

make any ado to the settlement of them & I will befoure his Brother heare so that they may be Settled in futer Day. I no that they are considerable in my favour. give my love to my dear sister & family & all the connescion & remain Your Affectionately

[signed]

ROBT. WILLMOTT.

Give my respects to W. Stansbury. I should wrote to him but time was short. Priscys love to you & Sally<sup>1</sup> & all brothers & sisters & all inquiring freinds.

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## JOHN KILTY ON THE AGENT'S SALARY.

[Executive Archives.]

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[John Kilty was born in England in 1756; educated at St. Omer's College, France; appointed by the Convention of Maryland, July, 1776, ensign in Capt. Edward Tillard's company, 3d Md. battalion; 2d Lieutenant in 4th Md. Regt. December, 1776; 1st Lieutenant, 1777; Lieutenant in Baylor's 3d Regt. Light Dragoons, to February, 1782, and Captain in same from that date. He was a member of the Governor's Council from 1786 to 1793; appointed by President Washington Supervisor of the Revenue of the U. S. in Md. June, 1795; Register of the Land Office 1806; Adjutant General 7th July, 1810; died at Annapolis May 27th, 1811. An obituary notice in the *American* of Thursday, May 30th, 1811, said of him: "His demise is truly an irreparable loss to a numerous family, to the State, and to society in general. In our revolutionary contest he shared the dangers of the field and reaped a portion of his reward in British dungeons. He has spent much of his time usefully in literary pursuits. Whether we regard him as a soldier or a civilian, his talents were of a higher order—eminent at the bar and brave in the field, he won the affection and commanded the respect of all who knew him."]

The following resolution was proposed by the Honbl. John Kilty, Esq.

Whereas this Board did on the 20th of April 1786 in virtue of powers vested in them by Law, appoint Daniel of St. Thomas Jenifer Esq. Agent for special purposes, and did in consideration of the trouble and expence to be incurred in the execution of his duty agree to allow him a salary at the rate of five hundred

<sup>1</sup> Sarah Wilmot, a sister of Lieut. Robert Wilmot and wife of Benjamin Talbott, of Baltimore County.

pounds per annum, and a commission of 1 1/2 per cent on all confiscated british property hereafter to be sold by him,—and whereas it appears that from the low condition of the State in point of credit and finances, he has been able but in a very small degree to carry the purposes of his appointment into effect; and as it appears by his letter of this day in answer to the enquiry of the Board that he believes the two principal objects of his appointment are not further attainable. Resolved that from and after the 25th day of Jan<sup>r</sup> the said salary of five hundred pounds shall cease—that the said Agent remain entitled to the commission aforesaid, and that the Board will hereafter make him reasonable compensation for any services which contrary to present expectation he may be enabled to perform.

On the question to agree to the resolution

His Exc <sup>r</sup> the Governor &	} were in the negative.
The honble James Brice Esq.	
Affirmative' the honbl	{ John Kilty John Davidson.

The resolution being lost by an equal number of votes, the Honbl John Kilty agreeably to his constitutional privilege requires that the opinions of the Members on this subject be given in writing and filed among the records of the Board.

The opinions of the Honbl John Kilty and John Davidson Esqrs were given in and filed accordingly.

The agent being confessedly unable to perform the services expected, my opinion is that it is *proper* and *necessary* that his salary should be either lessened or wholly discontinued by an act of this Board.

When I say that such an act is proper, it follows that I hold it to be within our powers; and I ground this opinion on the title and whole context of the Law under which the agent was appointed. The act purports to entrust with the Executive the carrying into effect certain measures therein mentioned, but as it was impracticable for this body to execute personally the services directed, they are permitted to assign the active perform-

ance to others and to secure the faithful and diligent services of the persons so to be employed, by allowing them a commission, salary or other reward, as they may think proper. The unusual latitude here given to the Board, together with the constant control vested in them over these agents expressly in the principal matters, and (as I contend) impliedly in the rest, prove to me that the Executive being thus amply furnished with the means of carrying the intentions of the Legislature into effect, are accountable for the performance, and more particularly for the expence of these services, when they are vested with so unlimited a confidence in that article.

Waving any farther direct arguments, I shall reason for a moment on the consequences of the opposite position in two possible cases. The Board might in the first instance have divided these duties among four persons, and have assigned a salary to each ; it is evident from present facts that this arrangement would have been improvident. On the other hand let us suppose that the duties undertaken by the present agent had proved too arduous and extensive for one person to execute. As in the first case, economy would have suggested the idea of consolidating the different departments, so in the latter, a view to the due execution of the Law would have pointed out the expediency of separating the tasks ; but agreeably to the doctrine which has obtained on this occasion, neither of these remedies could take place. In the first case the agents might live on the public money without doing a single act of Service ; in the other, different duties requiring at the same time the attention of the officer, some of them must be neglected. I ask then, what part of the Law in question denies the authority of the Executive to remedy a confessed evil, resulting from their own act ; which act moreover is grounded on a Law, purporting by its title "to vest certain powers in the Governor and the Council ?"

I would here take occasion to observe that I was not aware of any such difficulty, when having during the last year, the honour of a seat at this Board, I consented to the appointment of the Agent and to the liberal salary which was allowed him. I gave him my voice from a persuasion of his capacity and experience in

the matters to be transacted ; and having under this impression been obliged to vote for him, I felt the same obligation to procure his acceptance of the trust by offering him the salary which his services had been usually valued at : But in return I expected the devotion of his whole time and talents to the service of the State ; and consequently my idea of the contract went no farther than for so long as he should be thus fully employed. It soon became the opinion of the Board, that funds and credit were wanting to effect the beneficial purposes intended in the agent's appointment. The idea of reducing his salary occurred to me, but was for some time repressed by the languid and discordant spirit which I fear distinguished the administration of that year, and when at length the Board thought it expedient to demand a precise state of his transactions, he insolently declined or neglected to satisfy them. The present Board having in the early part of the late session of Assembly made a similar requisition, it was complied with so far as was sufficient to confirm the opinion hitherto taken from common report—and from that time I remained in the intention to bring his salary to a level with the services performed, if (as it happened) the assembly should not take the matter into full consideration. The resolution accordingly as I at first offered it, proposed a reduction of his salary, but this being disliked, I was content to model it in the present form ; which as it contains an engagement that the Board may not always be in a capacity to fulfil, I do not esteem entirely regular.

To all this it may perhaps be answered that the Agent has voluntarily relinquished his salary, and that the thing I contend for is thereby done in effect—true—he has relinquished it. How far the act was voluntary, I shall not determine, but the fact authorizes me to observe that it was done *after* the business had been agitated at the Board, and *before* their authority was brought into debate. But I have said that an act of the Board in this case was *necessary* ; and I esteem it so, because the disinterested spirit of the public Servant which seems here to supply the place of authority in the Government is rarely to be expected—and supposing the prospect otherwise, the Board incurs reflection by

receiving as a favour a sacrifice which they are not only authorized but bound to exact with spirit and decision when circumstances require it. It is moreover evident to me that the agent's salary is not effectually annulled by his act. The officers concerned in the payment of the expences of government, are not, nor can they officially be made sensible that the State is exonerated from this article of its disbursements while the act of this Board which created it, remains on the records, uncontradicted by the same or an equal authority, so that the legal representative of the agent (to suppose no possible change in his own mind) might hereafter claim the salary and must receive it, unless the auditing officer's remembrance of past transactions should direct him to the files of the Council for the agent's letter, which when produced would in my apprehension be no absolute bar to the claim.

As the resolution which I proposed has brought on the discussion of another point—viz. the authority of the Executive to remove public Servants of the agent's stamp, I presume it is within my privilege to say something on that subject; more especially as the reasoning I shall use will apply in some measure to the point I have already attempted to prove.

The 48th Section of the form of Government says that "the Governor with the advice and consent of the Council, may suspend or remove any civil officer who has not a commission during good behaviour."—I shall argue from the plain import of the words—"any civil officer"—from the plenitude of intention always to be ascribed to the Constitution; and from the absurdities that must arise from the contrary doctrine, that public Servants of the agent's kind are comprehended in this article.

I contend in the first place that the agent is an officer—if this is questioned, I ask under what general head he is to be placed—It is true he bears the style of Agent; so likewise are a Surveyor; Coroner &c known by their particular titles, but they do not therefore lose the general denomination of Officers—an appellation which I conceive applies to every public servant who exercises a charge circumscribed and guided by definite limits and rules, and from which consequently none can be exempted but the Legis-

lature; the nature of whose authority, (excepting only the obligations imposed on them by the Constitution) is original and unlimited.

If then the Agent is an officer, and his duties are of a civil nature—he must be a “civil officer,” and he is moreover an executive and a subordinate officer. Having as I think brought him to his proper point of consideration, I shall proceed to consider the presumable intention of the clause in question.

If it is admitted that our Constitution was intended to be a full and permanent rule of Government, it must of course apply to every object that can arise during its existence. The argument used against our authority in this case is that such officers are not mentioned in the form of Government—Why were they not mentioned?—because the Constitution described only those establishments for which the nature of our Government inculcated a permanent necessity. There was no need for an article empowering the Legislature to create extra offices on urgent occasions—this being evidently a proper legislative authority—therefore though such Officers are not mentioned, they are in contemplation of the Constitution; or else the Legislature, deriving their power from that source alone, have exceeded their authority in making such appointments. If the appointing occasional officers was in contemplation, so likewise must have been their dismissal; for it would be highly absurd to erect a controul over the highest officers of Government, and to leave the inferior ones without a check so long as the Legislature should not be in session; such persons being independent of the Executive would derive an insolent advantage from being related in a remoter degree to the Constitution; and by the same rule their deputies being appointed by the principals, must be out of the reach of the Legislature itself. More inconveniences might be shewn to result from this doctrine, but as it is not the matter immediately in question, I shall proceed to shew that the resolution having been agreed to by a majority of the members present ought to have been entered on the proceedings as the act of the Board. This has been prevented by the vote of the Governor, who derives his right to a voice on such occasions, from that clause in the Act before mentioned “to

vest certain powers" &c. which in contempt and violation of the 36th article of the Constitution prescribes to an independent branch of the Government, a new mode of transacting their business. Here, lest it should be asked why I have not hitherto protested in form against this clause, I beg leave once more to refer for explanation to the transactions of the last year. It is I presume remembered that I then held the clause to be an infringement of our constitutional right; and that as such, my voice was for rejecting it and transacting the matters directed by that Law in the usual manner; two members agreed with me as to the illegality of the clause; but held farther that it vitiated the whole law. As this difference of opinion threatened a total neglect of the Law, I suggested the expedient of consulting such of the Judges of our Superior Courts as were on the spot; and abiding by their decision but the latter part of the proposition was disliked. The business was at length brought on in a manner that enabled me to agree to the execution of the law, without admitting the legality of the clause. On the question whether we should make the appointments directed by the act, I was in the affirmative; because being precluded from the advice of the Judges, I was obliged to have recourse to common reason, which told me that a clause, the last in order, and having no necessary connection with the body of the act, but hastily proposed in the Senate, after the Bill had been sent up by the other House, as complete, could not, if unconstitutional itself, infect and annul the whole Law. Moreover the new doctrine to which I objected was not the propriety (for that was never questioned) but the necessity of the Governor's presence. His Excellency's right to preside at the Board at all times is undoubted—my objection therefore could only be seasonable in the absence of the Governor; when according to the arbitrary prescription of the Legislature the Council would be incapacitated to act under the Law which created far the greater part of their business—the Execution of the Law being determined on by a majority I gave notice that whenever a constitutional quorum should be assembled, I should move for the transacting any matter that presented itself whether arising from the Law or otherwise. I accordingly took the first opportunity

to do so ; my motion was rejected in favour of the clause alluded to ; which being thus received and imposed as a binding rule on the board, by its own act, I contested the matter no more during that year.

The reason why I have at last thought proper to file my dissent to the acquiescence of the Board in this clause is because the consequence which so plainly argues its impropriety has now first arisen—I mean the effectual negative which a proposition must receive from an equal number of votes for and against it. The framers of our government guarded against this inconvenience by providing an umpire where an equal division happened at the Board ; but the Legislature by destroying this necessary quality in the Governor have given room for a case which an entire article of the Constitution was framed to prevent.

My objection to this clause however does not arise solely from the inconvenience it occasions. Had the regulation been abstractedly a good one, I should still have opposed it, because I deny any right in the Legislature to impose new rules of conduct on the Executive by a single act. The only argument I have heard urged in favour of this right is that the powers from time to time vested in the Board by Laws are not derived from the Constitution, and are therefore not among its objects. I know of no difference between authorities given originally by the Constitution and those occasionally confer'd by Laws, but the latter are and the former are not alienable by a single act of the Legislature ; and it may as well be contended that the hand being appended to the arm, and receiving through that channel its powers, does not derive them from the heart, as that the Executive branch of government receiving authorities through the medium of the Legislature does not derive them from the Constitution ; which is the root ; the parent ; and supreme regulator of both.

Are duties thus imposed *constitutional* ? then they have relation to the Constitution and ought to be executed in the manner there pointed out.—Are they *unconstitutional* ?—why then they are repugnant to the Constitution and ought not to have been directed at all. Every public act is liable to a comparison with this fundamental rule ; and according to its consonance or opposition thereto,

must admit one or the other of the foregoing epithets. The duties inculcated by the Law under consideration, are constitutional, because being of an executive nature they are (as the form of Government directs) entrusted with the Executive power. The Constitution is then certainly in contemplation, and its dignity and pre-eminence is such, that all its parts must govern, as far as they apply to, the subject it is called forth to regulate.

In thus hazarding my ideas on the powers of the Executive, I have perhaps advanced some new doctrines; but they are such as result fairly from the Constitution, allowing it the *plenitude* and *superiority* which I deem its obvious and essential qualities. My object is to discover the true nature of our trust; and with whatever earnestness I may seem to urge my opinions, they shall be given up with candour when the truth requires it, but I would rather risk the imputation of a pertinacious adherence to the notions I have formed, than I would stand chargeable with having by a supine acquiescence in gradual infringements, contributed to the diminution of consequence and authority which the Executive branch of Government at this day experiences.

JOHN KILTY.

[Endorsed John Kilty's opinion on the resolution to strike off the Agent's salary, Apl. 18th. 1787.]

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## LAND NOTES, 1634-1655.

[Continued from p. 270.]

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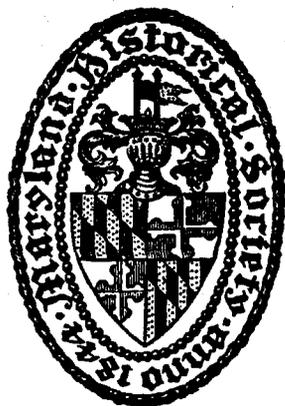
The land notes heretofore printed in this *Magazine* are taken from Land Office Records Liber F, known also as Liber No. 1. (*Archives*, 1, xv.) The present instalment is from Liber A or L. O. R., No. 2, the first 58 pages of which have been lost. The contents of Liber A are much more miscellaneous in character than those of Lib. F, being a daily journal of all official business; other portions of the volume have been printed in the earlier volumes of the *Archives*. For details as to contents of Liber A see *Archives*, 1, xvii. The marginal numbers set in brackets refer to the original pagination of the record book.

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