Supplement to the American.

SATURDAY, FEBRUARY 12, 1814.

FROM THE BALTIMORE PATRIOT.

OF JAMES L. DONALDSON, ESQUIRE,

HOUSE OF DELEGATES OF MARYLAND, ON THE SUBJECT OF THE

ALLEGANY ELECTION.

MR. SPEAKER,

N discussing this most momentous question, it is not only my desire to divest myself of party feelings, but to conduct myself in such a manner, in the observations which I shall offer to the House, as to satisfy them that I regard it as a naked question of law and right, unmoved by popular sympathy or public excitement. I should be pleased to express a just expectation, that those who on the other side of the question, will contribute their views and opinions as to a common stock of information, would, in imitation of the gentleman from Worcester, (Mr. Wilson) strip this matter of all political irritation, & consider it not as a great cause, set down to be argued, wherein federalism is plaintiff and democracy defendant, but as a cold question of right, involving the deepest interests of society, affecting the first principles of a free government, and of vital moment to the latest posterity. Such is the question you have now to decide upon-a question in which moderation and justice should be the sole umpires, and in the decision of which, no party feelings should have the slightest influence. The really wise, the temperate and reflecting men of our state, look on with anxiety at this great contest, as the test of principle, as the touchstone of popular government; and most highly honorable will it be for the majority of this house, if your decision on this occasion shall meet their concurrent suffrages. The gratification of a party object, when weighed in the scale with the law of the land and with legislative duty, is surely in the eye of reason lighter than the dust of the balance; for the triumph of principle and duty over prejudice and interest is immortal, while in the very act of sacrifice, when these high considerations are made tributary to party, even then in the moment of success, retributive justice does her duty, and gives a foretaste of that bitter disappointment, which inevitably pursues and lashes the offender. So may it ever be; that the justice of Heaven may link itself with the integrity of man, that he may be ever sensible that to be just is his best interest, and to be unjust and to be unhappy is the same.

But, sir, I entertain better hopes of this state, than would be anticipated from this exhortation. All the fears, which those who have said that party spirit in the majority of this body is stronger inaccessible to the storms of party.

If this be the spirit, in which the questions now submitted are to be regarded; if gentlemen discarding all considerations but those which grow out of the constitution and the law, and resolved to establish a precedent, by which they would be willing to be bound themselves; will be governed in their decision solely by these considerations, which, would I could flatter myself was the case, then indeed would our task this day be light and pleasant; then as mere abstract questions might all the bearings of this subject be candidly discussed, the objections fairly weighed, the fair intent of the law entirely gratified, and from the whole discussion the cause of truth and justice must prevail. But if, as I fear there is too much reason to believe is the case, gentlemen who have to pass upon this great question, have brought with them into this discussion, an angry spirit of predetermination, to which and from which there is no appeal; which in spite of reason, of law and the constitution, is determined at all events to achieve a certain political purpose, and to the people.

issue, it shall not be charged upon those, who have ever presented themselves as the guardians of the rights of the people, that upon this great occasion they have been unfaithful to their trust.

Before I enter at large into the discussion of the questions, which the report of the committee of elections presents to our consideration, I would beg leave to deprecate an impression on this subject, which may be entertained by some, but which I only mention here, because some out of doors, more zealous than judicious, have been hardy enough to countenance it. It is, that the majority of this would be adviseable to use on common occasions; and that with a wishes of their constituents, may adopt a rule not universal in its application, nor what would be at all times practised, in order to attain what they may deem a great public benefit. Even while stating such a proposition, I am sensible that there is not a heart or a head in this Assembly, which can assent to, or dares to advance so monstrous a proposition. No, sir. Justice is universal in her maxims; immutable in her principles; and her chief characteristics are her unalterable sameness and equality. To do even a slight wrong, in order to achieve a benefit, can enter into no morality, which can be tolerated on this floor; and as you establish principles now, must you be content that they should ever be hereafter established, invariable and immutable. For, it is not whether it would be expedient to give a construction to a law here, which it might be inexpedient to establish in other cases, for that would be to say, you are to make the law, and not expound it; but here you are bound by every the most solemn obligation, to apply the rule as you would in a case where the political feelings of a majority of the House were in direct opposition to what they are now; that is, with a sole eye to the constitution, and the just construction of the act of Assembly of 1805. And I do contend, that under that constitution, the right of the citizens of this state to their vote, stands upon as firm a footing, in point of law, as that of any gentleman of this floor to his estate; and that you have no more power or right to shake the right of the citizen to his vote, than you have to deprive him of his freedom or his inheritance. This must be universally admitted; all vague, incoherent notions of the absolute power of this house over elections of members of this body, must be discarded in this discussion; and if I did not know the irresistible proneness of the human mind to lay claim to absolute authority, in matters wherein prejudice and interest can be so gratified, I would not even have glanced at the topic.

Ne, sir, it is not in a common case of doubt and difficulty, on which this House is to pass judgment; it is upon a stern and inflexible principle of justice, applicable to every case, and mixing itself inseparably with every other branch of your law, with which it is connected, that you are now called upon to decide. It is not a fleeting and inconstant vapor, raised from putrefaction, changing its form every instant, which seduces its unwary followers into pit-falls and quagmires, which is now to be our guide; but it is the steady light of fixed principle, which burns ever clear and unquenchable, which now invites us on our way.

And let it not be thought, sir, that this is a mere question between the voters of Holtzman's District and this House, whether their right of suffrage has been secured by all the solemnities, which the law enjoins upon the judges, and for any neglect in which, these voters alone are to be sufferers—this is not a true view of the question; it is as important to every voter in the state, as to those of Holtzman's District. Them the decision of this House may affect by a more immediate injury, if hostile to their rights; but upon all, in turn, may the sentence equally fall; and those who are now pluming themselves, in their short-sighted wisdom, on their security, may be forced, in their turn, to drain, to the bitter dregs, that cup of poison, which they now, unhesitatingly, present to others. For let it once be established, that this law, like a law imposing a penalty, shall be held subject to so strict a construction, that the slightest trip, or minutest error, in which the voters bore no participation, and could not avert, shall be fatal to the right of suffrage, and who can say where the mischief of the principle may next alight? If report speak true, there may be some gentlemen here present, who may tremble for their seats, should these monstrous doctrines be upheld, that a slip, in mere matter of formality, by a judge or clerk of election, will render void such election; and who, cock-sure as they are, may be compelled, unless glaringly inconsistent, upon principles now advocated, to return to the people for a new commission. Are you prepared to mete out to others, as you will not to yourselves; and will you give the strictest construction of this law to your political adversaries, while you conveniently retain the loosest and most advantageous construction of it for yourselves? Can you doubt, what kind of construction of this law the interests of the people call for? That a strict construction will turn this law into an engine of destruction of their rights, making those very provisions most baneful to their interests, which were intended most effectually to secure and protect them? This, then, sir, is not a question between the voters of Holtzman's District and this House; it is a question, upon the decision of which, rest the rights of all the freemen of this state; for as you decide it, so shall the right of suffrage be a substantial blessing to the people, or the mere shadow of a shade; the sport of the capricious will of the very minions of the law.

The great principle, for which I am about to contend, is, that than the constitution and the sense of justice, have entertained, may | although it may have been conducted informally; the law inclines be unjust; and it may be found, that although we are unfor- in favor of the election, that is, of the people. When the voters are tunately divided into political sects, and differ widely on the sub- not in fault, when in the exercise of their right of suffrage, they jects of foreign and domestic policy, yet in all questions on which have done all which the law exacts from them; when, as far as the the rights of the people call for protection, and the freedom of elec- voters had the control, no other result could have been obtained, and tion in particular, the great constitutional guard of those rights, is the people might have been considered as waving the right of sufmenaced with extinction, that there is an inherent principle of gra- frage, if they, from an apprehension of irregularity, had not insisted vitation of attraction to a common centre, that is, to the common in- upon their rights; the law will not imply or permit a forfeiture of terests of all-which few can resist; which in spite of jealousy, of | suffrage, but upholds the act done by the voters, although those who political enmity, of long-harbored resentments, secures to principle | held the election, may have acted irregularly. This, I take, as my a triumph, and fences in popular right, secured on a rock of safety, | main position, and I intreat the House never to lose sight of it; and I know of no case, either in England or in any Legislative Body in this country, which in the slightest degree, weakens this first great principle of election law. On the contrary, as I shall endeavor to shew; they all mainly support and maintain the position; as I purpose to prove, as well from the act of 1805 itself, from British and American precedents, and from the unquestionable construction, which the common law puts upon the act in question, as from the common law itself.

Now sir, what is the objection here urged from the other side of the House, to the election held in Holtzman's district? Not that the voters have committed an error; not that they have failed in taking the steps necessary to the security of the right of suffrage, according to the constitution; but that one judge of election out of three, whether through design or accident, had the oath administered to him by a judge, and not a clerk of election. It is admitted, that the other judges and the clerks, were duly qualified. Here is the whole case, and upon this trifling, silly, minute matter is it conto carry a point, even if in so doing they tread on the prostrate body | tended that the right of suffrage of the voters of a populous district of of our constitution; then although all efforts to move such a spirit, a county of this state, is to depend! Now, sir, where is the passage even if the light of Heaven should descend upon us, and an angel of the act of 1805, which either declares, or in any manner implies, that should speak as from above, would be in vain; still are not those ef- | this non-qualification of a judge, in the mode pointed out, shall render forts the less due to a sense of duty, to one's own consciousness, and | illegal, the votes taken under such circumstances? but, on the contrary, when we consider the words, spirit and manifest intention of The sacred cause shall not be deserted, although not defended this act, how immaterial in the eye of that act, must appear the alwith the force, to which it is entitled; and whatever may be the leged irregularity? What is the only intent of the law? That elections shall be held fairly, and shall be held at all events. How multiplied are its provisions with this view only? The act provides, that two judges may hold the election in the absence of the third, one in the absence of the two-nay, that the people might appoint judges of election for that time, if the regular judges failed to attend, imposing a penalty of fifty dollars on each judge, for non-attendance -Now, according to the doctrine contended for, on the other side, which is the greater evil; non-attendance in a judge, or non-qualification in the mode which this act directs; certainly, non-qualifica-House, as representating a majority of this state, in representation, tion, as that altogether vitiates an election held in a district, while but not in numbers, will be justified in applying, upon this occasion, | the law enables the people to cure the inconveniencies, by their own a stricter rule of construction to the election law of the state, than act, of non-attendance. Then, you at once charge this statute, with the folly of imposing a penalty of fifty dollars, for an omission in a view to the state of parties, the majority, in order to effectuate the judge to do an act, without which an election can be held; and of considering as harmless an omision to do that, without which an election cannot be held. The lesser evil is heavily and effectually punished, while the greater and most enormous mischief is not even glanced at. In the construction of a statute, the argument ex absura Legislative Body, so to construe the acts of their predecessors, as to avoid that conclusion to absurdity, which it would be highly indecorous for any inferior tribunal, to attempt to deduce from any act of the Legislature, which they are bound to respect and enforce, according to its intent. It could not have been the intention of this act, that the non-qualification of a single judge, should render an election void in his district, or it would have imposed a penalty on | disposition to do justice to the voter. the omission. As far as the law, with a view to the certain holding of an honest election, could communicate power to the people, to cor- | in directing a judge of elections to take an oath at all? Is it not to rect their omission, neglect, or mal-practice, so far the law has given | secure and guarantee, as far as this sanction will secure it, the puthe people power. Here the law stops; having shwen its manifest in- | rity of elections, and to warrant the faithful exercise by the judge. tention that an election shall, at all events be held, committing the of the power and duties he is required to discharge? This is the security of the people in those other particulars, wherein a control only sensible meaning of such a provision. How, sir, can any could not by any possibility be communicated to them, to the solemn | gentleman believe that the real object of the law has not been comconstitutional guarantee of this right, to the manifest intention of pletely attained in this election? That this judge did not act (adthe law; and to the obvious maxim of common justice, that what | mitting that he can be said to have acted in the legal sense of the the voter could not prevent, shall not be set up to his prejudice.

But, sir, when we come to look a little more narrowly into this matter, it will be found, that with respect to this bug bear, as to the mode of administering the oath to the judge; the difficulty vanishes when we consider similar cases, where provisions equally peremptory -even in your constitution, have been considered to be merely di- law, solely intended to produce a pure expression of the public will rectory and not conclusory, a distinction well known to the common | in elections, be made to produce an impure result; that is, to effect law. The oath I contend, is the substance, the person before whom I a return of members to this house not elected by a majority? Mon-

alone, it would appear that a judge of election ought to be more entrusted with the administration of the oath, than the clerk, who is altogether ministerial, and inferior in the trust committed to him.

Suppose that on the second Monday of this month, there shall be no election of a governor (an event not at all improbable, according to present appearances) can there not be an election of governor on another day? Unquestionably there can, for there are many precedents to that effect; the day, then, on which the election is constitutionally directed to take place, is not of the essence of the thing to be done; the constitution being only directory of the time. Here is a practical illustration of the doctrine I contend for. This act of assembly directs the mode, in which a certain oath shall be administered; the constitution directs the day, on which the appointment of Governor shall be made—what reason is there, that there should be a stricter construction put upon the law, than has been put upon the constitution? If the act of appointing the chief magistrate of the state, be good on another day, than that pointed out by the constitution, by parity of reasoning, will the oath taken by a judge of election, be less an oath, if administered by a judge, and not by a clerk of election? As to any penal consequence to the judge himself, can it vary his liability, whether administered in the one way or the other? Surely not; for, however, he may transgress his duty, no indictment of perjury can be preferred against him, whether the oath of office be taken according to the strictest form of law or not, as it is not a matter in which perjury, according to the rules of law, can be assigned at all.

But, sir, if this reasoning be altogether waved, (and, to my mind, it is entitled to great weight) and admitting, for argument's sake, that in no other manner than that designated by the act of 1805, can the administration of the oath be good; let us enquire how the entire non-qualification of the judge, will affect the question. It is expressly stated, in the act of Assembly, that two judges shall, in the absence of the third, be qualified to hold the election. Shall the mere presence of a third person, not qualified to act as judge, while the election is holding, vitiate such election? None of the expressions of the act of Assembly can warrant such a conclusion, which appears manifestly hostile to the spirit of the above provision. Suppose a single judge absolutely refuses to qualify, with a view to defeat the election, and the other two determine to hold the election themselves, excluding their contumacious colleague from any participation in the act, would his insisting on remaining at the polls be such a presence, according to the meaning of the act, as to divest those two judges of the power of acting? Assuredly not; either by the spirit or the letter of the law. And, let me ask, where is the difference between the supposed case, and the one now under consideration. A judge not qualified, (if he derive his power from his taking an oath) is like any other private citizen; nor can his mere personal presence, when lawful acts are done by others, officially qualiin all cases where a fair election of representatives has been held, fied, and when no question arose, or act was done, affected by his presence, render void those acts. In construction of law, he cannot be said to be present as a judge of election. I admit, that this construction could not prevail in cases, where it could be shewn, that points in controversy, material to the election, wherein the other two judges differed in sentiment, turned upon his decision. But when two judges could lawfully act; when they did act jointly; when no difference of opinion arose between them; would it not be intolerable to set up the presence of a third person, not qualified to act, to render void that proceeding, otherwise strictly legal; and this, too, with a view to deprive the citizens of a district of the most inestimable right appertaining to them as freemen? Common sense revolts at so monstrous a doctrine; and I feel persuaded, that if such a proposition had been stated to the Legislature, which framed this act, as likely to result from its provisions, and, therefore, that it was necessary, by express declaration, to guard against its mischief, they would have rejected such a provision, as altogether superfluous, and only crowding the statute book with idle matter.

But surely, sir, the irregularity here stated, is one of the most minute and trifling, which could have been well supposed to occur. Is the doctrine to be now broadly established, that any irregularity whatsoever, in the mode of qualifying a judge or clerk of election, or in the certificate which shall be returned of their qualifications on the polls, shall be fatal to all the votes taken in the district where the irregularity occurred. If this be the case, I apprehend there are many other instances of members, actually holding seats in this House, no more entitled to sit here than the gentlemen, whom this Report undertakes to exclude. It is by putting extreme cases, that the soundness of a principle of law or of legislation, is to be tested. Suppose, that in administering this judicial oath, a single word should be omitted, (we know the slovenly way in which these forms of law are complied with) or admit, that on the certificate on the polls, a similar error should occur, is this House prepared to set a side for such cause, the votes of all the freemen of that district? Yet if the doctrines now contended for be sound, such election must be set aside, as the oath taken is not the oath prescribed, and to be certified; and it must be a more fatal defect, not to have taken the oath as the law had dictated it, than to have had the oath in its exact words, administered by an unqualified person.

I earnestly entreat gentlemen to weigh the enormous evils which such hair-breadth refinements will introduce into the simplicity of the election system, to consider that a wide door will thus be opened to infinite disputations; that your elections, by the adoption of such a principle, will become a mere matter of chicane, wherein he who is most ingenious in detecting a slight error in the title of his adversary, will be sure to prevail. A nice and technical knowledge of the forms of law, is not to be expected, either from the judges or the clerks of election. Presuming that their intentions are, in general, upright, that they are not disposed wilfully, to deviate from the duty which the law prescribes; will you establish the severest scrutiny, into the mere ceremonials of their acting, and tie them up in the net of form, as certain special pleaders are forever endeavoring to entangle justice, by shewing the omission of some such formidable words, as "and," or "by," or some other equally important monodo is allowed to have great weight; and it is peculiarly the duty of | syllables. If such defects in form, are hereafter to pass sentence on the rights of the people, let me intreat you to make provision, that none but the most eminent jurists and casuists of the state, shall hereafter hold the important situation of judge of election, for the task is beyond the strength of plain and well meaning men, unacquainted with the profundity of election disputation, and with no other capacity to do this new duty, assigned them, than an honest

But, Mr. Speaker, after all, what is the real intent of the law word) with as much purity of intention and uprightness of conduct. under the belief (which ought to be presumed) that he had taken the requisite oath in the mode prescribed, as if the veriest tittle of the law had been strictly complied with? What more can you require to secure the purity of this election? Shall the very forms of the it is taken merely the form; and if it depended on common sense strous indeed would it be, if form should be thus nermitted to de-