feat *substance*; if the object of the law should be lost from a superfluous anxiety to preserve its letter, and a non-compliance with an unessential provision should be permitted to produce that very mischief against which it was the sole object of that provision to protect the citizen.

But, sir, let us now fairly meet the question, how far voters can be affected in their right, by the irregularity of a judge neglecting to qualify in the mode directed? What have the voters of Holtzman's District done, that they should forfeit their right of suffrage under this act of assembly? Where penalties are imposed by the law on the voter, they are imposed for some act committed by the voter himself, as for instance, for the act of voting twice. But let gentlemeu point out the provision of this law, which expressly or by intendment, justifies the conclusion that the voters of a district shall for an irregularity in the conduct of one judge out of three, be subjected to the penalty of the loss of their votes, to which they have the same undoubted right as any member of this house has to his farm. It is an established maxim of jurisprudcnee, that penal laws are to be construed strictly, and cannot be extended by inference, one syllable beyond their letter; but here is an attempt to convert this act of assembly into a penal act, and then by implication to deduce from it, the heaviest penalties, by forfeiture of vote and disfranchisement of the citizen; not for his own act, nor his omission, nor his error, but for an error in another, which he could not prevent, and in which he never, in the slightest degree, participated. The real offender escapes, while the innocent people are to be lashed by a vicarious punishment for his fault. Is such the true intent and meaning of this act of Assembly? Can it intend this monstrous injustice; and if it did, (which no man can believe) can such an intent be gratified, by extending, contrary to the rules of law, the no penalty of a forfeiture of vote, by mere inference, where there are express words of forfeiture used in the statute?

This House, I trust, will not be guilty of the accumulated injustice of, in the first place, straining and torturing the meaning of this law to so outrageous a result; and, in the second place, in defiance of the best established maxims of law, of giving that strained construction its full operation, by extending the penal consequences of an act of assembly, beyond its letter.

I should hope, then, Mr. Speaker, that upon the true consideration of the act of 1805, I have not been altogether unsuccessful in my attempt to maintain the following propositions:

First—That the statute is merely *directory*, in saying by whom the oath of a judge of election shall be administered; that its spirit is gratified, by that oath being administered by a brother judge, and not a clerk of elections, the taking such oath being the *substance*, the mode of taking it the *form*.

Secondly—That even if the Judge were not duly qualified, the law is sufficiently gratified, in the other two Judges being duly qualified, the actual presence of an unqualified person not vitiating their acts, no interference of his having taken place, which could at all affect the election.

Thirdly—That this is a trifling error, give it all the weight which can be justly attached to it: and that the construction of the Law contended for, would be attended with infinite mischief, and would be altogether subversive of the true objects of the act.

And *Lastly*, That according to the rules of legal construction, it cannot be contended, that a forfeiture of the right of suffrage can be attached as a penalty on the voters of a District, in consequence of an omission to qualify, in one out of the three judges of a district.—If I have succeeded in satisfying the House of the correctness of any of these positions it would be superfluous in me further to prosecute the subject; but I must farther bespeak the indulgence of the House while I take a review of some precedents, in which principles corresponding with those, which I have maintained are expressly recognized and solemnly determined.

[Mr. DONALDSON, then quoted the case of *Spalding & Meade* from Georgia, in which the House of Representatives determined that votes, though not returned, *in the manner*, prescribed by the law of the State of Georgia, should be deemed valid—Also the case of *Taliaferro and Hungerford*, in which the House of Representatives dissented from the Report of a Committee, against an election in Virginia, on the ground of an entire omission of the Clerks of Election of the several counties, constituting the District, to comply with the requisites of the Act of Assembly of that State, with respect to the *administration of the oath*, which they are required to take, and for other formal defects, and a subsequent Report of the same, *waving these objections*, and instituting an enquiry into the votes taken. He also instanced the case of the Hon. ALFRED MOORE, one of the Judges of the Supreme Court of the United States, undertaking to act as Judge, *before he took the oath prescribed by act of Congress*, being satisfied of his legal competency to do so, his authority being derived from his commission, and not from his oath.

Mr. DONALDSON then contended, that according to the law and customs of Parliament, the doctrines he had advanced were expressly recognized.—He quoted Peckwell's Contested Election Cases, & particularly instanced the Taunton case, decided in 1803—from the printed Report of which case, he read the following extracts, page 423, vol. 1.

"The question then will be, has the precept *in substance* been executed? This was the point considered in the case of Bleckingley, and they decided, that if a warrant, precept or return to the Parliament have sufficient substance, *it shall not be judged void for want of form*." Again—"To prevent inconvenience and confusion, the law of Parliament." (says Mr. Sergeant Heywood) "has departed from the general law of the land, and elections, *made under usurping presiding officers*, where there had been the form of an election, have been uniformly supported;" and in a note to this quotation it is said, "See the case of Bodwin, 1791-2, Tra. 236, where it was agreed on all hands, that an election, held by a mayor *de facto*, though not so *de jure*, was good."—He then commented on the decision in this case; which was, that although *persons besides those legally qualified* were associated, in holding the election, yet that the election was good notwithstanding. After commenting on the several precedents, which he adduced, Mr. DONALDSON thus proceeded.]

But, sir, this question does not depend either on the true construction of the act of 1805, or on the authority of precedents, or the reason of analogous cases. There is a stubborn and inflexible rule of the common law, that kind and indulgent parent, whose mild and gentle reign, with guardian care, saves and protects the weak from the strong; which in spite of the negligence of your statutes and your officers, will bear out the just claims of the voters of Holtzman's district to their right of suffrage; and in spite of the non-qualification, *even of all the judges*, protects the innocent voter from the penalty of their neglect. I lay it down, Sir, as an established maxim of of the Common Law; that *when it holds out to the citizen a person duly commissioned "and clothed with reputed power," altho' such person may have neglected to comply with the several required qualifications of office; that his judicial acts are good; the law holding such officer accountable for not complying with the required forms.*" This principle of common justice, which merely prohibits the cheating of the people, through the means of its accredited agents, is to be found in almost every book of authority. It is laid down in Croke, Eliz. 699, quoted by Viner in his Abridgment, that "acts done by an officer *de facto* and not *de jure*, are good; as if one being *created* bishop, the former bishop not being deprived or removed, admits one to a benefice, by presentation or collates by lapse, these are good and not avoidable, *quod curia concessit*. For the law favors acts of one in a reputed authority, and the inferior shall never enquire whether his authority be lawful."

Thus, also, in Hawkins' Pleas of the Crown, vol. 1, page 17, wherein certain acts of Parliament, requiring certain tests from all officers, civil or military, are set forth; it is observed, that "notwithstanding the words of the first of these acts are so strong, as to make such election &c. void—and those of the second, to make such persons disabled in law, to all intents and purposes whatsoever, to have, occupy or possess the said offices; *yet it hath been strongly holden, that the acts of one, under such a disability, being initiated in such office, and executing the same, without any objection to his authority, may be valid, as to strangers. For otherwise, not only those who no way infringe this law, but even those, whose benefit is intended to be advanced by it, might be sufferers for another's fault, to which they are no way privy;*" and Bacon's abridgment, page 190 strongly enforces the same doctrince.

What do these precedents of common law authority, incontestibly prove? That the validity or invalidity of judicial acts, does not depend on judicial agents, having strictly complied with the forms of legal qualification—that the law will not take advantage of its own wrong—that it will not cajole the people into an intire dependence on its own agents, and then fraudulently take advantage of the neglect of those very agents, to vacate the acts, done under its authority—That you commit the grossest outrage on the law itself, if you make it the minister of a wrong, committed, under the sanction of its own forms, on the people. I most solemnly conjure this honorable body to reflect on the tremendous consequences, likely to result from the establishment of the principle—*that the validity of judicial acts shall depend on the proof of the due qualification of the judge.* Would you be willing to set at large, the security of all the multiplied objects of judicial cognizance, on so hazardous an experiment? and shall the *right of suffrage* be protected by a weaker sanction, that the common interests or rights of the citizen? The acts and jurisdiction of a judge of election, surely do not stand upon higher ground, than those of a judge of a court of record; and there appears to my mind, to be no good reason, why there should be a legal guarantee of the official acts of the one, and none of those of the other. It is for gentlemen, to reconcile this absurdity, who have determined that the *right of suffrage* shall be dependant on rules of law, differing altogether from the established rules, prevailing in every other instance.

It will be observed, Mr. Speaker; that hitherto, the whole scope of my remarks has been to prove, that the election in *Holtzman's* district, as conducted, is a good and valid election; and therefore, that *Upton Bruce*, *Benjamin Tomlinson* and *William Hilleary*, are entitled to seats in this House, as members duly elected from Allegany county. It now remains to consider, whether the report of the committee, in favor of *Howard*, *M'Culloh* and *Robinett*, is not false in its legal conclusions, even admitting (which can only be admitted for arguments sake) that the election in *Holtzman's* district, is altogether void. Now, sir, the election in Allegany county must be held in six districts, and consists of six parts; and from this simple statement, it must be obvious, that *if the election be void in a part, it must be void in the whole, as an entirety consisting of parts, cannot, according to any logic, be good in the whole, unless good in its several parts, constituting the whole.* If the election in one district may be set aside, and yet the election for the county be good, although a different result would have been had, if that district had been taken into the account—where are you to stop? May not more than one district be thus set aside? *Nay, the majority of districts in a county, until a single district by this species of election legerdemain may be held competent to return the members of a whole county, of which not one tenth part of the votes taken, are suffered to come into the account.*

Thus a trifling minority, in a single district, may, by this sort of management, be enabled, not only to counteract, but to prevail against the sense of the great majority of voters of the county. Are you willing that this should be the law of the land? Are you prepared to establish a precedent, which, in its effects, may altogether stifle and extinguish the voice of the majority of the people? But, sir, we require here no aid of argument, no proof of the inconvenience and danger of the principles. The act of Assembly of 1805, is sufficiently explicit on this head. I should be indeed sorry, if its language bore with a tenth part of the weight, upon the right of suffrage, as dependent on the will of a judge of election. The act declares, in so many words, that it shall be the duty of the returning judges to cast up ALL the votes, taken in ALL the districts; and thus it is obvious, that a valid return cannot be made, unless the votes in ALL the districts are taken into the computation. *Can there be a good election, in a county, of which there cannot be a valid return?* It is an absurdity in terms to say there can; the Charles county case to the contrary, notwithstanding. And the only protection, which that case can ever be entitled to, is, that the monstrous principle it advances was never disputed, as none stood candidates for the county, besides the members returned. But I protest against the doctrine of that case, as altogether inadmissible in theory, and in its practical effects, leading to consequences, altogether subversive of the right of suffrage. No immediate injury was done to the district in Charles county: in which, upon that occasion, no election was held, and, therefore, the matter might have been slurred over, no peculiar interest having been excited; but men, solemnly pledged to legislative duty, ought never to be insensible to the danger of precedents, to which alone a culpable indifference gives an existence, and of which it is impossible to say, how soon they may be turned as a battery on the vital interests of society.

Thus, Mr. Speaker, have I presented to you my poor ideas, on this most important subject; the which the more I contemplate, the more I am impressed with its peculiar moment to every citizen of this state. I fear I have exhausted the patience of this House—I feel that I have nearly exhausted my own strength. But, before I conclude, I would beg to be indulged in a few remarks, growing out of the subject, and connected with a not dissimilar contest, in the country, from whence we draw most of our peculiar impressions on the rights of voters, and of those, whom the people select as their representatives. In the celebrated struggle between *Wilkes* and *Luttrell*, the latter candidate was declared, by a majority in the House of Commons, to be duly elected, although the former greatly outpolled him. Upon what principle was this daring act of power predicated? That Wilkes was incompetent to serve in Parliament, being incapacitated by a former act of expulsion; therefore, that votes given in his behalf were void; and his opponent, even with a minority of votes, was duly elected.

It is a matter of history, with which every gentleman is conversant, that this decision shook the monarchy itself to its very foundation. The people of England were sensible, that a deadly blow was aimed at the purity and freedom of election; and that, from the moment the candidate having the minority of votes could be held to be legally elected, the right of election in the people became a dead letter. Did not the most eminent patriots of that country, so fruitful in great men, oppose this doctrine as subversive of the constitution? Need I mention the name of CHATHAM, who was foremost in the opposition; whose vigorous protest is recorded on the journal of the Lords, against this gross assumption of power, in the Commons House of Parliament; and of whom, it is not for any weak effort of mine, to pronounce the eulogium?

Now, sir, what is attempted here? Precisely the same thing, that the House of Commons undertook to establish, in the instance of *Wilkes*. *The House of Commons, in fact, declared itself competent to make members of Parliament, without the intervention, and against the declared will of the people. Here, this House is called on to make members of a county, in direct contradiction to the voice of the majority of the free voters of that county.* And how did the struggle finally terminate in England, between power and right? By a solemn decision of a subsequent House of Commons, the whole proceeding was indignantly expunged from their records. Was it the *cause of Wilkes* that excited this ferment, and which shook the government to its centre.—No, sir. IT WAS THE CAUSE OF THE PEOPLE—*it was the invasion of the right of suffrage—it was the attempt to suppress their votes as freemen, which threw England into a flame, and which, finally, gave them the triumph over the corruption and violence of the times.* And shall it be said, the *voters of Allegany county* are not as well protected in the right of suffrage as the *voters of Middlesex?*

We are now on the verge of a precipice—a single step more, and to go back, I fear, will be impossible. What you now determine, may be a precedent, from which no returning sense of justice may be able to extricate you. What is precedent to-day, becomes law to-morrow. The mischief, once legalized, takes deep root; and spreads, until like the produce of the mustard seed, in the Gospel, it overshadows the land, not shedding, like that allegorical tree, a mild and benignant influence; but like the deadly poison-tree of the East, spreading a noxious and malignant shade, which withers and blasts whatsoever it covers. The march of tyranny is the same, throughout all history. It is by precedent upon precedent, that it is nurtured—itis by the abuse of legal forms, step after step, that it is fastened onan abused people. Resistance to lawful authority, is treason against the state, let the powers of government be ever so much perverted from their true objects; but one abuse leads on to another, until the land is covered with abuse, and a thousand times greater effort is required to shake off the yoke, than would have effectually checked the first attempt at usurpation.

Is it, Mr. Speaker, to be the eternal destiny of nations, that history unfolds her pages to them in vain? Are they, forever, "*to roll darkling down the torrent of their fate*," unrestrained by example, unwarned by experience? Are you at a loss for powerful examples on this subject, to which a people, proud of the privileges of freemen, are so peculiarly alive? Look at our own example; and you may find the master-key to the heart of your people. This country rose, like the giant of fable, and burst the iron yoke of England. What excited the tremendous conflict, which terminated in the right of this body to occupy this Legislative Chamber? The attempt of a British Parliament to impose taxation without representation. What sensible difference is there, let me ask, between not being represented at all, and in being falsely represented? And where is the security of a republican government, if men, other than the representatives of the people, elected by the majority, can, by any device, be interpolated into the Representative Body? But, sir, I forbear to press farther this ungrateful subject. Let me conclude, by entreating this Honorable Body, as they value the blessings of our free constitution; as they hold the honesty and purity of elections, as the best means of maintaining that constitution unimpaired; as they wish to transmit to posterity, this their best and most precious inheritance; *to decide this momentous question, in the spirit of truth and justice; so that an approving consciousness may ever, through all the vicissitudes of life, and storms of party, sanction the decision.*

REPORT

Of the Committee of Elections on the Contested Election of Allegany County.

[To which the above Speech alludes.]

THE Committee of Elections and Privileges, beg leave specially to Report, on the case of the Contested Election of Allegany County:

IT appears to the Committee, that Allegany County is divided into Six Election Districts, and that six attending Judges, at the close of the election in said districts, assembled at the usual place of the sitting of the County Court of the said county for the purpose of making their return as prescribed by law.

That four of the said Judges, thus assembled, being a majority of the whole number, have made their return, (marked No. 1) declaring that Wm. Hilleary, George Robinett, of Nathan, George M'Culloh, and Beal Howard, had the greatest number of legal votes, and are therefore duly elected delegates of Allegany county to the General Assembly of Maryland.

That two of the said six Judges, assembled as aforesaid, differing in opinion from the four Judges aforesaid, refused to sign the return thus made; and that the said two judges have made a return, (marked No. 2) declaring that Upton Bruce, Benjamin Tomlinson, William Hilleary and Thomas Greenwell, had the greatest number of legal votes, and are duly elected delegates for Allegany county to the General Assembly of Maryland.

The Committee consider, that the return signed by the majority of the Judges is a valid return, under the circumstances apparent on the face of both returns, because it does appear, that all the attending Judges at the close of the polls in the several districts of the said county were assembled together, in the manner prescribed by law, and there is evident cause to explain, why the said return does not bear the signatures of the whole of the said six Judges; for that two of them, attending as before stated, did refuse to concur in the aforesaid return, which is signed by the other four judges, and regularly certified. The committee, in accordance with the opinion already expressed by a resolution of the house, do therefore consider, that the sitting members are all of them, *prima facie*, entitled to their seats, until it should be shewn that the return made by the four Judges in favour of the sitting members is unconstitutional or illegal.

In the memorial presented to the house by Upton Bruce, Benjamin Tomlinson and Thomas Greenwell, Esquires, it is urged, that the return under which the sitting members hold their seats is illegal, because they allege, that it gives the votes only of a portion of the people of Allegany county; and it is insisted, on the part of the petitioners, that they had a clear majority of the legal votes. In support of this allegation, the petitioners have adduced a certificate from the clerk of Allegany county, accompanying their memorial, to which the committee beg leave to refer.

In a counter memorial presented to the house by Beal Howard, George M'Culloh, and George Robinet, of Nathan, Esquires. being the three sitting members, whose election is contested, it is represented, that the allegations contained in the said petition are unfounded; that the said petitioners had not a clear majority of the legal votes in Allegany country—that it appears by the return made by four of the presiding Judges, out of six, that the sitting members are all duly elected—and that the said return is constitutional, and in conformity with the express directions of the law regulating elections in this state. From the statements and certificates by both parties, it appears to the committee, that on an aggregate of the whole number of votes as taken in the six several election districts of Allegany county, including the votes taken in district No. 4, that Upton Bruce, Benjamin Tomlinson, William Hilleary and Thomas Greenwell, (three of whom are the petitioners aforesaid) had the greatest number of said votes.

The committee also find, that, exclusive of the votes taken in district No. 4 William Hilleary, George Robinett, of Nathan, George M'Culloh, and Beal Howard, had the greatest number of legal votes.

The committee refer the house, for more particular information, to the certificates of the clerk of the county, which are exhibited with the petition and the counter memorial, in order to shew the whole amount of votes taken in the several election districts of said county, and the number of votes taken in the said district No. 4. It is ascertained by a certified copy (marked A) of the return of the polls of district No 4, that the election in the said district was held by three persons acting as Judges of the election of that district; that two of the said persons were qualified as Judges agreeably to law; but that the presiding Judge of said district did not qualify as the law requires, and that he took the oath before one of the other Judges, not being a justice of the peace, and not being authorised by law to administer such oath.

It thus appears to the committee, that the election was held in the 4th district of Allegany county by three persons as Judges of the election, one of whom was not lawfully qualified to act in that capacity; and the committee are therefore of opinion, that the poll in said district was illegally held, and was null and void. The 6th section of the act of 1815, chapter 97, directs the appointment of three persons for each election district, who, or a majority, or any one of whom, *in case of the non attendance of the other two*, shall be the Judges or Judge of the election for such district. But this was not a case of non attendance; for all the persons who had been appointed as Judges did attend at the said poll, and one of them acted as the presiding Judge of the election, and exercised all the powers af a Judge in common with the other two, and was concerned throughout in conducting the said election, without being qualified in the manner which the act of assembly regulating elections has specially and positively enjoined. The 11th section of the act referred to, directs the form of the oath to be taken by every Judge of election before he proceeds to take or receive any vote, by whom it shall be administered; and moreover that a certificate of every such oath, signed by the person administering the same, shall be annexed to the polls. It further provides, that if no justice of the peace be present to administer the same, it shall be administered by a clerk of the said election, after such clerk shall have qualified as aforesaid. In this case; then, there was not, and there could not truly be, a proper certificate annexed to the polls of the necessary qualification of the said presiding Judge; because it is well known, that an oath, administered by a person not competent or authorised by law to administer such oath, is in effect no qualification whatever. Nor can it be reasonably contended, that the want of the requisite qualification in the person thus acting as presiding Judge, could possibly operate, as in the case of actual non attendance, to vest in the other two persons a complete and exclusive authority to conduct the election, and thus legitimate the said proceeding.—They did not act in any rightful separate capacity, but in conjunction with a person who had no legal authority or power to act with them. In the execution of the important trust committed to them as Judges of the election, there was an equal participation exerted by an individual, who had not bound himself by taking the prescribed legal oath before the justice or clerk authorised to administer it, and who could not, therefore, be held accountable for any breach of that sacred obligation of office, which the law meant to impose, and with which it was intended to guard the fairness and purity of elections.

Under these circumstances, the committee do not conceive it necessary that the house should comply with the desire expressed on the part of the sitting members, by entering into a general scrutiny of the polls. In their counter memorial, it is stated by Messrs. Howard, M'Culloh and Robinett, who are sitting members, that unconnected with the circumstance of their being no election legally held in the district No. 4, they are elected by a majority of the legal voters of the county; that fifty or upwards, of voters were received in favour of the petitioners in the county aforesaid who were not entitled to vote in said county; that various fraudulent means were successfully practised to impose upon the judges the votes of persons of foreign birth, who were not naturalized citizens of the United States, or were not *bona fide* inhabitants of the said county, or were otherwise not entitled, according to law, to vote at said election.—They offer to go into proof to substantiate these facts, if a full scrutiny can be obtained.

But the committee do not conceive that the scrutiny, thus proposed, however desirable such an investigation might be, can be now properly instituted; because the committee are decidedly of opinion, that the return itself, as made by the four Judges of Election of Allegany County, is available and sufficient, according to the foregoing premises, to entitle all the sitting members from said county to retain the seats which they now hold under the decision already given by the house.

The Committee of Elections and Privileges therefore submit the following resolution for the consideration of the House of Delegates—

RESOLVED, That Messieurs Wm. Hilleary, George Robinet, of Nathan, George M'Culloh, and Beal Howard, delegates returned from Allegany County, are duly entitled to their seats as members of this house.

By order, L. GASSAWAY, Clerk.