the estimation of many good men, is more valuable than life—it may be reputation. And shall the judge yield to popular clamour? Shall he decide according to the popular voice? If he resist it, what is to be his fate? Need I answer the question? If he suffers, what is it that is cast down? Gentlemen have talked here, as if it were only the judge that was overthrown—"the mere operation," it is said "of a republican principle." Sir, they have overlooked the most material fact; they have forgotten that there is a triumph achieved a million times more important than this—a triumph over the law. It is the law that is trampled upon—

it is the law that is laid prostrate and bleeding in the dust—never again to command respect. How is it to be restored to life and vigour?

The judge may take his seat with his confidence somewhat diminished, or a new judge may be appointed; but the same scene is to be renewed. And what is to be the permanent sufferer? Why, the law. What is to be the effect of the destruction of the law? The loss of every man's security, and consequently the loss of every man's freedom. Now, sir, when we look at these things, do we find in them any thing which will justify us in the distinction I have before alluded to, between one form of government and another form of government? Sir, we have heard much said of the sovereignty of the people. What is sovereignty? What, I repeat, is sovereignty? Sovereignty is power; neither more nor less, all the world over. When a man is under the influence of passion—passion is sovereign, and for the time has entire command over him. Is it not so? Shall I affirm that a man is always under the dominion of passion? By no means. When this sovereignty yields, reason may resume her influence; but, until it does, while passion is raging and overpowering reason, it is rage that is sovereign. Why? It has the power over the man and his faculties, and exercises that power for the time it continues. Ignorance may be sovereign. It often is so. Sir, if without any knowledge of a case you or I should undertake to decide it—we should decide it ignorantly; then would ignorance be the sovereign judge. Now, when we speak of the sovereignty of a nation—whether it reside in one part or another part, we speak of what, in masses, is of the same nature as in an individual human being—it is fitful, capricious, subject to temptation, subject to the influence of passion, and to every kind of error. It may be influenced by want of knowledge—by hasty and inaccurate prepossessions—by want of qualification, as well as by positive disqualification. And where these things exist—for the time they are sovereign. Their power is sovereign, and they bear down all before them. What is it that is to secure you and me, and the rest of the individuals of this commonwealth, against occasions of error, ignorance, passion—ten thousand things which may tend to the destruction of our rights? It is the judiciary, and nothing else; for there you can appeal, and they are obliged to hear you. You can make them decide your case—they *must* deliver their opinion, and the law they administer is omnipotent over all sovereignties—I care not what they are. Yes, over all sovereignties whatever. If the whole people of this commonwealth were to be under the influence of one feeling and one error, and they were prejudicial to an individual, he has a right to appeal to the judicial tribunal, to demand that he be heard, that he have the benefit of the law, and that every other consideration or influence be disregarded. There can be no doubt of

the sovereign power of the people. Their sovereignty, sir, has been exercised in making this Constitution. Their sovereignty is still exercised—in the exercise of the powers granted by it, as well as of those which the people have reserved to themselves under this Constitution; the election of their representatives—of the governor—of all their officers who are elective—the changing them when they think proper to do so, and changing the Constitution also. But what rightful sovereignty—I put the question guardedly, but advisedly and confidently—what rightful sovereignty has ever been claimed, or ever can be claimed, to be exercised over the administration of justice or the rights of man. I do not ask what a despot may do—I do not ask what may be or has been done under a monarchy; I do not go back to inquire what is recorded in British history. But I ask if rightful sovereignty in a free republic can do this, or can even desire to do it, if properly enlightened? Sir, let us never forget that this matter of the administration of justice deals, as you will presently see, entirely with individual rights; that its decision is final, and that it concerns no one on earth but the parties to the controversy—whatever its decisions may be, it is nothing to any man living but those parties. No other can have any interest—no other can have any concern in it, unless you change the nature of your judiciary, and make it a legislature. But, as to an individual dispute, I would say that no one on earth, but the parties, has any thing to do with it. Sir, government of every sort has desired, at all times, to get rid of independent judiciaries. I do not mean republican governments—for I do not believe that it is the deliberate wish of any such government, or ever will be. But all governments we have been acquainted with, in the history of the world, have entertained this desire. You have seen what was done in England down to the revolution. Here is a very recent work, published by Baron Pelet, a member of the Chamber of Deputies, and late Minister of Public Instruction.

It consists of opinions delivered by Napoleon in his Council of State. I will read a few extracts from the book; it is deemed to be genuine, and therein differs from many works published of late in France, under the denomination of "Memoirs." You will hear something as to what Napoleon in his power wished in regard to a judiciary:

Speaking of a sort of circuit judges, the author says, "He thought, also, that the government would by this means *exercise a just share of influence in these matters, by possessing the right of sending one judge rather than another*, according to the nature of the case."—Pp. 215, 216. Again, "*I grieve daily* over the numerous *arbitrary* acts which I am now *obliged* to perform, and my wish is, that the state should be governed by *legal* means generally," p. 228; that is, he wished these *arbitrary* acts to be done by the courts, and thus to relieve himself from the odium. For this purpose he wished to establish a *special* tribunal, to *be named by*

himself, and removable at his pleasure; and then adds, "Such acts (that is, arbitrary acts) would come more appropriately from the tribunal I have been speaking of." "I shall let them decide the dispute between the superintendent of *my* civil list and *my* upholsterer, who wishes to make me pay 100,000 crowns (£12,000) for *my* throne and six arm chairs, a sum so exorbitant that *I* have refused to pay it;" that is, he would name judges to decide his own case, which he had himself already prejudged. Again, he says, "The gendarmerie requires the protection of exceptional tribunals against the partialities of juries—but until we can establish special courts to protect the gendarmerie, might we not establish that, in every case where a gendarme is implicated, the jury might be composed of gendarmes?" He wished to appoint the judges, and that they should hold during his pleasure—that they should do what he desired, however odious and arbitrary; and that the jury should be gensd'armes.

Such were the plans of a military emperor for administering justice. I suppose they would fulfil the duties of military imperial tribunals. They would do *military imperial justice*, as distinguished from *republican justice*. One more extract will give us a notion, somewhat more precise, of his views of justice. "Shall I tell you," he says, "what I did in the last Italian campaign, when a small town proved faithless to us, and declared for the Austrians? I degraded the inhabitants, by taking from them the title of Italian citizens, and had their disgrace engraved on a marble slab, placed at the gate of the town. An officer of the gendarmerie was then put in command, with orders that when any of the inhabitants incurred the penalty of imprisonment, that punishment should be commuted for a certain number of stripes."

Here, then, sir, is an exemplification of what I have just now said—of the continual effort of power to break down this barrier of an independent judiciary, and to have a judiciary which will be subservient to its own purposes. Sir, I have said that justice is one, and is it not true, I would ask, that power also is one, in every part of the world? I mean as to its essential qualities, its appetites, its passions, and its indulgences; whether it be the power of a single man, or the power of many, or whatever it may be—has it not precisely the same aspirations? And what are they? To accomplish its own object, as Napoleon, in the plenitude of his power, desired to have a special court, dependent upon his pleasure, and gensd'armes for jurors; as power of other kind will seek to accomplish its purposes, by obtaining instruments calculated to promote its own views and wishes. I will not, at this time, advert to the manner in which this may now operate here. I have given you an instance, and I might cite others. Now, I say that the functions of the judiciary are one and the same every where, and every where government will strive to interfere with it. To make this view plainer, if necessary, let me ask

the Committee, a little more precisely and specifically, what are the functions of a judiciary? After having examined them, we shall be prepared to weigh the allegation as to the exercise of popular sovereignty, and the expediency of the exercise of its power over a judiciary in the manner which has here been contended for. The first and greatest office of a judiciary, as already intimated, is to protect private rights—against whom? Against all assailants,—all, without exception. In favour of whom? The feeblest creature in the community. Sir, I do not mean to limit myself to merely the feeblest, in the ordinary acceptation of the word. I will take for the exhibition of it, in its most striking form, an individual who is unpopular, if you please, hated by his neighbourhood. Such a man is feeble, because he is obnoxious. But is this to make any difference in judgment? Is he not entitled to justice? I care not for the disesteem in which he is held, he is still a human being; he is still a citizen of the state. If he come to the door of justice, he is entitled to be admitted. If he have a just claim, he is entitled to have it allowed. And, if the world be in arms against him, he can demand, as a right, of the judge who sits on the bench, to decide, and if justice be on his side—to decide in his favour. Can any but an independent judiciary do this? You have heard of the blind leading the blind, and how it fares with them. Set one cripple to support another cripple, and their fate will not be very different. The judiciary must be independent and strong, that it may be able to support the feeble. Else the judiciary will fail, and, with it, the administration and power of the law. If a judge cannot sustain himself, how shall he sustain him who comes to ask for justice? I know what answer is here attempted. If the judge is an honest man, he will do what is right; he will do his duty. Sir, if it be so easy a thing to do one's duty in the face of danger, and at such a risk, I would be glad to know why a crown has been awarded to martyrdom? If every man is capable of being a martyr, what peculiar merit was there in those who have suffered in the fire and at the stake for their faith, that they should have been so highly distinguished? Tell me that such heroic integrity is of every day occurrence! Every one knows it is not true.

There may be those who are capable of it; who would sacrifice themselves rather than see another wronged. But how few are they? Else, why does it happen that in the only authoritative prayer—strictly, the only authoritative one that there is in the world—we are instructed by Infinite Wisdom to ask, that we may not be led into temptation? Put this case—a case which must unavoidably arise, unless the independent tenure be continued. A judge knows that if his decisions be one way, he will lose his office, and be disgraced. What can you expect from him?

But further—the judge, I have said, is to redress private wrong. He is also to punish public transgression. These are specific duties. But

let me remark, there is an incident connected with the performance of these duties, which, in a free government, is not of less value. How is it that your law is kept up, and made known throughout your commonwealth? Sir, gentlemen will talk of judges as not doing all that might be done—not disposing of as many causes as they ought, about which it is difficult to come to any accurate estimate. But when they do decide, they decide right. They thereby establish a principle—a standard by which to regulate the conduct of thousands, who never were in a court nor engaged in a suit. As you make the law known, not only in criminal, but in civil cases, in that proportion you prevent crime—you settle controversies—keep the peace, and preserve tranquillity throughout the country. And, sir, precisely in proportion as you introduce capricious judges and obtain capricious judgments, so will you have disorder and disunion. If the law be sovereign, this natural mode of acquaintance with that sovereign, is of vast importance. Sir, that is not all—your courts, and especially your higher courts, make the law for all the inferior tribunals. When I say they make the law, I do not mean to say that they legislate. Their business is to expound; they declare what the law is by their decision. When you call together an arbitration to decide between two individuals, and they are informed what has been the decision of your high tribunals—if they be held in respect—in a like case, the matter is at once decided. If a controversy arise between two neighbours, they inquire, and are informed that the point has been settled by your legal tribunals. The dispute is at an end: no law suit takes place. Further: every man, in the same way, acquires the knowledge he has of his own rights—of the extent to which he may insist upon them, and how he may obtain justice,—just as the people of this state have become better acquainted with the Constitution of the state in consequence of the information they have received from the Convention, and of their attention being continually and closely drawn to it. Such, sir, is some imperfect sketch of what the judge has to do. Let me invite the attention of the Committee again to a leading circumstance, before referred to, that the judge *must* decide—that it is his duty to do so—that he must decide, to the best of his ability, according to law and justice. I would now ask, whether this judge has, by his office, any political power? Not a fragment. Has he any voluntary power? Not a particle. Has he any authority, unless called upon, to decide a controversy between you and me? No. Can he declare, beforehand, the law by which you and I are to be regulated? Not at all. Dare he open his mouth as a judge to you, unless in the course of his appointed duty? No. He never acts upon his own impulse, and cannot refuse to act when he is lawfully required to exercise his functions: and then it is only to declare the law.

If a citizen goes into court with a complaint, he is heard with respect

and attention; the judge is then compelled to act, whether he be reluctant or not reluctant. If the Legislature pass an unconstitutional law, no judge has the power to declare it unconstitutional; that power was never conferred on any tribunal except the Council of Censors; and they could not annul the act, but only give their opinion upon it. What I have just stated, may appear to be a paradox; but it is nevertheless true, and can be made plain. Let us see how the matter stands—I go into court, with the Constitution in my hand, founding my right upon it. My antagonist claims adversely to me, under an act of the legislature: in support of my right I plead the Constitution; if the act of Assembly be contrary to the Constitution, it is not in the power of any man to deprive me of my right; because the Constitution is paramount to an act of the Legislature. What is the judge, in that case, to do? Declare the Constitution a dead letter, and place the act of Assembly above it, in order merely to flatter the Legislature, and by so doing, deprive me of my clear right? Take a case, for example: the Bill of Rights declares, that private property shall not be taken, except for public uses; nor then, without a just compensation. Suppose the Legislature should pass an act depriving me of my property and giving it to another, who, under this authority, should attempt to take it from me. Something of this kind is alleged to have happened in Luzerne county, according to the statements of a petition recently presented.—What am I to do? give up my property, because it is so decreed by the Legislature, or hold to my right under the Constitution? The judiciary must decide this question of right, and, in deciding it, must determine that the right under the Constitution is superior to the right under the act of Assembly. Is there in this any exercise of power over the Legislature? No, sir, it is no exercise of power. It is simply a decision upon a question of right to property, and he would be set down as a madman who would say that the judge in this case could decide otherwise than according to the Constitution, as the paramount law. It may be said, that this is an extreme and impossible case—so palpable an infraction of the Constitution, it is true, is not likely to happen, but the Legislature may, in a thousand ways, through inadvertence or error, pass acts which would deprive individuals of their just rights, and woe befal the judiciary which would say that these rights must be surrendered and destroyed, because there is a legislative act to authorize their violation. When I say that the courts have no power to declare laws unconstitutional and void, I mean that it is only an incident to their duty to decide questions of right. If a thousand unconstitutional laws were passed, no judge can meddle with them, unless a case come before him for judgment in which the question is necessarily presented. Then it is the right of the suitor to have a decision. The judge cannot deny it to him. He is bound by his oath to decide that the Constitution is above all legislative

acts; and that a right founded upon it, cannot be taken away by the Legislature. It is only in this way that he pronounces an unconstitutional act to be void. Surely the security of the citizen requires this.

We have been told that the courts of the United States have political power, and, therefore, that the good behaviour tenure is very properly applied to them. But, sir, this a mistake. It is true, as alleged, that the courts of the United States have power to decide controversies arising under treaties, acts of Congress, and the Constitution of the United States. But it is true, also, that the state courts have the same power. If political power belong, on this account, to the federal courts, it belongs, for the same reason, to the state courts. The supposed distinction therefore fails, and if this be a sufficient reason for establishing the tenure of good behaviour in the courts of the United States, it is equally so in the state courts. The courts of the states not only have the right to decide all such controversies, when judicially brought before them, but to decide finally, and without appeal. Every lawyer in the commonwealth knows this. Suppose a case should come before your Supreme Court, involving a question of individual right under a treaty—and this is the only way in which a controversy, in respect to a treaty, can come before the courts, whether federal or of the states—your Supreme Court can decide upon the claim set up under the treaty; and if the decision be in favour of the claim, it is final and without appeal. Again, suppose the claim to arise under an act of Congress, or a provision in the Constitution of the United States; the judgment, if in favour of the claim, is final. It is only when your Supreme Court decides against a claim brought under a treaty, or the Constitution of the United States, or an act of Congress, that their decision is subject to revision by the Supreme Court of the United States. So far as their action is in favour of the claim, their jurisdiction is just as conclusive as that of the Supreme federal judiciary, and involves as much political and judicial power. I would not be understood, however, to concede that either the state courts, or the courts of the United States, exercise any political power in the instances referred to. To make a treaty, is an exertion of political power. But to expound and apply it, when it comes in judgment before a court, in questions of right, is no more a political power, than to expound and apply an act of Assembly is the exercise of the law making power. It is purely a judicial act, indispensable to the performance of judicial duty. Sir, I must further remark, that your judiciary is the organ through which you speak upon questions of right and justice, not only to our own citizens, but to the people of every part of the world. You say, and as a civilized country are bound to say, that no matter from what quarter of the world a man may come,—though he be a stranger, friendless and poor,—you will protect him in all his rights, and will afford him the means of obtain-

ing justice. Should we not, then, be careful to avoid making our judiciary, in this respect, different from what it is—and avoid giving any ground for the suspicion that our tribunals will not afford equal justice to all men, whether citizens or strangers? What was the representation of the letter brought to our notice some time ago, by the gentleman from Indiana (Mr Clarke), in respect to a portion of the judiciary of Ohio? It stated, that there it was a difficult thing for a person, not a resident of the same district with the magistrate, to get justice in his court against an inhabitant of the district. Why? Because the magistrate depended for his continuance in office upon the votes of the citizens of his district, and would therefore be solicitous not to give any of them offence. Is it not to be apprehended that, by adopting a similar system—by making your tribunals dependent—you will violate the pledge which every civilized nation gives of equal justice to all men? Would there not be danger that your courts, if thus constituted, would refuse justice to foreigners?

It is no answer to this objection to say, that other nations violate their obligations in the same manner. During the late wars among the nations of Europe, when our property was assailed and depredated upon by all the parties to the conflicts, did we not hear from our citizens the loudest complaints against the dependent judicial tribunals of foreign nations? Our commerce was at the mercy of all their cruizers, and from their courts our citizens could obtain no justice. The Courts of Admiralty in England are dependent on the crown, as the delegate from Philadelphia county (Mr Ingersoll) told us some days ago. Yes, sir, and I tell you further, that in the British vice-admiralty courts in the West Indies, the judge received ten pounds for every condemnation. What was the effect of this? Their decisions were always in conformity with the policy of the British government; and, notwithstanding all Sir William Scott may endeavour to say to the contrary, the orders of the king, in council, were the law of the courts. Our fellow citizens found much cause to complain that justice was refused by their tribunals. It has been confessed by the nations themselves, and tardy justice obtained by treaties. The British, Spanish, French, Dutch, and Neapolitan treaties of indemnity, all acknowledge the wrongs done by their tribunals—that unjust decisions had been given, contrary to the law of nations, for which they were bound to make compensation. Shall we, then, so constitute our courts, as to expose ourselves to the same complaints from foreigners?

But, sir, there is still more to be said of your judiciary which is worthy of remark and reflection. In the court of final resort—the Supreme Court—the decision, whatever it may be, is final, as to rights, in civil cases. In criminal cases, too, the decision is final, and the life of the person condemned may be forfeited, unless the clemency of the Executive be interposed to save it. Think of this. Ponder upon it. Weigh

it deliberately, as it deserves to be weighed. The acts of the Legislature, unless they amount to contracts, may be changed. So may the acts of the Executive. And, further, if they adopt any measures contrary to the rights of an individual, they are answerable for it, and the grievance may be redressed. But, with regard to the individual whose case is decided by a judicial tribunal, there is no possibility of change, and no hope of redress. The decision, once made, is made for ever. There is no power on earth by which the decision can be averted or retracted. Would the impeachment and removal of the judges redress the injury? No. It may prevent occurrence of similar wrong to others. But whatever may be the decision, it is final and for ever—except only in cases of ejectment, where, as limited by our acts of Assembly, there may be a second suit. Can you, then, on any ground of speculation, on any general principle of popular sovereignty, on any vague notion of amenability to the people—can you deny to the citizen the most independent and impartial tribunal that can be established, when its decree is to be thus final and irrevocable? Will you send him to a tribunal which is dependent, which is thus amenable, which is liable thus to be called to account?—and to account to whom?—To those who will calmly sit down and listen to the facts of the case, and decide it, after a patient investigation? No. To another court, where the cause may be reheard? No. To the legislative body, where the defence of the judge will be listened to? No. Not at all. But to common fame. The courts are to be dependant upon what the gentleman from Indiana called their popularity—upon the opinion of persons who cannot be informed, and who will not be informed, of the merits of the judge, nor of his official conduct. And what are the people to decide? That the judge has done wrong? No. It is not even the popular judgment that is to be brought into action—it is the popular will. The sole object is to make the judge dependant—to deprive the individual suitor of his right to a trial by an independent court—and this is to be done, in order that you may have a popular judiciary. I know, sir, that you cannot have a perfect judge, because a judge is only a man. The gentleman from Mifflin (Mr Banks) mentions, as a proof that the judges are not in esteem, that no state judge has been elected by the people to this Convention. According to this rule of judgment they are all bad judges alike, from A to Z, which is more than any of the opponents of the judiciary have ever yet pretended. But there is a good reason why the state judges have not been chosen to this body. They are interested in the result of our deliberations. Their own case is to be decided upon. This is a sufficient explanation of the fact, without going further.

The reason does not apply to a judge of a federal court as a member of this body—such a judge is a very desirable member—he can assist us with his counsel, and his knowledge and experience, uninfluenced by any personal interest. But, admit that the judges are not popular, or even that

they are unpopular. Is that any proof that they have not faithfully discharged their duty to the commonwealth? The judges are cut off from many offices, and that is what I hope will ever be the case, as the judicial office ought thus to be kept distinct. They cannot be elected to Congress, nor to the State Legislature, without giving up their judicial office. But does it follow that, because they cannot be elected to office, they are bad judges? No. They may be very good judges, and yet not popular. Their very unpopularity may be a proof that they are not, what they should not be—popularity-seeking judges. The question of popularity may have relation to their fitness for things other than their judicial duties, and may be consistent with utter judicial unfitness. This is exactly the system which it is proposed to substitute for the present judiciary. The judges are to be estimated, not by their fitness for their official duties, in their very nature stern and offensive, but by their fitness for other things. The unpopularity of a judge ought not to weigh a feather against him if he discharge faithfully his duty. What is the oath of a judge? Is it to make himself popular? Is it his duty to be, as the gentleman from Indiana says, always a new man?—To be all smiles and graces, and to flatter and cajole the people? Ought he to affect the arts of a demagogue? Is it by the supple arts of a popularity-hunter that he is to become able to hold the scales of justice with steady firmness? Is he to let them fall on the one side or the other, or to lay them down, in order that he may make a winning bow from the bench? Is his eye to wander, in courteous glances, with the devotion of man-worship? All this is the very opposite of what a judge ought to be, and is a prostitution of his high office. He is unfit to minister in the temple of justice, if he be not blind and deaf to all but her demands.

Is there any rule or method that can be suggested, by which, according to this theory, the judge can so conduct himself, as to perform the duty of his office with singleness and fidelity, and have any chance of continuing in it? And yet, sir, this is a man that, so far as concerns the law, is to decide finally. Now, sir, I repeat my question—What is the nature of the functions to be performed by this judge? You may see something of it in the Bill of Rights, which has already been alluded to here. The whole Bill of Rights is under the protection of your judiciary, and of no other power. I beg gentlemen of this Convention, then, to read over that Bill of Rights; to examine it carefully, with all the additions that may be made to it—and when they have done so, let them read over the rest of the Constitution. In the other parts of the Constitution, they will find it provided, that there shall be a government; that there shall be an Executive; that there shall be a Legislature; that there shall be judges, and that there shall be various officers to carry on the operations of the government. These things concern the citizen but remotely, and that part

of the Constitution is of comparatively little value to him. But, when he comes to the Bill of Rights, in every word, and every line, he finds his own property; that which the Constitution has not given to the citizens, and cannot give to them, but which they had before the Constitution was made—those sacred, reserved rights, which they have not given up, and cannot give up—which are declared to be inalienable and indefeasible. And how are all these sacred reserved rights—these indefeasible attributes of a freeman, secured to him? By your judiciary. Where is his appeal to be made, when these rights are invaded? To the judge. It is an appeal of right, and to whom is it to be made? To one who knows how to do right, and nothing else. Then, is it requisite that a judge should be popular? Is it not questionable, sir, whether it be any great recommendation of a judge, considering the functions he is to perform, to say, that he is popular in the same sense you would say so of many other persons?

It is impossible adequately to express the magnitude of the functions of your judiciary, and their infinite importance to the citizen. When you think of them, and when you think that it is but man at last that you trust with the performance of these high duties, even with all the selection you can make; with all the guards that can be placed around him; with all the strength you can give to the hands to which you commit the custody of the laws—it almost makes one tremble to think of it. But if, by the tenure, or mode of appointment, you make the person entrusted with all this duty a trembling slave, a watcher of the countenances of the people and the working of parties, an observer of popular signs—when a case is brought before him to decide, you will have him looking around to see who will be able to aid in keeping him in, and who may have an influence in turning him out, before his decision is rendered. If you place a man in this position, you will have him, instead of keeping an eye single to justice and truth, wandering about, reeling after popularity where it was to be found. Sir, it makes a thinking man shudder to reflect on this. A quiet, retired citizen, who does not take much part in public business, would stand no chance before such a tribunal. One who does not make himself known and felt in the political struggles of the day, would have no inducement to hold out to the judge to aid his cause, and he would have nothing to offer him in the shape of a security for the tenure of his office. He might as well be before a jury of gensd'arms—or a special court of Napoleon. Sir, unless a judge be a most uncommon man indeed, such an individual might as well give up his rights, and submit to a violation of what is declared to be reserved and secured to him in the Constitution.

You have mingled in the discharge of these functions one thing more, which this tenure of good behaviour is especially calculated to protect:—that is, the settlement, and permanency, and stability of the laws—that

they shall be uniform—that they shall be continued—that they shall be the same—that they shall not be fluctuating, according to the dictates of any body—that they shall not be fluctuating by frequent changes of the person who administers the laws, and that they shall not be fluctuating by frequent appointments to office, and, worst of all, the appointment of weak and incompetent men, which is likely to ensue. What is so well calculated to preserve this stability and uniformity in the administration of the laws, as the tenure for good behaviour, now existing; and what is so certain to destroy it, as any other tenure?

Those who look to the administration of justice in any other view than that which has now been attempted, have no conception of its value. What is your law without the administration of it? I mean, of what use are laws, unless every one has a tribunal to which he can appeal to have the law applied in his case? Of what use is the Bill of Rights, if there be no remedy or redress for its violation? It is a dead letter. It is the knowledge that there is a law, and the knowledge that there is a tribunal to which every one can appeal, to have the law applied, which is our great security, and often saves us the trouble of appealing, when, otherwise, we should be wronged and injured. Hundreds and thousands pass through life without ever being in a court of justice. Hundreds and thousands pass through life, without having their houses broken, or their families endangered, or wrong or violence of any sort done to them. Why is this so? It is, because the law is every where present. But how is the law actively and virtually present? Not by its being in the statute book, or in the written Constitution, but by its living depositaries, the tribunals of justice. It is, that every man knows that there are laws, and knows that there are tribunals to administer them—to redress wrongs and to punish crimes. Perhaps if the boy we have heard of in Luzerne county had known that he would be punished for horse-stealing, the man might not have had his stable broken and his horse stolen. It is the universal presence of the law, and the universal presence of the tribunal for administering the law, which give us security. It is our only security. If there were no tribunals for administering the law, there would be no security. So it is, at last, these tribunals which secure to us all our rights; and without them, it would be in vain to make Constitutions or laws, or to reserve rights, for they would have no living efficacy. Sir, the laws administered by these judges claim to protect us all, and against all; yes all, without exception—high and low, rich and poor, strong and weak, popular and unpopular, in office and out of office—no matter whom it may be. These judges are to measure out justice with one measure to all of them, without regard to their circumstances, condition or power. To whom does it offer this protection? I repeat, to all the people of the State of Pennsylvania; to each and every

of them ; whether they have political power, or whether they have not. There is not in this commonwealth more than one in five of the people who have any political power—that is, the power of voting, and interfering in any manner in politics. What are the rest? Strangers, females and children—those who pay no tax—those, in short, who want the qualification which entitles a person to be a voter. These are four-fifths—the remainder of our inhabitants, the voters, are one-fifth. Sir, your bill of rights, although it gives no votes to these four-fifths, is made for them, as well as for the voters. The gentleman from Allegheny has said, and said correctly, that the Constitution was made, and the tribunals under it established, for the purpose of protecting you against majorities. I agree with him fully—but I carry the view still more into detail—the Bill of Rights extends to all persons under the Constitution. The rights there reserved belong to all the people of the state, and so does the obligation to maintain the tribunals of justice to protect them. These rights belong to the whole people, whether with or without the right to vote. Shall we be told that a female, because she has no vote, has no right of conscience? that a child, who has no vote, has no right of property or protection? or that a stranger, who has no vote, has not a right to come into our tribunals of justice to vindicate his reputation? Not at all. This would be rejected, at first sight, as savage. Well, sir, how are the rights of these four-fifths to be protected—they having no vote, no political power, and no means whatever of aiding in the appointment or removal of a judge? Political power cannot belong to the whole people. The four-fifths have no share in it. The popular sovereignty, then, is to be exercised over them, and by whom? By the one-fifth, or a majority of the one-fifth, in whose hands all the rest are to place their rights. Can this be a sound principle? Would you insert such a principle as this in a new Constitution which you were forming? If it would not be wise to insert it in a new Constitution, can it be wise so to alter an existing Constitution, as to make it work out such a result? There may be those who think these matters have been too much dwelt upon. Perhaps they have; because, after all, they will strike every body who hears them as being very plain, and, perhaps, minute. But, in the establishment or change of a Constitution for our government, it seemed to be a duty to go back to first principles, and carefully explore the ground. We might easily, perhaps, establish a form of government under which we could scramble along pretty well for the remainder of our lives; but we must recollect that we are framing a Constitution for our children, and our children's children, who, it is to be hoped, will live as happily under it as we have been living under the existing Constitution. In such an inquiry as this, then, it was well to look back, to examine the foundations, and see what it is that we are to build upon. If it do nothing more, it will at least keep us

in mind of correct principles of government. It will help to fix them more firmly in us.

Now, how is the right performance of these functions to be best secured? This is the remaining, and not the least important question. And here he would begin by saying, that it was the easiest thing in the world to find fault. Sir, it is, too, an easy thing to pull down. There is nothing in the works of man that is free from imperfections; and if you continually dwell upon the imperfections of an institution, and lose sight entirely of its beauties and benefits, then he would agree that you might, in time, persuade yourself to consider it as a mass of deformity, and, seen only in this light, as a very fit thing to be pulled down. But, after you have done so, and come to build it up again, it is, perhaps, found to be a very different thing to restore,—entirely different from what you expected. Is it not well, therefore, to examine carefully the foundations to their depths, and begin the inquiry with plain, simple, practical questions?—What is there, then, he would ask, in the existing administration of justice in Pennsylvania, in which it has been found wanting; and if there be defect, is it of such a nature that you can remedy it? He did not claim for the administration of justice in Pennsylvania, complete perfection. Not at all. What are your materials to make judges of? The same that you make a Convention or a Legislature of. They are men. When we know this fact, are we to fall to quarrelling with the judiciary, and denouncing it, because the bench of justice is not occupied by beings of a superior order—because your judges are men who are not free from the infirmities of other men. Had we not better at once go to war with our whole race? Where is the righteous man? There is a book that tells us, and he believed it told us nothing but what was true, that there is no such thing in the world—no, not one. Then, sir, in every human constitution, he meant constitutions made by men, you must expect to find a certain portion of human infirmity. He did not look for monsters of perfection, so to speak, any where, and all conventions, legislatures or governments, whenever and wherever assembled, will fail to find even an individual of that description in their whole numbers. The gentleman from Indiana (Mr Clarke) has asserted, that judges are more complaisant and pleasing in their manners, in the first year or years of their appointment, than they are afterwards. On this account he would have them often changed—have new men. Has he never observed this to be the case with all of us, every day of our lives? We come into this hall in the morning, after breathing the fresh and invigorating air which a good Providence has graciously given us, and we sit down here in the most perfect state of gentleness, and mildness, and self-satisfaction. By-and-bye the air becomes heated and oppressive—lassitude overtakes us, and we have a long debate, and

in the course of our proceedings, something does not work to our mind—we are crossed and vexed. By the time that the hand of that clock reaches the hour at which we take our recess, instead of being the fresh and almost joyous creatures we were in the morning, we are jaded, tired, irritated, perplexed and out of humour. But who would say that we were different or less worthy men in the evening than in the morning? It might be said that a man was less free from infirmity, but it could not be said that he was less worthy. This only shows the human infirmities which we are subject to, and so it may be, and must be, with the judge. Those who advocate the doctrine of the gentleman from Indiana (Mr Clark), would have us all turned out into the fresh air every half hour, so as to keep us in better temper and with better looks. How would this answer, and what would be the progress of business upon such a plan? It may be that a judge will alter a little after he is in office some time. He (Mr S.) did not expect to find perfection in any of them, and he did not expect to find any of them free from ordinary infirmity. What then did he expect? The first great quality he looked for, was integrity, and, with it, a competent knowledge of the laws of the Commonwealth and of the practice under them. We all believe it is not right to have men appointed judges who are destitute of integrity and knowledge. Appealing, then, to the history of the judiciary from the adoption of the Constitution to the present time, he would ask gentlemen, whether it had ever failed, either in integrity or knowledge? You may have judges who have physical infirmities; you may have judges who have not the rare endowment of intellects of the very highest order; you may have judges who have ununpleasant manners—and you may have judges like other men, who have some particular infirmity. If these be of such a nature as to destroy their integrity or their capacity to transact judicial business, then they may become a ground of removal by the Legislature, which is wisely provided for in the present Constitution. But he believed our judiciary to be honest, upright and faithful in the discharge of its duties. Nay, he had no doubt of it—for otherwise, the judges would have been removed by the proper tribunal. If, then, the character of our judiciary was what he had stated it to be—if you have a judiciary honest and learned to the extent of what is required in the administration of justice—especially if it be true, as he believed it to be, that the judiciary of Pennsylvania is now as good, if not better, than it has ever been before; and if it be further true that the judiciary of Pennsylvania is at this moment higher in the estimation of lawyers than any other judiciary in this Union—if it be true that every man's rights have been secured to him—if it be true that the laws have been so administered, as that we have all felt the benefit of this system, then, in the name of all that is good, what have we in our judiciary system, under the present Constitution, which needs to be subjected to a new and untried experiment, of which we know nothing

that is good, and from which we have to fear all that is evil? Are we to risk so great an experiment, that the judicial relation may, according to the fancy of the gentleman from Indiana (Mr Clarke), be a sort of perpetual honey-moon?

If our present judiciary be what I suppose it to be, it is a pearl above all price, although there may be, and probably are, some blemishes in it. I know, indeed, that there are some things in relation to the conduct of particular judges of which I disapprove, and to which, as a member of the Legislature, I should feel inclined to apply the corrective of an address under the Constitution. I allude to those who occupy a portion of their time in an improperly active interference in party politics, and the strife of party—who are party leaders, the framers and signers of inflammatory and proscriptive resolutions and addresses against portions of their fellow citizens. I would remove them for cause, and this should be the cause: No violent partisans on the bench. But, with all this, has the administration of justice in our land, as yet, been what it ought to be? That is the question when we speak of the judiciary. If it has been what it ought to be, then the judiciary rises above this particular complaint, unless it be made the subject of application to the Legislature. In the general declamation against the judiciary, or in relation to the judiciary, or whatever it may be, which has been indulged in here, we are in very great danger of being led entirely astray. I never will condemn a judge without a hearing. And what judge has been heard? I never would even form an opinion, in the slightest degree injurious to the character of a judge, without allowing him an opportunity to defend himself. What opportunity has been given? I would not even believe that the Legislature had been wanting in its duty, as seems to have been alleged here, unless there were specific evidence of the fact. Yet without any evidence before us against a single judge, and with the fact staring us in the face that there has been a satisfactory administration of justice, we are nevertheless called upon to condemn the judiciary, and to change its tenure—upon what ground of evidence? Upon vague statement, applying to individuals who have not been heard, and in relation to whom, therefore, we cannot possibly form a judgment!—whom, by the commonest maxim of justice, we are bound to believe innocent!

What we shall get in lieu of that, with which it is now proposed to part, is another question deserving our anxious consideration. Shall we get something better? Shall we get something that will secure to us greater integrity—more knowledge—more freedom—more of that martyr-like devotion that seems to be thought so common—which induces a man to stand up in defence of another, even at the risk of his own character and his own fortune? What do you want to secure the proper performance of these functions? The first indispensable quality is, independence. Now, independence, absolute independence, belongs to no man as an indi-

vidual; I know of none. It is in the order of Providence that, as mere individuals, all should feel their dependence on each other. It is right that we should. The member of the Legislature feels his dependence on his constituents. It is right that he should do so. The governor feels his dependence on his constituents. That is right also. But a judge, according to the confession of all the members of this Committee, with only, I believe, one exception, in order to be qualified for the performance of his duties, must feel his entire and complete independence. If it does not belong to the individual, where is it to come from? The greatest discovery of modern times, that which has wrought a change in the judicial character, amounting to a measurable, judicial perfection, has been accomplished by means of the office—by constituting the judge, while in his office, that which, as a single individual, he rarely or never is—to make him a new man—to give him new attributes—to create him in his office, and in every thing relating to his office, a being different from others occupying any other posts in the government. And how has this been accomplished? Look at the history of British judicature, down to the period when the independence of judges was established, in 1701;—and when you have done that, look at the history of British judicature—I mean, the administration of justice, from 1701 down to the present day, and I will leave it to every man, saying to him, here choose ye between them! Will you have good, or will you have evil? Prior to the period alluded to, without exception, there was a dependant judiciary. The consequence was that the will of the monarch was done—the will of the favourite was done—the will of the individual who had power was done—but justice was not done. You can trace it, notwithstanding the even current with which the administration of mere questions of *meum and tuum* between individuals glided on, to the time when this last discovery was made of judicial independence, by means of the office. From that time the history of the administration of justice in England, where the office was held during good behaviour, is without stain and without reproach. I do not now speak of the Lord Chancellor; for his is an office which would require more time than I shall occupy, in addressing this Committee, to examine the character of its various duties, which, as we all know, are partly political and partly judicial, and which have at length become so onerous aud complicated as to render it impossible for any one man living to go through with them all. But take the administration of justice, not in the Courts of Admiralty, by ten pound judge's courts, as they once were in the West Indies, but in courts where officers are appointed during good behaviour, and the history is one. It is in perfect contrast to the antecedent period. I repeat, it is without stain and without reproach.

What is the history of Pennsylvania? I have appealed to it, from the adoption of the Constitution up to the present time. Let me go back a

little. Prior to the revolution in England, the commissions of the judges were sometimes, it would seem, held by the tenure of good behaviour, and sometimes for a term of years; but the king had always power over the judges. William Penn chose to have power over the judges in Pennsylvania. He granted a form of government, and, at one period, promised in it that the judges should be appointed during good behaviour. This was in 1683. The people required it. Under what circumstances did they require it? They required it after the experiment, and during the experiment of the judges being appointed for a term of years—and that term not a very long one. What they required was not granted. They went on with the tenure for a term of years, and year after year continued to ask for the tenure during good behaviour. They passed acts of the Legislature, but these were repealed in England. They never could get what they required, and they continued with their two years' judges, or judges during pleasure, in spite of all their entreaties, up to the revolution. I will not detain you with the particulars. They have been precisely stated, with ample illustration, by the gentleman from Union (Mr. Merrill). We are much indebted to him for the labour of the research, and the very able manner in which he has presented its results. We are all of us better informed than we were before his speech. I thank him for my portion of the benefit of the light he has thrown upon the subject. Now, mark! The first thing which the Convention, assembled in 1776, hastily to build up the form of a temporary Constitution, did, was to extend the term of office of the judges from two to seven years. Mark this! It was a considerable step—almost as great indeed as it would be for the state that now appoints judges with an annual tenure, to direct that tenure to be changed from one to seven years. This experiment was tried from 1776 until 1790. Was it satisfactory? The present Constitution proves that it was not. It was abandoned; and the voice of the freemen of Pennsylvania, which had been crying aloud from the first coming of Penn, in 1681, or 1682, or 1683, down to the period of our revolution, when the proprietary government was terminated, that voice, I say, was listened to and obeyed, as soon as freemen were at liberty to act for themselves. Almost at the very moment when they were liberated from the severe pressure of their revolutionary struggles—in the midst of which the first Constitution was formed—the voice of the freemen of 1790 was the same as the voice of the freemen of 1683, and the voice of the whole body of freemen who had lived in the century which elapsed from the one to the other—with this difference only—that, having got rid of the proprietary government, the freemen were left at liberty to do for themselves that which the crown of England and the proprietary government of Pennsylvania had alike refused to do. That Constitution of 1790 was the exercise of the free-born power of freemen, which would have been exercised a century before, but that oppressive power was arrayed against it, and

prevented its exercise. Therefore, with the small exception of the time which elapsed between 1776 and 1790, during seven years of which the country was engaged in war, with an enemy invading her soil, and the remaining seven years of which were barely sufficient to enable her so far to recover her energies as to frame a deliberate Constitution—with this exception, I say, the freemen of Pennsylvania have always thought that the independent tenure of the judiciary was essential to the enjoyment of freedom, and that one could not exist without the other.

To proceed with this view of the matter. What was it that stood between them and the accomplishment of that which they believed to be beneficial? I answer, arbitrary power. If you have the concurrent testimony for a century (and you have it for more) of the voice of all the freemen of Pennsylvania in favour of this tenure during good behaviour—if you have the testimony of your own Constitution, from 1790 to the present time, speaking in favour of that tenure, what have you against it? The crown of England! The proprietary government of Pennsylvania! The freemen were cheated out of it. The promises made to them were broken. And for what? Why did the crown and the proprietary object? Because limited appointments, or appointments during pleasure, were better for the freemen of Pennsylvania? No. Because it was better for themselves. And are we at this time of day to be called upon to renounce, not only the proofs of our own experience, but the proofs from the testimony which our ancestors have borne for a century, in order that we may re-establish doctrines carried into effect, against their wishes, by the crown of England and the proprietary government of Pennsylvania? Are we, upon their authority, to adopt what they did to support their own power, and to depress the rights of freemen;—making part of that struggle of which you may find the history in a book called a Historical Review of the Constitution of Pennsylvania, said to have been written by Franklin, although I doubt whether he was its author—a perpetual struggle going on between the government and the people? And if the principle was right to be maintained by freemen then, is it wrong now? Gentlemen say that, in a monarchical government, the independence of the judiciary is necessary for the protection of individuals against the power of the crown, but that it is not necessary in a republican commonwealth like ours. On this ground they think they may justify it, in reference to England, as right; but they think it is wrong and unnecessary here. In conceding that it is good for England, and good in the Constitution of the United States, and especially the latter, it strikes me that the whole argument is ceded, or rather conceded away. But, in such discussions as these, I never wish to rest my case upon concession. It is an advantage in argument, but that is all; except as it furnishes the testimony of respectable gentlemen, of good understanding, who have investigated the subject, and

for whom I entertain respect. And if gentlemen who are opposed to us have come to the conclusion that this principle is right in England, and right in the Constitution of the United States, I shall find myself fortified by their concurrence, and shall feel myself justified in drawing my inference accordingly. But, still, I will not put my case on the concession. I will endeavour to do more. I will endeavour to examine the distinction, and to show that there is no ground for it.

Mr Chairman, there are many mistakes in this position; and the first is, in supposing that there is any difference in the government of England and our own, in relation to the character of the changes which are made. It is true that the English monarchy is one of a very extraordinary kind; and amongst its other extraordinary accompaniments is this—that the life or death of the monarch makes no sort of difference.

Mr Reigart here rose, and stated, that as the usual hour of adjournment had arrived, he would, if the floor was yielded for that purpose, move that the Committee rise.

Mr Sergeant said he would yield the floor for that motion; expressing, at the same time, his extreme regret that, after having occupied so much of the time of the Committee, he had not been able to conclude his remarks.

The Committee then rose, reported progress, and obtained leave to sit again. And the Convention adjourned.

Wednesday, Nov. 8, *A.M.*—Mr Sergeant resumed:

Mr Chairman:—I have already stated why this tenure of good behaviour was established. I have said that it was necessary to the construction of an independent judiciary. It is now my purpose to state to the Committee a further, and what I think they will consider a not less decisive recommendation of this tenure; and that is, that, precisely as the principles of free government have advanced, this great principle, in regard to the judiciary, has gone along with them. It has never been seen in operation, but in connexion with free governments; and I think I might say, its growth may always be traced where free principles have been established as their natural and spontaneous production. Where did this great principle originate? In Pennsylvania. Yes, sir, in Pennsylvania, when Pennsylvania was free from the restraint of any power over her, except the power of the proprietor and a slight power in the crown. It was introduced here for the benefit and at the instance of freemen. It was promised to them; it was put on paper for them, and if they had not been cheated out of it, it would have been the law of Pennsylvania for the last century and a-half. I say they were cheated out of that charter which established the tenure of good behaviour; the form of government was, in some way or other, taken from them—they were promised an independent judiciary,

but the promise was never fulfilled. They made their own acts of Assembly to establish it, and these acts were repealed by the royal authority in England, which had control over their Legislature; and thus it continued from the period of the first establishment of freedom in the Province of Pennsylvania, to the time of the formation of the Constitution in 1776, during which time the tenure of the judiciary was either for a short term of years, or during pleasure, and always dependent on the will of the proprietary. In the mean time, this tenure was established in England—when? in the year 1701, but as part and parcel of the revolution of 1688. And what was the revolution of 1688? It was to establish the principles of freedom. How? By getting rid of the oppression which had been practised on the people, by means of an ill-constituted judiciary, which enabled the executive government to disregard the rights of individuals, and to have the law declared by the judges just as they desired it should be declared. We come to more modern times, and again we find, that exactly as free principles have been established just so this tenure of good behaviour in the judiciary has been established, also, as inseparably connected with them. What does Chancellor Kent tells us, in a passage quoted the other day by the gentleman from Franklin county (Mr Chambers)? He says:

"The excellence of this provision has recommended the adoption of it by other nations of Europe. It was incorporated into one of the modern reforms of the Constitution of Sweden, and it was an article in the French Constitution of 1791, and in the French Constitution of 1795, and it is inserted in the constitutional charter of Lewis XVIII. The same stable tenure of the judges is contained in a provision in the Dutch Constitution of 1814, and it is a principle which prevails in most of our state Constitutions, and, in some of them, under modifications more or less extensive and injurious."

Now, sir, continued Mr S., apart from the experience which we have had in our own states, some few of which (principally the new states) still retain the tenure for a term of years, how is the world divided? We have freedom on one side, with an independent judiciary, holding its tenure during good behaviour, and tyranny on the other, with a dependant judiciary. Thus is the world marshalled. The State of Pennsylvania, thank God, to this moment is in the ranks of freedom, and yet bears aloft that standard which is the standard of freedom and free Constitutions throughout the civilized world, with the exceptions I have named, so far as they go. Look at those states where they have no Constitution—where there is despotic power, kingly power without a charter. What do you find? An independent judiciary, holding office by the tenure of good behaviour? Not an instance! Do you find it in the history of England, up to the time of the establishment of the principles of freedom under the revolution

of 1688? No! Tyranny and an independent judiciary cannot coexist. They never did, and they never will. Then look at the converse! Wherever constitutions, and charters, and freedom are to be found, there this principle is to be found also. It is the soul of free Constitutions; they are a dead letter without it. And yet we now propose to deprive ourselves of that form of judiciary which has been established by the wisdom of mankind, as the indispensable safeguard of constitutional liberty, by voluntarily separating ourselves from the great body of those who cherish the principles of freedom throughout the world. Sir, is it not so? Are we, then, going traitorously to join the opposite ranks? Are we going to form this great republican Commonwealth of Pennsylvania into the line of tyranny and oppression? If, with one voice, throughout the whole world, wherever the principles of freedom have been established, and so soon as they have been established, the tenure of good behaviour has been established also, and to this day is deemed essential to their support,—if the first great revolutionary burst in France was accompanied with the cry for an independent judiciary and the tenure of good behaviour,—if under the milder, but far more efficacious revolution in England of 1688, the same principle was asserted and acknowledged,—if Louis XVIII., in the charter for securing the freedom of the people of France, inserted the same provision,—if it was incorporated into the Constitution of Sweden, and if the same principle was acknowledged in the Dutch Constitution of 1814,—if our ancestors have cherished and acted up to it, so far as they were able, from the first moment when they trod the free soil of Pennsylvania: is all this no evidence that the independent tenure of the judiciary is itself the child, and the champion, too, of freedom? What higher authority can you have? Gentlemen talk about Rome and Greece—words which convey no definite idea; for Rome passed through as many changes as any nation under the sun; always, however, distinguished by one great characteristic, which, I trust, will never belong to us—the military spirit of her institutions, overbearing and trampling down every thing else. And as to Greece, there is no definite idea in the word; because the denomination is not confined to one, but embraces several states, all differing from each other; some having one tendency and some another. Would any man be so insane at this time of day as to wish that we should adopt an example like that of Sparta? That we should teach our children that it was a virtue to steal, and that the only crime lay in suffering ourselves to be detected in the theft? Would any parent desire that his children should be taught to lie and to cheat, as well as to steal? And yet this was the fashion of the morals of Sparta; Sparta was a military government. As to the Israelites, whose history has been alluded to, I must be allowed to inquire, is there any man here who does not know that a judge in Israel was not what we, in these days, mean, when we speak of a judge?

What was a judge in Israel? A governor; not a man entrusted merely with the administration of justice, but one comprehending all powers within the scope of his authority. I have not, recently, investigated these historical matters myself; but the latest writer on the subject says, that these judges were a sort of military dictators. We all know what a dictator is, and what a *military* dictator is; and if a judge in Israel was a military dictator, he is not at all the sort of judge that we ought to desire. The governing power among the people of Israel was in the judges for a period of nearly five hundred years. They had their changes. The judges continued, as I have said, nearly five hundred years, and then the people had kings to rule over them for a short time. I do not want a judge in Israel here! There was an attempt made a short time ago to establish a Jewish empire on an island in, or near, the Niagara river, in the state of New York; there was a great assemblage of people congregated together. The person who took the lead declared himself to be a judge in Israel; meaning thereby, I presume, that he was to be the head and supreme authority in this new establishment. I speak not, however, of these things now. I come down to modern times, and I have shown that the principle of an independent judiciary has been adopted wherever free principles have been established. I go further, and state, that it has been continued with them. And I go still further, and say, that just as long as the independence of the judiciary could be maintained, just so long have the principles of free government been maintained—have grown and flourished. And I will go yet one step further, and assert, that wherever there has been a design to overthrow the liberties of the people, to destroy the principles of free government, and to take away from the people their charters, their constitutions and their rights, the first assault has been made on the judiciary. And why? Because, at last, the liberties and rights of the people are under the protection of the judiciary, and you never can destroy those liberties so long as you have an independent judiciary. I defy the most ambitious man in the world—nay, there never has been, and, I do not hesitate to say, that there never will be, an instance in the history of the world, of the destruction of the liberties of the people, so long as they have an independent judiciary, acting fairly up to its character as such. What is it, I would ask, that is at last your resort, if your liberty and rights are in danger? Do you appeal to the Executive? Do you appeal to the Legislature? Do you appeal to the people? No. You appeal to the law, and where is the law to be found but in your courts of justice? Suppose it were the policy of our government to establish the *lettres de cachet* of the old French government, and that a citizen should be taken from his home privately, clandestinely, at any hour of the day or the night, and carried to prison. How is he to be released? A little piece of paper, signed with the name of a

judge, unbars the prison doors, brings forth the prisoner, and gives him a fair, public hearing; and if there is no just cause of complaint against him, restores him to liberty. If his property is taken wrongfully from him, on what must he rely for redress? On the Executive? On the Legislature? No. He must rely on the law; and that law is deposited for him in the courts of justice, and there he may go in the full confidence that he can obtain the relief that is due to him. Suppose his reputation is assailed, or his life menaced, by individuals or otherwise. Nay, suppose the highest functionary in the government oppresses him—where does he go for redress? To the law in the court of justice, whose door is always open to him, and where he is certain of finding a response according to the merits of his case, and not according to any man's will. Can you enslave a people where there is an independent judiciary? Impossible. What is slavery? What is it but to deprive a man of his rights, more or less? Can a man be deprived of his rights where there is an independent judiciary, forming an integral part of the government, and exercising its authority independently of all men? How is it to be accomplished? Who can enslave him? Who can take his property? Who can injure his reputation? No man—high or low—rich or poor—many or few—from the governor down to the humblest individual in your land. And why? Because he finds himself amenable to a court of justice, into which he may be compelled to come, as well as any other man. Can any man be a slave whilst such a state of things exists? No. And hence, as I before stated, from the moment the revolution burst out in France, as appears from the authority of Chancellor Kent;—from the moment our ancestors touched the soil of Pennsylvania, and felt that they ought to be free;—from the moment that the English people were relieved from the dynasty of the Stuarts, which had prostrated the liberties of the people under the deleterious influence of absolute monarchial power;—from the moment that a free charter was to be granted on the approach of freedom, in any state or nation, this condition of an independent judiciary was insisted upon and adopted. I sum it all up in one word, and say, that an independent judiciary *is freedom*. The words are equivalent, and whatever assails an independent judiciary, assails freedom. Do I exaggerate? Instead of dealing in general principles, let every man bring it down to its details, and ask himself what that is in which freedom consists? If he does not find that it begins and ends where I say, then I am egregiously deceived.

But, sir, I would ask, have gentlemen reflected, independently of this positive security, how great a value your independent judiciary has in a more enlarged, though not less efficient point of view? Why is it that our freedom is our principal, or, at least, a serious part of our every day's thought? How is it that it cannot be separated from us,—that it belongs

to us almost as a part of our existence, and that every man, woman, and child in the State of Pennsylvania, lives under the certainty of the enjoyment of freedom? It is by the manifestation of their rights, continually exhibited to them, through the medium of the judiciary. Do they learn any thing of it from the Legislature? Do they learn any thing of it from the Executive—further than as the Legislature and Executive are themselves influenced by the same pure atmosphere in which we all live? Where then, do they learn it? By every day's experience, which teaches a man that this belongs to him—by seeing it extended to every one who stands in need of aid to resist oppression or wrong; until at last it becomes an instinct, a part of his nature—but only to be kept alive by being constantly kept in action.

But, Mr Chairman, an attempt has been made to distinguish between the judiciary under a monarchical government, and the judiciary of a republican government. How can they be distinguished? I answer, by the tenure of good behaviour, and responsibility only upon a fair investigation. And I will show you that there is no other mode in which a judge can be free. Yes, sir, free. Instead of dealing in generals, let us come down to the simple elementary principle of this thing. With the tenure of good behaviour a man is sure of continuing in office, if he does his duty. Some one will say, this is a mere truism. None will contend against it, and all will admit that a man who holds his office by the tenure of good behaviour, is sure of continuing in office if he does his duty, so far as you can make him sure. Is not this an independent judge? Is not this exactly the sort of judge you want? When you come to this plain exhibition of the principle, you there find, so far as human agency can produce it, the very thing you want. But again; without this provision, the judge is not sure of being retained, even if he do his duty. Nay, he is not sure that doing his duty may not actually become the cause of his removal. What is the case to which reference has been made, in the state of New Jersey: I mean the case of Judge Drake. Did not he do his duty? Yes, sir; for he decided according to his conscience and his best judgment;—whether he decided right or wrong, I am not about to judge. I say nothing about it. He did his duty; but notwithstanding he did it, he was turned out of office—he was turned out because he did his duty. Is that man an independent judge, who may be turned out of office, although he does his duty, and even for the very act of doing his duty? Look at his extraordinary condition! Here are two parties in the state, each of them zealous, not to say inflamed, on the subject of their respective rights, and both being sufficiently powerful to have a great influence on an election. And what is the consequence to the judge? Decide as he will, in favour of one party or of the other, he must be turned out of office, if both parties be equally violent and determined.

Yes, sir; and the case of Judge Drake is even stronger than has been stated. He is bound to decide, and if he does not, he ought to be turned out. If he does decide, he is sure to be turned out; for, decide as he will, he must decide against one powerful party, and if that one should be as jealous on the score of its claims as the other, it will use all its power and influence to have him turned out. Well, gentlemen say very coolly (especially the gentleman from Luzerne has said) that the judge has no *right* to his office, and then comes to the conclusion, that this is only the fair operation of a republican principle. Sir, I am aware that no man has a right to his office. I concede that point; and for this reason, that no office is established for the sake of the officer, but for the sake of the people. But the question under discussion is, not whether a judge has a right to be a judge. You want a judge, you must have a judge, and the question which you have to determine is, how will you make a judge who will be able, humanly speaking, to fulfil the duties of that office?

Now, Mr Chairman, if the operation of a principle be, that a man shall be turned out of office for doing his duty, then, I say, it is falsely called a republican principle, and that it is in fact no republican principle at all. Why? Because the answer does not apply to the question. The question is, how shall we make an independent judiciary? and the answer is, no man has a right to his office. This, as an answer, is irrational and absurd. But, sir, let the judge know beforehand, that if he do his duty, he will be turned out; and that to have a chance of retaining his office, he must violate his duty—and what will be the effect on your judiciary? Is it in accordance with a republican principle, so to constitute your judiciary, as that the judge shall have a motive for *not* doing his duty, or for deciding contrary to right and justice—for deciding contrary to the very terms of his oath? Have you, sir, any right to put such a temptation in the way of a fellow citizen to violate his oath, and to tamper with the liberty, the property, and the reputation of individuals in society? Have you a right to keep for ever hanging in the sight of a judge a bait to draw him off from the path of justice, and make him do that which is wrong? What has arbitrary power done? It has given you the bitter fruits of arbitrary principles. And what are the fruits? When the monarch desires the accomplishment of any particular object, no regard is had to the rights of individuals, but the judge is bid to do the will of his master. If he hesitates, he is asked, as Oliver Cromwell once asked a judge, "who made you a judge?" This is the action in an arbitrary government; it is the application of arbitrary and lawless principles—and how can that ever be the operation of a republican principle? It is no republican principle. It is unjust, immoral, sinful and tyrannical, and its offspring must be anti-republican and hideous. Of the distinction

alluded to, between governments, I will speak hereafter, but in the meantime I invite the attention of the Committee again to a simple exposition of the nature of this tenure of a judiciary, and I ask if it is not the most perfect security that can be found in the world—such as Providence has been pleased to make the world—that a man is sure to be continued in office if he do his duty,—and if you give him any other tenure, he is not sure of that, but, on the contrary, is sure that, in certain cases, the very act of doing his duty may be the means of depriving him alike of his office, his character, perhaps his bread. This principle is, itself, based upon another, which I also hold to be sound. Sir, I do not believe in the perfectibility of man. I do not believe that any man who walks the earth, is raised above the ordinary standard of humanity, I mean the moral standard. Kings and princes can be flattered. All who approach them would persuade them that they are giants. I have no faith in such things. Every man who is successful in life, has those around him who will flatter and fool him. He will often become foolish and self-deceived, because he is flattered. Let a man become rich, he will find himself surrounded by toad-eaters; let him become powerful, he will find flatterers. They may make him inflated, but they never will persuade any other mortal man that his powers are above the ordinary capacity of mankind. Such flatteries do nothing but debase his intellect, injure his morals, and make him a worse man than he otherwise would be. So, sir, power in the hands of multitudes will always have flatterers and parasites—these are the demagogues. Whilst I say this, I am not speaking of the effect of religion, and the degree of perfection which may be attained by means of its holy influence; I do not wish to deal with such questions here. But, even religion, although it may change a man in one, and that a most essential point, will not change him in all respects; it will not change the whole character of the man. It leaves human infirmity still clinging to us, and leaves, too, distinguishing infirmities. It does not make all men alike. But, whilst I believe this, I believe that mankind in general are good—probably, as I grow older in the world, I entertain a more favourable opinion of it—and that they will endeavour to do what is right, if there is no temptation to do what is wrong. I speak of mankind in general. There are, undoubtedly, many exceptions, as there are to every general principle. I believe, that a man will tell the truth, if you place before him no motive to say that which is not true. If, then, you want to be assured of the good conduct of men in a given station, you are first to lay down clearly, in what good conduct consists. This you do with your judge, by taking his oath of office to decide according to law and justice. You lay down no such a rule to a member of the Legislature. He has a wide range of discretion. But your judge has but one plain path of duty before him. This is the fairest

thing. What is the next? Take care, as far as you can, that there are no temptations to seduce him from his path. When you have done this, you have accomplished all that man can accomplish. But suppose —weak and fallible as our nature is, and yet good as it is—blended—mixed—imperfect—undergoing trials, for which *we* shall be hereafter judged—with this nature, you throw in the way of a man temptations to wrong. This is the question. If you do so, the history of mankind proves that it cannot be resisted; and proves it further in all governments of all descriptions, from the beginning of the world down to the present time. If the tenure of good behaviour be accompanied by a knowledge of the precise character of the duty to be performed; if it will leave a man free to do his duty, with a certainty that he will be continued in office if he perform it; and if you put in his way nothing to counteract or disturb it, have you not as much security as you possibly can have? Are you content with less? Are you willing to destroy any part of it? Gentlemen have admitted, that in a monarchical government like that of England, the judicial tenure must be an independent tenure, and during good behaviour, and they admit it, also, as to the government of the United States. Sir, I desire to achieve no triumph in any argument which I may urge as such—I want no trophies of victory;—I would persuade, if I could; I would conciliate, if I could. But I am not here to catch at the concessions of any man, with a view to build upon them a triumphant argument for my own cause. I am here to sustain, uphold and defend those principles which I believe to be most conducive to the liberties, interests and the happiness of the people, and not merely to get the better of an antagonist. Therefore, I would sustain them on their own proper grounds, and ask, where is the foundation for this distinction? The government of England has been taken, for example. Now, I venture to say, and I think I shall be able to convince any man who is not already convinced, that an independent judiciary, holding its tenure during good behaviour, is of infinitely more importance in our own government, than it is even in such a monarchical government. If I look to that government, I find that it has one great feature in common with ours: and that is, that there are three branches, intended to be entirely independent of each other. So far, then, the analogy is complete. They have their king—an hereditary monarch. We have a chief magistrate, elected by the people, every three years. They have an aristocracy. We have no such thing. Still, however, their government consists of three branches, intended to be entirely independent of each other. This independence is more important to you, than probably it is under such a government as that of England. How, then, are these three branches to be independent of each other, if one is placed under the power of the other? I care not which of them it may be; but the first principle of a

true republican government being, that its branches are to be kept separate and independent, I desire to know, how that object is to be accomplished, if one branch is placed under the dominion of another? As to the appointment, that must be made in some way; but this once done, no occasion can exist for any further connexion. Is the Executive dependant on the Legislature? No. Is the Legislature dependant on the Executive? No. Is either dependant on the judiciary? No. They are individually amenable to any one to whom they may do wrong, but are they in any manner under the power of the judiciary? Can the judiciary punish or remove them? No. Then, is it not clearly a violation of the free principles of your government to make this branch—the judiciary—dependant on either of the other branches, or upon both of them? And yet, do you not make the judiciary dependant on the other branch of the government, if you give the power of removal without cause, and at the mere will of another? Are you taking away power from the judiciary? I will show you that you are not. You are destroying the independence, not diminishing the power. You leave the whole power, but you corrupt its exercise. On the other hand, you are accumulating power in the hands of that department of the government to which you give this authority to remove the judges. Look at the Executive! The cry which has been heard throughout the state has been against the increase of Executive patronage; that too much power has been allowed to lodge in the hands of the governor! And what are we about to do? To increase it to an infinite extent. How? by placing within his reach the control of another department—that is to say, the judiciary—thus doing the double mischief, of increasing executive patronage, and placing one branch of the government under the power of another. I speak of this matter practically; I care little about theory. And I will put to you the case of a judge whose commission is about to expire within a month—nay, within a year, or within two or three years. Upon whom is he dependant for reappointment, according to this extraordinary plan? Upon the governor! And how is he dependent upon the governor? Is he to come before the governor, as before a tribunal, to have his conduct investigated, in order that it may be ascertained whether he has done his duty or not? Not at all. Is there to be any inquiry whether he is a man fit or unfit for his office? Not at all. No reasons are to be given *Sic volo! sic jubeo!* says the governor, and then you know the result;—"my will," stands in the place of the law. Sir, is it not ridiculous—I speak with perfect respect to every gentleman who hears me—but is it not absurd and ridiculous, a downright mockery, to say, that there is any independence in this? Sir, the judge—if he be no better than mortal man—driven to desperation by the circumstances which surround him, is much in danger of becoming reckless; of forgetting his duty—of disregarding his duty—of suppressing

the voice of his conscience—and of converting himself into the mere instrument of that power which is nearest to him, and which can either make or destroy him by the single expression of its will. I say, sir, he is in danger. I do not mean to say that he will, or he will not, do this. But I say that, in such a state of things, it is the *will* of the governor, and not the *conduct* of the judge, which is to decide. Is this an independent judge? What do you mean by an independent judge? I mean a man who is sure to be continued in office if he does his duty. But is there any such meaning here? No. It makes no difference whether the judge has done his duty or not—if the governor choose to displace him, he will be displaced. And whom will he appoint in his stead? I do not know who the individual may be, but, according to the course of government, I believe I can say of what political party he will be. This is undoubtedly a very great evil.

But, Mr Chairman, let us examine this matter a little more closely, and let us see whether we are not entirely mistaken in this point. It will be found that, in this respect, the analogy between our government and the government of Great Britain is far greater than gentlemen seem to imagine. What is it which works a change of government in England? The change of the ministry, not the change of the king. And how is a change of ministry wrought? By a change in the House of Commons. And how is a change in the House of Commons brought about? By the people —who have a right to vote—more extensively and more powerfully since the late reform in Parliament. In modern times it makes little difference who is the king, unless he should chance to be a man of very decided character, or of vast popularity. What have we seen within a few short years? George IV. dies, and is succeeded by William IV., the Sailor King, as he was commonly designated. William IV. dies, and is succeeded by a young lady of eighteen years of age—a soldier's daughter. The ministers still go on with the government, and the same ministers who held office under William IV. continue to administer the government under the reign of Queen Victoria. The movement of the government is the same. It is true, then, that in the British government, as in our own, the change in the government is a popular change, made by the influence of the popular voice in the election of members to Parliament—it being fixed, as a principle of that government, that when the ministers are no longer able to command a majority in the House of Commons, they are unfit to conduct the government. They must go out, and thus the change in the government is effected.

Now, in this point of view, the change of the judiciary in England ought to be placed on the same basis as the change here; because a change in the government of England belongs to the popular part of the Constitution in England, and if the judiciary is to be of the character of the go-

vernment, it ought to be as much so there as here. It ought equally to follow the popular movement.

But why is independence admitted to be necessary in a monarchical government? Because all history tells us that, if the monarch has power over the judge, he bends the judge to his own will, and is not satisfied with the just execution of the law. Sir, this is true. Be it so. Then, is it not most obvious that the argument applies, *a fortiori*, to a republican government; and for this plain reason, that the influence of sovereignty in a republic is more pervading, more searching, and more able, as well as more disposed to act against individual rights, than it is in a monarchy? What can a monarch do, or what is he inclined to do? He can employ his judges to legalize unconstitutional acts; to take away charters—to bring about illegal condemnations of men, as in the case of Sydney, which has been already brought to the notice of this Committee. There, his power and his inclination terminate. But what can your sovereignty in this country do—speaking practically, and not theoretically? In whom does it reside? In the whole people of the commonwealth; but remember, it is in very different proportions. Look at it as a matter of fact. Examine it closely, and in detail, not in vague generalities. I say, and every one must know, that this sovereignty, thus belonging to all, is actually divided among them in very unequal portions. One man may have a share equal to a thousand, such being the extent of his popular influence. Another man, in the same section of country, has a share but as one. These two men constitute parts of the sovereignty of the country—although there is this prodigious inequality between them. One man, therefore, if the popular sovereignty is to avail, would have power over the judge to the extent of one thousand—and the other only to the extent of one. Suppose, then, that a controversy should take place between these two persons. Here is a man having the influence of one thousand, holding out all the menaces and all the blandishments within his power to turn the judge aside from his duty. Is not this exactly what has occurred in reference to the magistrates in the state of Ohio, who are elected for a term of years? One man says to the judge, if you do not behave yourself, if you do not decide this case as I wish it should be decided, I will make a popular appeal against you—I will set the people against you. Suppose the governor himself to be a party. Will he not be likely to succeed? Sir, is not this kind of influence to be as much avoided as the more direct influence of the monarch? But it does not rest here. In a monarchical government the judge has a support against the influence which is most likely to beset him, in the opinion of the people, which every where weighs for something, and which, in a free monarchy, weighs for a great deal. There the judge, when he resists the monarch, falls back upon the opinion of the people, and if they cannot retain him in his office, they will, at least, award him their esteem, and will find

means to testify their respect for his love of popular rights when invaded by the crown. But, sir, where is the judge to meet with support in a popular government like ours, where public opinion and the whole sovereignty of the people run in one channel—generally, I grant, mildly, equably, peaceably; but, at times, violently and irresistibly? Where shall he go for protection, if this current shall turn against him? In England there is a continual struggle between the crown and the popular part of the government—or between the aristocracy and the popular part of the government; and he who offends one, is sure of support from the other. But here, he who offends, has no protection, no support, except that which he may derive from a minority of the people, and *that* cannot help him. It is, therefore, more necessary that a judge here, in order properly to perform his duties, should be independent, to the extent of the tenure during good behaviour, than it is in a monarchical government like that of England.

I have said, Mr Chairman, that, in general, men will do that which is right, where there is no temptation placed before them to do wrong. Your legislation has carefully sought to remove temptation from the judge. Look at your statute book. It has incorporated this principle into its enactments with the most minute and scrupulous caution. What is the first principle laid down in regard to him? He shall not be a judge in his own cause. It is said, and truly said, to be contrary to common justice to allow him to be his own judge. What is next provided? That he shall not be a judge in any case in which his relatives are interested or engaged. And, again, that he shall not be judge in any case in which he has been counsel on either side—but that some other judge, not exposed to such temptation as the law supposes here to exist, shall try the cause. And why? Because the judge must not have this temptation before him. Sir, is it not as easy to appeal to the nature of man, and to say that if he is just he will decide, even although the decision be against himself or against his relatives—that if he is just, he will forget every other consideration, and that he will take no counsel of his wishes or his impressions; is it not just as easy, and quite as true, to say this, as it is to say that a man will stare beggary and degradation in the face, and that he will expose himself to a sort of infamy (if I may be allowed the expression) in relation to his judicial character? Is it not more likely that he will yield in the latter case than the former ones? In all the cases enumerated, you have prevented the judge from deciding, that he may not be exposed to temptation; and yet it is now proposed to place in the Constitution a much stronger temptation, arising from his dependance on the mere will of man. It appears to me that the case is too plain to admit of any question.

But again; I believe that, in the constitution of a judiciary, the mere fact, that when a man receives his appointment, he is separated, as it were

for life from all the concerns of this world, and is to be devoted to the service in the temple of justice, will have a powerful influence upon the judge, as well as a salutary influence on the people. But, sir, I do not call this a life office. This phrase, I am aware, implies something reproachful to the judiciary, and it is for this cause alone that I do not call the office by that name. But it is a serious thing to make a man feel that, if he conducts himself properly in his office, this is the last step between him and the grave—that this is the last step between him and where he, after all his judging, shall himself be judged—that here is all which he can hope for, or which life can probably give him. Such convictions must exercise a benign influence not only on the man himself, but upon all those who are concerned in the administration of public justice. They see the judge set apart, for the performance of duties, than which none can be more sacred—they see him devoted to that which is probably to constitute his occupation for the remainder of his sojourn on earth—they see him raised above the sordid excitement, irritation and strife, producing injustice and enmity, which every where surround him; and they behold him placed where, in serenity and calmness, he is as a man who has almost passed away from this life, into a sphere where he can look upon others with an impartial eye, and can decide between them uninfluenced and unawed. It cannot be otherwise; and, with some exceptions, the fact is so. And here let me say, Mr Chairman, that I disapprove, as much as any man, of the conduct of those judges who enter into the strife and conflict of political parties. The judge who does this, in the point of view in which I am now speaking of him, injures his character to that extent. How this abuse is to be corrected, I have already mentioned. But, sir, is there not something in this too—that you give the judge employment for his whole life, which, whilst it makes him independent of the will of others, makes him at the same time consider more carefully what that life is to be, when he finds that it is all concentred in a single point. The principle of independence in its whole extent is, that a judge is to be no man's slave. And here, I would ask, to what, according to the plan now proposed to us, is a judge to appeal? Is a judge the only solitary being in our whole country who is to have no appeal from the injustice and wrong which may be done him? Under the existing Constitution of our state, he may be heard by the Legislature, in case of complaint, and by the Senate, in case of impeachment. But, according to the theory here presented to us, where is he to be heard? By whom is he to be heard? I cannot conceive of a man being reduced to a state of degradation greater than that proposed to be brought upon him by engrafting such a provision as this in the Constitution of Pennsylvania.

Now, sir, it is supposed—and this, coupled with the principle laid down by Miss Martineau, to which I have before referred, seems to constitute

the great objection to the tenure of good behaviour—that the independence of the judge is power. Sir, if it be power that is given, and power that is unnecessarily given to the judge, I shall readily agree that it ought to be taken away; for no power should be unnecessarily given to any one. But independence is *not* power—neither is independence given to the judge so given for the sake of the judge—the power is in the functions he has to perform, and that power being given to the judge, the independence is given for your sake and for mine. It is given in order that, in the exercise of that power (if so his duty may be called), the judge may do right, and that he may have no inducement to do wrong. It is given to secure to us the exercise of his judgment—and not the judgment or the will of others. It is not given that the judge may be continued in his office for life; it is not given that he may set at defiance that popular opinion which he must sometimes necessarily defy; it is not given that he may set right and justice at defiance. It is not given for the judge. It is given for the people—it is given for the citizen—it is given for him whose cause is to be decided by the judge—not exactly as a restraint upon the power of the judge, but as a security against that power being turned aside from its legitimate channel by improper bias. Let us return for a moment to the very case I have mentioned, where two suitors are engaged in a controversy—one of whom has political influence to the amount of one thousand, and the other only of one. What is the independence of the judge given for in such a case as this? And here it ought to be remarked that, from the very nature of our government, and from the division of sovereignty among the people, it reaches to every case, however private it may be. Every suitor is a part of the sovereign. But in the case which I mention—of the influence of one thousand against one—what is the independence of the judge given for? It is given to enable him to protect the one against the thousand—that the one may neutralize the power of the thousand; that the political influence of the thousand, in other words, may be thrown out of the scale, and that judgment may be given according to right and justice. It is not, I repeat, the power of the judge; this is proved in England, it is proved here—it is proved wherever a judiciary exists. How does the judge stand under the existing Constitution? He is amenable to the law, and he is therefore, in this respect, placed on the same footing with every every other citizen. And what is that you wish to make him amenable to? The will of man. That is what the citizen should not be amenable to, and what the Constitution of this Commonwealth declares he shall not be amenable to. Well, sir, in making a judge amenable to *any will*, no matter whose, instead of making him amenable to the law alone, what do you put into the power of that will? Not the judge—but the right of the suitor; so that, in the person of the judge, you violate the first principle of the Constitution, which declares that no man shall be subject to the will

of another, but that all men shall be subject to the law. At the present time a judge is amenable to the law in the shape of impeachment, by means of which he may be removed from office if he has committed a misdemeanor. If he has been guilty of any misbehaviour, or of conduct which renders him useless in his office, he may be removed by address. This, sir, is true; and so far the provision in the Constitution meets the case. Two-thirds of the Legislature can remove any judge in Pennsylvania, but they will not remove him without cause and without a hearing. Are you not satisfied with this? If so, what would you have? Do you desire to have the opposite of that Constitution which says that the judge is amenable to the law, that he is amenable to the Legislature; do you wish so to fashion your Constitution as to say, that he shall be removed without law, without an appeal to the Legislature, and without a hearing? This, sir, I admit, is the result of what is now aimed at; but I ask those who maintain this doctrine of limited tenure, whether they are willing, as a principle, to adopt it, and to say that, whereas the Constitution, in its present form, makes a judge amenable to the law—amenable to the Legislature—provides that for any reasonable cause, which shall not be sufficient ground of impeachment, the governor, on the address of two-thirds of the Legislature, may remove him, and that he shall be liable to impeachment for misdemeanor in office; they are not content with this—they demand a Constitution under which he shall be removed without law, without appeal to the Legislature, and without hearing. Put such a provision into the Constitution in terms, and let me see the man who can read that as a free Constitution. No, sir;—the Constitution of Pennsylvania is safe and right in its principle, and as to any failures which have been alluded to here, the Constitution is adequate to redress them all. If there be a failure, the failure is not owing to the Constitution. It is owing to the appointing power in making bad appointments—or to the removing power, that is, the Legislature, in refusing, on proper occasions of address, to remove an unworthy incumbent.

By taking away the tenure of good behaviour, will you correct the appointing power? Will its exercise be better? No, sir, it will be worse—because, by so doing, you degrade the official character of a judge, and less attention will be paid to the selection of those to be appointed. Will you correct the removing power? Just the reverse; because, the answer in every case will be, it is not worth while to remove him—his time will soon be out, and, in the meantime, let the people have such justice as he will give to them. Instead, then, of creating a motive for greater vigilance in the appointing and removing powers, you do exactly the opposite, and at the same time you destroy the cardinal quality of the judiciary, by destroying the independence of the judge. If I were to admit that the appointing power was not properly exercised, and not

safely exercised, it would furnish no argument. The answer would be, that the governor must do better, and that the Legislature must act otherwise.

But, sir, how do we know that the Legislature has failed, or that the governor has failed, in the discharge of their duty. It is to be presumed, *primâ facie*, that they have not; but every member of the Convention has his own view of every case that has arisen. He presents it, believing it to be correct, and upon that he founds his opinion. But, can we form any adequate opinion of any given case, when we have no particulars of it, when there has been no hearing—no examination? And are we to declare, on each case, that the Legislature has done wrong, in not removing—and are we finally to pronounce a wholesale condemnation on the judiciary, because of this assumed, but unproved failure? Sir, I will venture to say, that the Legislature has not failed. I say this, because, I feel confident that the Legislature, in the main, have done right. I do not think that, in every case, where the Legislature has been applied to, they have removed the judge—nor even in every case where a judge has been impeached, that they have convicted him; nor do I think that this is a necessary test of the efficiency of the Constitution, that every man complained of should be removed, or, that every man impeached should be convicted. Does any man ever hear it said, that a criminal court is good for nothing, because it does not convict every man who is brought before it? Sir, I had thought that all tribunals, and especially the criminal tribunals, were for the purpose, not of condemnation, but of trial—and of condemnation only if guilty. The Legislature, when it is acting in reference to an address—and the Senate, when it is acting on an impeachment, are both performing a kind of judicial duty—in a criminal matter—exercising judgment in a sort of criminal case—and their duty is not to condemn, because complaint is made, but to condemn in case there is proof of guilt. I suppose that the Legislature has condemned in case of guilt, and acquitted where the party has proved innocent. Would any man go further, and require condemnation, even if innocence is proved? Try this with your other criminal courts, and see where it will end. But I need not comment further on this point. It is too plain. The duty to acquit the innocent, is not less than to condemn the guilty.

Having spoken, Mr Chairman, in reference to the general government, and the character and efficiency of its judiciary, I beg leave to state, in reply to another branch of the argument, that the Commonwealth's judiciary—the judiciary of Pennsylvania—is a more important judiciary, in relation to the individual rights of our own citizens, than the judiciary of the United States. There is not one in ten thousand who feels the influence of the judiciary of the United States. It is occasionally, though very rarely, that the exercise of its functions is felt; it has very little to

do with the individual rights of the citizens of Pennsylvania. It is only in the instances where they have controversies with aliens or with citizens of another state, or where a state law is carried up to the Supreme Court of the United States, for the purpose of testing its constitutionality, that they know any thing at all of the judiciary of the United States. But it is your state judiciary—in its aggregate, I mean—your justices of the peace —your president judges—your associate judges—and the judges of your Supreme Court—all these are of daily consequence; operating, as they do, upon the security of every citizen of Pennsylvania, and acting upon it every moment, efficiently and powerfully, even where not felt—presiding at all times over our peace and security.

It is there that his rights might be in danger; and it is precisely there, because it belongs to his daily life, that it is most important to him that all the security which can be given should be provided for. He would say, without hesitation, that the citizens of Pennsylvania could get along perfectly well, in all probability, through life, without even knowing of the existence of a federal tribunal. But it was not so as to the courts of the state. He would not take up much more of the time of the Committee—for he had already detained them too long.

There was a great deal to be said, and perhaps it might be right on another occasion to say more—but he had already trespassed too long, and would limit what he had further to say to a very few words.

It was admitted, he presumed, that the judge was to uphold justice against every assailant. He ought to be strong enough to do so, else justice must be beaten down. Consider, then, what it is that the judge has to contend for, and what it is that he has to contend against? He has to contend for the law, not in the abstract, because every man looking at it in that way, will admit that it must be upheld. But the judge was to uphold it in its application to individual cases, where, as sure as the law was in favour of the one, it was against the other; and where, as sure as it decided in favour of the one, it disappointed the other. The judge had to stand between the two eager and excited combatants; when he had made his award in favour of the one, that one did not thank him, and ought not, because he has only obtained his right. The other, always dissatisfied with the decision, often embittered. That was not all he had to contend against. He had to contend with the members of an eager, active, ardent, zealous profession, who frequently entered deeply, feelingly, into the cause of their clients, and who were liable to the same perversion of judgment as the client himself, and were apt to persuade themselves that the judge who decided against them was therefore wrong. If heated, they were apt also to suspect that there was some false motive, some undue bias at the bottom, which led to the decision. And if the judge, in a moment of irritation, happened to let a single sharp word escape him, though naturally

provoked by offence, he perhaps made a permanent enemy—inflicted a wound which time could not heal.

Yes, the very best men at the bar are liable to such excitements. He (Mr S.) had never been on the bench. He never should be. His feelings were all on the side of the honourable profession he had so long been connected with. But he must say that the members of the bar were like other men, and were subject to these influences. Sometimes they were hard to please or manage. The judge had to contend against them too. He had still further to contend against the popular judgment and the popular will. Does any one deny this? Will not every man at once admit its truth? He was sure that no member of this body would differ from him when he said, that if a cause should arise in which the popular will and opinion were arrayed in opposition to the demands of justice—however plain in their manifestation—however forcible in their expression—the judge was not to conform his judgment to that will—he was not to place the law at the feet of popular opinion. He was to disregard it—if necessary, to defy it. Was it not his duty to decide according to the dictates of his conscience and judgment, in defiance of all considerations whatever? Though the whole people should rush to the court-house, and with acclamation should declare that he must pronounce in favour of one of the parties, whom they named—though they filled the court-house, as in New York, and evinced the feeling so shamefully exhibited there. Could it be said that the judge could justify himself in the sight of God, and of his fellow-beings, if he yielded to popular clamour, and thereby sacrificed the liberty, the property, or the life of an individual? Suppose that the whole people of Pennsylvania, knowing nothing of the case, should determine that an accused must be convicted and executed. He (Mr S.) would ask, if gentlemen meant to say that, in that case, the judge should bow to the will of the people—to popular opinion, and, without law, and against justice, sentence an unfortunate fellow creature to the gallows? Those who had been in the habit of attending courts, and had seen the popular will as it was sometimes exhibited there, could duly appreciate the feelings which a judge had to contend against. He himself had seen much disappointment exhibited amongst a large number of people, because a man was not convicted of murder in the first degree, and sentenced to the gallows. Was the judge in that case to yield? Every one would say—"No." Then, he had to contend against popular opinion; he had to struggle against the popular will. He was bound in duty to disregard and to defy it. And how could he discharge this solemn duty if he were made subject to the popular will?

Mr Chairman, he said, in conclusion, I cannot express to you my feeling of the deep importance of this question, in all its aspects, but especially that which I have last touched upon. I hope every member of the

Convention will earnestly dwell upon it—will carry it out into all its realities—and, in coming to a conclusion, will purify his mind from all considerations that do not belong to the question. So sacred and so important do I hold the right to an independent judiciary and fair administration of justice to be, that there is scarcely any thing I would not yield, rather than go home with the slightest apprehension, that any human being should be tried for his life, his liberty, his property, or his reputation, by popular clamour or the popular will.

NOTE.

During the discussion the Constitution of Michigan was frequently referred to, as an example of limited tenure. The day that this speech was concluded, there appeared in the papers the following report of a case in that state, which shows something of the working of her judiciary, and is therefore here inserted :—

"*A Court in Michigan.*—The papers give an account of a very strange proceeding in a late trial before a court in Pontiac, Michigan. Benjamin Irish had sued George W. Wisner for the recovery of a bet made upon the result of the election. Among other witnesses in favour of the plaintiff was Samuel N. Gantt, editor of the administration paper in Pontiac, and a candidate for the state legislature. Being asked by the defendant whether he was interested in the event of the suit, he replied that he had promised the plaintiff to help him to pay the expenses of the suit—had also promised to help five others to tar and feather the defendant, and carry him out of the village—knew the ballot-box had been robbed, and he did not care who said it had'nt.

The defendant objected to receive Gantt's evidence, and commenced making remarks to the court in support of the objections. Gantt rose, drew up his chair, and said: "If he (meaning Mr Wisner) says any thing that insinuates against me, by —— I'll knock him down."

The defendant to the court:—"I do not intend to insinuate any thing against any body. I only wish to show the court the impropriety of receiving Mr Gantt's testimony, and I trust the court will protect me. It is a strange state of things, indeed, if I must be openly assaulted with a chair in a court of justice." [The defendant recommenced his remarks, and Gantt again rose, drew his chair, and swore he would knock him down if he insinuated any thing against him.]

The defendant to the court:—"Will the court protect me by ordering an officer to take the fellow in custody?"

Esquire Henderson:—"No, I shan't" [winking to Gantt].

The defendant to the court:—"Very good, sir, then I shall protect myself."

Here the defendant drew from his pocket a pair of small pistols, cocked them, held one in each hand, and proceeded with his remarks to the court. Gantt turned pale, and his lips quivered; he dropped his chair, and retreated to the back part of the court-room. Esquire Henderson then said that

the further consideration of the objection would be postponed at that time, upon which the defendant coolly replaced his pistols in his pocket, and took his seat.

The case was at last committed to the jury, who could not agree; and Mr Justice Henderson is accused of having *forged a verdict* in favour of the plaintiff. On this accusation he has been arrested."

THE END.