

(I suppose, with that maxim of the law, "præstat potius cautela, quam medela."

And here I would proceed, on the grounds and authorities of law, above adduced, to consider the constitutional nature, and legal effect of a proclamation to enforce an ancient, or prior subsisting law against EXTORTION and OPPRESSION in the various departments of OFFICE; and to appeal to every man of common-judicial knowledge, whether a proclamation of this kind, would not be thoroughly justified on the principles of the cases before transcribed by me from Blackstone's commentaries; but that I am apprehensive, it may be pre-requ岸ed of me, to shew, that the proprietary of Maryland, or his governor here, for the time being, hath a right, generally, to issue proclamations, (for that too hath been denied by some) before we enter on the discussion of the particular proclamation, in question amongst us; and that the proprietor or his governor here for the time being hath this right under the charter of our province, an extract presently to be made from it, will, I trust, clearly and satisfactorily evince: for I suppose, the right of the crown to grant to individuals, certain portions of territory here, whether acquired to it by occupancy, conquest, or cession, together with "certain prerogatives, privileges and jurisdictions," will scarce be doubted at this day, (after such frequent experience of those grants) at least, by any British American, seized of property and privilege under them; or that if it be, a little enquiry and reflection may remove those doubts.

Taking it then for granted, that the crown hath such right, and the fact of the grant of the province of Maryland being notorious, and of record; let us next see, what powers of government were conferred in and under it. And besides, the power of legislation expressly given, in and by the 7th paragraph of our charter, conjointly to be exercised "by the proprietor, and the freemen of our province, or of the greater part of them, or of their delegates or deputies;" in consequence whereof, our houses of assembly have been established in imitation of those of the lords and commons abroad, and the constitution of our government, formed on the model of that of the mother country in Great-Britain; I say, beside the above powers, and the further sole privilege conferred on the proprietor, by the same paragraph, "of appointing deputies, lieutenants, judges, justices, magistrates, OFFICERS, and ministers for what cause soever, and with what power soever, to do all and every matter and thing, belonging to the complete establishment of justice, courts, tribunals, &c." The 5th paragraph of the charter doth expressly invest the proprietor, "with all, and singular such, and as ample rights, jurisdictions, privileges, prerogatives, royalties, liberties, immunities, and royal rights, and temporal franchises whatsoever, as well by sea, as by land, within the region, islands, islets, and limits aforesaid, to be had, exercised, used, and enjoyed, as any bishop of Durham, within the bishoprick or county palatine of Durham, in our kingdom of England, ever heretofore hath had, held, used, or enjoyed; or of right could, or ought to have, hold, use, or enjoy." Nay, these "royalties, privileges, jurisdictions, and prerogatives, &c." conferred on the proprietary of Maryland, by the above clause; I find expressly confirmed to him, by an act of assembly of our province, I mean, the act of recognition, which passed anno domini, 1650, (X) whereby it is "published and declared," by his lordship, and the then assembly, "and enacted by the authority of the same; that we being bound thereunto (for I recite the words of the act, as I read them) by the laws both of God and man do recognize and acknowledge your lordship's just title and right unto this province, by the grant and donation of the late king Charles of England, under the great seal of England, bearing date at Westminster the 20th of June, in the eighth year of his reign, anno domini, 1632. And do also recognize and acknowledge your lordship, to be true and absolute lord and proprietary of this province. And do humbly submit unto all power, jurisdiction and authority, given, granted, and confirmed unto your lordship, and your heirs, in and by the said grant and donation: and do hereby submit and oblige us, our heirs and posterities for ever, until the last drop of our blood be spent, to maintain, uphold, and defend your lordship and your heirs, lords, and proprietaries of this province, in all the royal rights, jurisdictions, authorities and pre-eminences, given, granted, and confirmed unto your lordship, by the said grant or donation, so far as they do not in any sort intringe or prejudice, the just and lawful liberties or privileges, of the free-born subjects of the kingdom of England (Y). And we humbly beseech your lordship to accept the same, as the first fruits in this assembly, of our fidelity and thankfulness to your lordship, and your heirs and posterity for ever. Which if your Lordship shall be pleased to accept and ratify by your assent, without which, it can neither be complete and perfect, nor remain to posterity, according to our humble desire, as a memorial of your lordship's affections towards us; we shall add this also to the rest of the unspeakable benefits, we have received by your lordship's vigilancy over this colony. We have traced, then, the prerogatives, conferred by the charter, and confirmed by act of assembly, to the

proprietor and his heirs, to be exercised by him or them; "in as full and ample a manner, within our province, as any bishop of Durham, within the bishoprick or county palatine of Durham, might have exercised the same: it w let us enquire, what powers or prerogatives the bishop of Durham is said to be invested with, in our books; and these, Bracton, and the Lord Coke, will briefly declare to us; the former of whom, saith, that he had "regalem potestatem in omnibus;" (Z) and the latter, that he had "jura regalia" (A) "as fully as the king had in his palace; hence he might pardon; treasons, (B) murders, and felonies; he appointed all judges, and justices of the peace; and all writs and indictments run in his own name; and all offences were said to be done, against his peace;" in one word, "his power and authority was king like." (C) Hence, the royal right, the prerogative of proclamation, was constitutionally invested in him; and the charter of our province granting "the like, and as ample rights, prerogatives and powers, to our proprietary, to be exercised here by himself, or his governor;" I think, we may as fairly conclude, that each of them hath, indistinctly in them, the power and prerogative of proclamation.

But we might have saved ourselves the trouble of this deduction of the power, or prerogative of proclamation, by argumentative inference, from the palatine of Durham, to the province of Maryland: for the eighth section or paragraph of our charter, doth (I submit to the intelligent reader;) incontestably give it; though inserted at large in the address of the house of delegates, to the governor, at the session of assembly in 1771, (D) to prove the very reverse. Its words are as follow. "And for as much as, in the government of so great a province, sudden accidents may frequently happen, to which it will be necessary to apply a remedy, before the freeholders of the said province, their delegates, or deputies, can be called together for the framing of laws; neither will it be fit that so great a number of people should immediately, on such emergent occasion, be called together, we therefore, for the better government of so great a province, do will and ordain, and by these presents, for us, our heirs and successors, do grant unto the said now baron of Baltimore, and to his heirs, that the aforesaid now baron of Baltimore, and his heirs, by themselves, or by their magistrates and officers, thereunto duly to be constituted as aforesaid, may, and can make and constitute fit and wholesome ordinances from time to time, to be kept and observed within the province aforesaid, as well for the conservation of the peace, as for the better government of the people inhabiting therein, and publicly to notify the same, to all persons, whom the same in any wise do or may affect. Which ordinances we will to be inviolably observed within the said province, under the pains to be expressed in the same. So that the said ordinances be consonant to reason, and be not repugnant nor contrary, but (so far as conveniently may be,) agreeable to the laws, statute, or rights of our kingdom of England: and so that the same ordinances, do not in any sort, extend to oblige, bind, charge, or take away the right or interest of any person or persons, of, or in member, life, freehold, goods or chattels."

Whether this section of our charter, be applicable to the purposes, for which I have adduced it; I mean; to evince the rights of prerogative and proclamation, in our proprietor, or his governor here, for the time being; I must submit to the judgment of the discerning reader, on his re-perusing the transcript I made above from Mr. Locke, and comparing it with this extract from the charter.

I remarked before, in a note, that this saving clause in the latter part of the 8th section of our charter, imported no other restriction of the proprietary prerogative, than what would have been implied by law, had it not been inserted: for the prerogative of the crown, in making ORDINANCES, "not extending (as I apprehend) to oblige, bind, charge, or take away the right or interest of any person or persons, of or in member, life, freehold, goods or chattels (E);" consequently such a power could not be intended by the crown, to be imparted to its grantees; and therefore the subject's right to these matters is referred to him, in the contemplation of the law, although no express mention had been made of them. And hence we may observe, that the ordinances, which the proprietary of our province is authorized, either "by himself, his magistrates, or officers, to make and constitute, and publicly to notify" (on sudden accidents or emergent occasions for the conservation of the peace, and better government of the people, when the law-making powers cannot conveniently be assembled, or convened) are, in the express terms of the charter, directed to be such, "as be consonant to reason, and not repugnant or contrary, but (so far as conveniently may be) agreeable to the laws, statutes, and rights of the kingdom of England. Conformable to what we have before laid down from the law-books

(Z) Vid Bracton. l. 3. c. 8. §. 4.

(A) 4 inst. 204. 205.

(B) Though these powers of the counties palatine have since their creation been abridged by stat. 27. Hen. 8. ch. 24. "The reason (saith Dr. Blackstone) for their continuance in a manner ceasing: though still all writs are witnessed in their names, and all forfeitures for treason "by the common law accrue to them." 1 vol. of his com. p. 117.

(C) 4 inst. 205. 218.

(D) See votes and proceedings, October session 1771, page 65. 66.

(E) See 2 inst. 60, 61, 62, 63. 3 inst. 84. and 4 inst. 28, 30, 301. and Plowden, fol. 362. who saith, "That the common law hath so admeasured the king's prerogatives, that they should not take away, nor prejudice the inheritance of any."

"Non potest rex subditum renitentem onerare impositionibus." Fortescue, c. 9, and 18.

And in the case of proclamations, 12 rep. 76. "it was resolved, that the king hath no prerogative, but that which the law of the land allows him."

(F), viz. "That the king (and consequently the proprietary of our province, his grantees) cannot, by his proclamation or otherwise, change any part of the common law, or statute law, or customs of the realm; nor create any offence, by his prohibition or proclamation, which was not an offence before (that being to alter the law of the land); howbeit, the king" (and therefore our proprietor, or governor here for the time being) "may well prohibit by his proclamation a thing which is punishable by the law, by fine and imprisonment; and that as a circumstance will aggravate the offence;" For (as Judge Blackstone well remarks) (G) "though the making of laws is intirely the work of a distinct part, the legislative branch of the sovereign power; yet the manner, time, and circumstances of putting those laws in execution, must frequently be left to the discretion of the executive magistrate; and therefore his constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject, where they do not either contradict the old laws, or tend to establish new ones; but only enforce the execution of such laws, as are already in being, in such manner as the king (and I add our proprietor, or governor, here) shall judge necessary."

Let us now then, without more ado, recite the particular proclamation in question, and put its legality to the test, on the principles and grounds of law, established in the law books from whence I have made my extracts; for, I flatter myself, the readers by this time is pretty well satisfied with our deduction of the constitutional rights of prerogative and proclamation from the crown, by charter to our proprietor, to be exercised here, by himself, or his governor; especially as he hath been these powers (with many others) confirmed to him by act of assembly of our province, herein before inserted; and whole force and operation, at least, will not, I guess, be denied; The words of the proclamation are as follow:

"Being desirous to prevent any oppressive and extortionations from being committed, under colour of office, by any of the officers and ministers of this province; and every of them, their deputies, or substitutes, in executing unreasonable and excessive fees from the good people thereof, I have thought fit, with the advice of his lordship's council of State, to issue this my proclamation: and I do hereby therefore order and direct, that from and after the publication hereof, no officer or officers (the judges of the land-office excepted) who are subject to other regulation to them given in charge) their deputies or substitutes, by reason or colour of his or their office or offices, have, receive, demand, or take, of any person or persons, directly or indirectly, any other or greater fees, than by an act of assembly of this province, intitled, "An act for amending the staple of tobacco, for preventing frauds in his majesty's customs, and for the limitation of officers fees," made and passed at a session of assembly, begun and held at the city of Annapolis, on Tuesday the fourth day of October, in the year of our Lord seventeen hundred and sixty-three, were limited and allowed; or take or receive of any person or persons, on immediate payment; (in case payment shall be made in money) any larger fee, than after the rate of twelve shillings and six pence common current money for one hundred pounds of tobacco, under the pain of my displeasure: And to the intent that all persons concerned may have due notice thereof, I do strictly charge and require the sheriff of the city of Annapolis to make this my proclamation publick in the said city, as he will answer the contrary at his peril. Given at the city of Annapolis this 26th day of November, in the twentieth year of his lordship's dominion, anno Domini 1770."

And here I would ask the ablest and loudest bellower against the proclamation, whether an ordinance "to prevent oppressions and extortions," in the various departments of office, be of "good or bad tendency?" For, saith Mr. Locke, in our transcript from him above, "when-ever there comes to be a question, between the executive power and the people, about a thing, claimed as a prerogative; the tendency of the exercise of such prerogative to the good or hurt of the people will easily decide that question." Was it then (I ask) for the good or hurt of the people of our province, that the wisdom and authority of the executive power should be constitutionally interposed to guard them from "the extortions and oppressions of the officers and ministers here, and every of them, their deputies or substitutes, in exacting, under colour of office, unreasonable and excessive fees" from them? Or, more briefly, in other words; Was it for the benefit or disadvantage of the people, to be enabled by legal authority (for the right of proclamation I trust I have incontestably shewn to be in the proprietary, or his governor here for the time being, to be exercised by them, as the emergency of government may require), to pay reasonable and moderate, rather than unreasonable and excessive fees? And would the silence of the governor, which probably might have been construed into an allowance of, or at least a countenance at, the exacting of such immoderate fees, have been productive of the same good effects to the people, as his proclamation; which expressly restrains their being taken, "under pain of his displeasure?" And which restrained their being taken, too, at a time when the old inspection law, that contained the rates of fees, had expired among us; at a time, when, from an unhappy disagreement between two of the component branches of our legislature, no new table of fees could be settled by them; at a time, when, in consequence of this defect in government, and through want of the restriction of some positive laws, the officers were left at large to riot with the property and purses of every man, that might have occasion to do business in their offices: at that time, at that unlucky era of our province, and critical conjuncture of af-

(F) See Bacon's abr. tit. prerogative, fol. 139. and the books referred to by him.

(G) Commentaries, vol. I. p. 270.

(X) See charter 23.  
(Y) This saving clause, with another similar to it, in the end of the eighth paragraph of our charter; and which shall have occasion, by and by to insert; "contains (as is well observed, no restriction more than would have resulted by operation of law; nor renders his lordship's prerogative here, less forcible than the royal in the other colonies." See votes and proceedings, October session 1771, page 84. For it was never contended, that our proprietor, or the crown, in virtue of their prerogative, had a right of imposing taxes, (properly so called) on the subjects, prerogative, being given for very different purposes, as is observed before out of Mr. Locke.