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MARYLAND GAZETTE.

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A CIVIL OFFICER OF MARYLAND.—CONCLUDED.

THIS *candid* writer "believes, that the Civil Officer can shew no public act prior to the constitution, which positively directs the governor to preside in council." To have rendered his negative creed more complete, he might have added, that no public act could be produced authorising the assembly to pass laws, or enacting the common law,—the indefeasible birth-right of every British freeman that emigrated to Maryland. But in all these separate articles of belief he would be equally mistaken: the most ample and satisfactory public acts still remain on record, enacting and declaring all and each of these organic provisions; and as he appears so unfortunately defective in legal information, we shall endeavour to suggest to him those sources, whence he may derive some knowledge of the constitution and laws of Maryland prior to the revolution, forming, as they still do, the basis of those under which we now live.

Whether the feudal system was introduced into England by the Norman conqueror, or was only extended over allodial property, the unextinguished remains of British or Roman titles, as seems to be the more correct opinion, (for there is no solid ground to believe that the Saxons differed in their fundamental institutions from their German brethren, or those other hordes of northern barbarians that subjugated civilized Europe on the decline of the Roman empire,) it is at least certain that these institutions were completely established long before the expiration of that period, which legal history exclusively assigns, to the reign of what we now term the common law.

The basis of this constitution in England, and in every soil and climate where the feudal tree has pushed its roots or spread its branches, was the power of the sovereign, or feudal chief, to grant lands to vassals, annexing to the grant at his discretion, any portion of the *jura regalia* or heritable rights of feudal sovereignty; the political rights of all other tenants of those lands remaining the same, for the rights of the grantor and grantee could not be increased to the prejudice of others by this division; together they could only be equal to what the grantor originally held.

These grants indiscriminately made of British or foreign lands through every period of English history, were termed County Palatines, when erected within the limits of England, but were conferred under the various descriptions of kingdoms, dominions, lordships, seignories and proprietorships, when of foreign lands. Of these Chester and Durham were counties palatine in the time of the conqueror; Henry 2d granted Ireland, with complete *jura regalia* to his son John; Edward 3d erected Lancaster in England into a county palatine in favour of his kinsman Henry Plantagenet, and granted Guienne and Poitou in France to his son the Black Prince, with similar sovereign authority; Henry 4th granted Man as a kingdom to the earls of Northumberland, and subsequent to their attainder, Henry 7th granted it to the Stanleys, afterwards earls of Derby; the discovery and settlement of America which followed, opened a wide field for the prodigal favours of the house of Stuart, and among their grants of this nature was that of the proprietorship of Maryland by Charles 1st to the family of Calvert, barons of Baltimore, by charter, bearing date in 1632. By the seventh article of this instrument, the lords Baltimore, &c. are authorised to *enact laws* with the advice, assent and approbation of the freemen, or their deputies, and to *execute the same* by their deputies, lieutenants, &c. &c as near as may be according to the laws and customs of England.

Two lords Baltimore of the name of Charles, exercised these powers personally within the province from 1676 to 1682, and again in 1733; but at all other times, whilst Maryland remained under their dominion, or was subject to the immediate jurisdiction of the crown, they were exercised by representation—by a deputy or lieutenant, commonly styled governor, from our earliest records, and by a council appointed by the proprietor or his deputy. The powers of the proprietor, when acting in person, were limitted by the charter and the common law of England; and the powers of his representative, the governor, by the same; and farther, by such commition and instructions, *not inconsistent therewith*, as were given by the proprietor or the king, which were entered of record, and ever were recognized and acted under as part of the fundamental laws of the land.

In exercising the legislative power by the advice and consent of the freemen or their deputies, the proprietor, or his representative, deliberated first conjointly with the assembly, and then acted solely and separately, passing or rejecting their joint acts; which is in exact conformity with the principles of the common law of England, where the king always presides in parliament, and sits in the house of lords, either personally or by representation, but still remains and acts as a sole branch of the legislature.

It appears by the original records of the first assembly of the freemen in 1637, that they appeared personally, or by proxy, and sat together with the governor, in one house: In an act of this assembly the governor is declared president of the assembly, and voted and acted as such, but preserving and exercising his sole and integral power of finally rejecting or assenting to the laws which were all proposed by him. In 1638, the freemen were allowed, by act of assembly, to appear by representation or deputies, electing burgesses for each hundred: the governor being still declared by law the president of the assembly, voted and acted as such, and separately rejected or assented to the bills when passed by the assembly. This assembly passed an act declaratory of the rights of freemen, and formed certain constitutional or organic laws, regulating the different departments of government, by which the governor, council, and those summoned by the governor, together with the burgesses, were declared to possess the same powers as the house of commons of England, and all laws passed by them, and assented to by the proprietor, or his representative, were declared to be binding on all people of the province. This constitution continued until 1650, when the governor and council were by law separated as an upper house, and the two houses thenceforth sat in different apartments. The governor was recognized by joint acts as president of the council or upper house, and voted with them as such, still however retaining his sole and separate power of rejecting or assenting to the acts of both; and the lower house nominated a speaker, who was to be approved by the governor, whose representative he was in that house: This constitutional law placed the government precisely on the basis of the common law of England.

The council or upper house derived their authority solely from the appointment of the proprietor as feudal seignior or lord, as the peers of England, the upper house of parliament, do from the creation of the king; but their authority was never rendered hereditary, they were removable at pleasure, and records of such removals are still existing: When appointed, and whilst their commissions remained in force, their constitutional form and relation to the governor, when acting together, were established by acts of assembly from 1650, as renewed, continued or altered, and by the commissions to the then governor and council from the proprietor, conformably to the charter and common law, which were renewed and continued by general reference, and special alterations, not materially affecting their constitutional form. By all these, as so occasionally renewed, continued or altered, it will appear that the governor might call, or prorogue or dissolve an assembly at his pleasure, consisting of his council and the house of burgesses or delegates of the freemen; that the governor presided in the assembly, sitting as president in the upper house or council, and by representation in the lower house; that he gave a casting vote as president of the council, and although in this special case he acted jointly, and might by that vote determine the act of the council, yet by the act of assembly expressly; by the terms of his commission; by the common law and uniform practice and usage, it was no law until it received his sole and separate assent as governor. This form and relation of the council to the governor, which had thus existed from the year 1650 to the 1st June, 1774, is precisely that which was rendered part of the constitution by sect. 34, although they are now confined to execute business. In legislative business it is the English common law, that the king may, and always must sit as president of the upper house of parliament, either personally or by his representative or proxy; and that he may give a casting vote and decide an act of the upper house; but he still remains a sole branch of the legislature to pass or reject any BILL so passed.

It will be found by examining our records, that the proprietor himself, when in the province, or the governor, or his deputy, did preside personally in the council whilst acting as an upper house, until the revolution; when the *jura regalia* of the province were seized by the crown; from that time the governors, as representatives of the king, and of the proprietor after the restoration of the Calvert family in 1715, seldom sat personally in the upper house, except at the opening of the session: They continued the custom and usage adopted whilst royal governors, (and latterly they were commissioned as such,) founded on the practice in England, of acting in the upper house generally by deputy, who was styled President of the Council, and confined their personal interference in passing laws, to the exercise of their separate authority, as a third branch, by assenting to or rejecting the acts of the other two.

In this constitutional form and relation subsisting between the governor and his council, we find the principle established from the earliest settlement of Maryland, that the governor, acting by and with the advice and assent of council, and voting when they were divided, still retained his separate and integral right of concurring as governor before the act was valid. The convention, therefore, using the same formulary, and establishing the same form and relation, could not possibly have suspected that an interpretation could be given to their act contrary to the uniform practice of themselves and their forefathers—an interpretation that would render their governor a mere cypher, and their constitution a mass of contradictions from one end to the other.

It may be said that this constitution or relation only subsisted between the governor and council when acting in a legislative capacity, but it is certain that the convention having established the same form of procedure, and the same formulary precisely of power on executive business, the legal effect and relation must be the same, as far as their powers extend or concur. But if we examine the laws and practice prior to the constitution as to executive business, they will still more strongly establish the construction of the Civil Officer.

By the Charter of Maryland and the common law and the constitution of England, according to which it was to be executed, the proprietor, or the governor as his representative, was the *sole executive*. In executing the laws he was not required to obtain either the advice or consent of the freemen, or any others—He might ask it, and if he did ask it, the common law of England, and the commissions of the proprietors to their governors and counsellors, provided and designated constitutional advisers, who were responsible for any advice they might give; but that advice never was necessary to the complete validity of an executive act; its object and effect was only to create and fix a responsibility on the advisers. The council as the upper house of the legislature, were by the common law, as well as by their commissions, the advisers of the executive; the upper house of parliament are, and have been time immemorial, the advisers of the supreme executive of England, who may assemble them at any time for that purpose, whether parliament are sitting or not. The council of Maryland were expressly bound by their commissions to advise the governor, when, where and upon whatever occasion he might ask it.—When convened by him he acted as president according to the act of assembly, but it does not appear by the journals that he ever voted, for being the sole executive, it will appear at every period of the journals of the executive prior to the constitution, that he considered himself as constitutionally empowered to act as he pleased, both before and after their advice, as he chose or might not choose to take the responsibility on himself; and his act in either case was held and considered as equally valid: This will appear by the journals of the 12th June, and 14th, 15th and 16th November, 1769, and by frequent and uniform preceding entries up to the earliest periods; and it will be found, governor Sharpe after requiring the advice of each member of the council, and having it entered on the journal May 5, 1756, in the manner now made part of the constitution by sect. 26, still acted contrary to the opinion of the majority as will appear by the law itself, as he passed it.

But the convention having established the constitutional form and formulary, (on certain specified executive business,) which subsisted between the governor and council, when acting in their legislative capacity, and having required that the governor shall not only ask the advice of council, but obtain their consent, before he does certain acts, which acts are declared to be concurrent acts of governor and council, their consent is undoubtedly necessary to the validity of an executive act in those cases—but in those cases only; and it is doubtful if he should require advice in any other cases, whether they are bound to give it, or are any wise responsible for it; *consent* they certainly cannot give, the governor being the sole executive in all those other cases, as well as the sole ministerial agent contemplated by the constitution in every case.

That this was the interpretation given to the constitution immediately after its formation, and for several succeeding years, can be yet established by the records, and by the contemporary testimony of the most eminent fathers of the revolution now living. At the head of these still remains Mr. Thomas Johnson, the first governor after its adoption: on mentioning his name, an expression of indignation may surely be indulged at the insinuation of the Friend to Candour, that "as he exercised authority confessedly unconstitutional, his proceedings could never be evidence of correct construction on questionable or controverted points;" by whom has this been confessed? Will he say by the Civil Officer? If so, when and where did he confess it? Is it possible that this production of Candour is only the misbegotten offspring of a defective intellect? Or is it intended thus to confound the Civil Officer with those Curs who bark at the SETTING SUN? He has said, that it appeared from record *that great part of the executive business was transacted by him, (governor Johnson,) when not a single counsellor was present.* Does not the constitution render the governor the sole executive, except where the concurrence of council is required by law? To shew then that Mr. Johnson acted unconstitutionally, it must first be proved that he acted without the advice and consent of council, when required by law. Has any such instance been adduced? And if such had been so entered, still the council might have confirmed the act of the governor at a subsequent session. This is not without precedent here; and in a neighbouring state the council acting under a similar formulary, have sometimes advised and consented that the governor might act as he should find it necessary, on a particular emergency; and the constitutionality of that advice was never questioned. However, there is no such pretence that this venerable patriot ever acted unconstitutionally. The journals of his proceedings as sole executive, will be found strictly conformable to the constitution, and precisely corresponding with the only precedents then existing of official conduct under similar powers, although he had no access to them as has been observed. During the present controversy, the Civil Officer has been indirectly informed, that this aged statesman has declared, that during the whole term of his service as governor, he recollects no attempt by any member of the council to propose or to nominate, but in one instance by a single member; that he repelled it with a becoming indignation, and that some warmth ensued; but that the next day the member made his apology, and acknowledged his errror. This account perfectly coincides with that which the Civil Officer received personally from the first clerk of the governor and council after the adoption of the constitution.

It seems to be admitted that no positive adverse precedent can be adduced from the records of the first administration of Mr. Lee; and although the Friend to Candour has quoted with a *benevolent* irony the expression of *a strict investigation* by the Civil Officer, *candidly* suppressing the limitation he had annexed by the preceding words "*for several years,*" yet his own indefatigable industry has discovered no precedent that he supposes will warrant his construction, for near seven years after the adoption of the constitution; and it happens unfortunately that not one of the six instances he has adduced during the administration of Mr. Paca, can possibly justify his conclusion; four of them are entries of the issuing commissions; and it will not be seriously contended, that they furnish evidence of correct construction of the constitution, as the council certainly cannot commission: one civil officer was appointed, but it appears clearly that the governor never commissioned him; and also a commissioner for the sale of confiscated property, but he was no civil officer, nor does the authority appear under which he was appointed.

With these instances he has closed his remarks on the administration of Mr. Paca, and he appears to lump the following governors under the article of BLANK COMMISSIONS. And so it seems the Friend to Candour has been rummaging the old trunk, instead of the records in the council room. Certainly his remarks on these blank commissions are designedly ludicrous, for in the light he considers them, he never could offer them as evidence of correct construction of the constitution. The governors who succeeded Mr. Paca were gentlemen of great merit and worth, and of independent fortunes; but as none of them, (it is believed,) were bred to business but one, they would probably have found it easier to sign blank commissions than to contend on constitutional points with the council, generally consisting of able lawyers, bred to, and practised in a profession, that can only be supported by the "indiscriminate defence of right and wrong:" it is probable that capacity for business naturally drew it into their hands, and that mutual confidence produced a custom and mode of procedure without investigation on either side; that one precedent served for another, and continued precedents, we know, soon become LAW, *with lawyers.* In every view it is most certain, that a commission signed by the governor, whenever, or by whomever filled, is evidence of his constitutional concurrence in the appointment: he could not deny it.—In the same manner an act of the council concurring in an appointment, would be conclusive evidence of their advice and consent, in whatever manner given; *they could not deny it*, and it would justify the act of the governor: but still it is believed by the Civil Officer that these blank commissions have been signed, rather from a confidence in the clerk that in the council, as he knows that the present governor has frequently signed them in the following manner: A number of