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Lord Baltimore and the Maryland County Courts

AUBREY C. LAND*

Anyone who leafs through that curious collection of death warrants, ship registries, and like miscellanea known as the Commission Records cannot fail to be struck by the unusual appearance of the twenty-third folio. Here, on 4 August 1733, a clerk entered in the usual way a new commission of the peace for Talbot County. But the entry itself is not at all ordinary. The striking feature of the page is a dramatic bracket that encloses the quorum of the court, no less than seventeen persons in all, headed by "The Honble Charles Calvert." Altogether the commission names the extraordinary number of twenty-two persons as justices of the Talbot County court.

Now everyone familiar with the county court sessions of the eighteenth century knows perfectly well that no instance can be cited from the records of twenty-two judges, or for that matter of even two-thirds that number, sitting at a meeting of the court. To our surprise, then, we add a puzzle. Nor is the puzzle made clearer when we scrutinize the quorum, for here we find that the first eleven members of this panel were also members of Lord Baltimore's Council of State and that they are set down in the commission in exactly the order of their rank as councillors. This unexpected result suggests no solution to our mystery, unless perhaps that a clerical error has occurred. But this easy answer is ruled out by the succeeding folios. One by one for each county of the province a new commission of the peace is recorded, every one beginning with the oversize quorum, each quorum containing all and several the members of the right honorable, his Lordship's Council of State.¹

These are the facts. Taken with the obvious inferences, they add up to a statement of the case about like this: At some time before 4 August 1733 the Lord Proprietor and his advisers had decided to make all the councillors *ex officio* members of all twelve county courts. Between 4 August and 28 August his governor, Samuel Ogle, issued new commissions for the counties to implement this policy decision. But still we have been told nothing we really

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¹ Commission Records, 1726-1786, Maryland Hall of Records (hereinafter cited MHRecs.) folios 23-28.

want to know about this extraordinary procedure. Did Baltimore expect his councillors—the gravest and weightiest persons in the province—to do regular judicial duty on the county benches? If he did, what was his object? Did his plan, whatever it was, work at all and if so, what were the results? How long did this arrangement continue? And finally why have we not heard of it before?

Only the last three of these questions can with any certainty be answered from evidence now before us. The addition of the Council to the quorums of the county courts lasted until the province overthrew the proprietary establishment at the time of the Revolution.² This was, then, a permanent alteration in the constitution of the Maryland judiciary. The discernable results of this reconstitution of the judiciary were, as we shall see, quite negligible. Partly because the arrangement was barren of results it has not figured in general works of history. But more lamentably we are not informed on this, and many similar matters of interest, because the legal and judicial history of colonial Maryland has not yet been written.³ To the other questions—Lord Baltimore's purpose and expectations—only partial and not altogether satisfactory answers can be given at this time.

In the lack of direct information on the origin and object of this scheme there are some bits of evidence that may be admitted to this hearing, evidence that is, I think, sufficiently material to create a strong supposition that Lord Baltimore had devised what was essentially a court-packing scheme. The earliest shreds that we can pick up come from the day of Governor John Seymour nearly a generation before, back in the days of royal rule.

John Seymour (1704-1709) may not have been the first governor of Maryland to clash with the county courts, but he was the first to formulate a definite plan for taming them. In his eyes the administration of justice was shot through with favoritism and, even worse, with indifference to the Queen's peace and good government. He found the judges deaf to his exhortations to mend their ways and

² Talbot County Civil Judgments, 1770-1773, MHRecs., March Court, 1773.

³ Judge Carroll T. Bond's admirable introduction to the first volume of the American Legal Records comes nearest to providing an overall view, BOND, PROCEEDINGS OF THE MARYLAND COURT OF APPEALS, 1695-1729 (1933). Limited periods and special aspects are treated in SAMS AND RILEY, THE BENCH AND BAR OF MARYLAND (1901), SEMMES, CRIME AND PUNISHMENT IN EARLY MARYLAND (1938), and in the introductions to court series in the ARCHIVES OF MARYLAND (vols. IV, X, XLI, XLIX, LI, LIII, LIV) (hereinafter cited ARCHIVES).

powerful in their resistance to his efforts to purify the judicial branch. His letters to the Board of Trade at Westminster, filled with denunciations of "country borne" justices and their obstructionist ways, disclose an ingenious plan to clip the wings of the justices of the peace. Very simply Seymour proposed for each Shore a circuit court composed of learned, tough-minded judges selected by the governor to hold assizes in the counties for hearing the more important cases that ordinarily would have been decided at the quarterly session of the county court. These hand-picked itinerant judges, Seymour predicted, would allow no nonsense in their courts. They would give "handsome, and regular charges to the Grand Jurys of Inquest" and generally teach the commonalty "their Duty to the Queens Matye."⁴

Seymour's reading is understandable. As governor he represented the crown and thought in terms of royal authority exercised for the welfare and good order of society. From this point of view his solution to the problem of the administration of justice was by no means unsuitable. But there were other views, the conceptions provincials held of their own welfare. And these Seymour either ignored or failed to see.

Whatever limitations his position and outlook imposed on his vision, Seymour did clearly perceive the importance of the county courts in the Maryland scheme of things. Not only were the county courts closest to the everyday life of provincials, they were also vested with functions and duties that made them the focus of local government. Beside hearing several dozen civil and criminal cases the court did an astounding amount of other business, so much in fact that we are mystified to discover how it was all discharged in a three- or four-day session. During the session the justices appointed constables of the hundreds and overseers of thoroughfares, committed the poor and orphans to responsible citizens, examined and paid bounty claims for destruction of wolves, squirrels, and crows, determined the county levy, fixed prices of accommodations at public houses, gave necessary orders of keeping the records — especially the vital land records — in its custody, and over the years assumed the authority of licensing taverns and ferries. It is possible that the justices often lacked *formal training*, as Seymour charged, but that they were ignorant or without ability we can hardly believe.

⁴ Seymour to the Board of Trade, 10 March 1709, ARCHIVES, XXV, 296-270. See also same to same, 10 June 1707, *ibid.*, 263.

Nor were they inconsiderable persons in either property or prestige. Indeed, if we rule out a dozen or so higher officials in the great offices of state and a handful of wealthy Roman Catholics ineligible for public service, the justices of the county courts were the substantial planters of their neighborhoods. Very frequently their neighbors elected them to the parish vestries and chose them as delegates to the lower house of the Maryland assembly, adding to their prestige and power. Altogether the justices of the peace were personages in the eyes of the citizenry that converged on the county seats for court sessions and made court days the busiest, most colorful of the year prosecuting suits, selling crops, trading land, talking politics, gossiping, drinking, and — occasionally — fighting. This was the life of tidewater Maryland in Seymour's day and, whether the governor liked it or not, the inferior court judges were articulated to it and expressed its imperatives.

Seymour got his plan in operation. The assemblymen did not approve of itinerant justices, at least for the end the governor intended them to serve, but Seymour ignored their objections and established the new courts by prerogative action.⁵ Their life proved short, however. The assizes did not long survive the founder, who died in 1709. They had never been popular with the country justices and few other provincials mourned their disappearance, certainly not the planters whose representatives within a few years were acting in such concert in the elective house of the assembly that they earned the name "country party."⁶

In the decade 1720-1730, the country party stood Seymour on his head. Led by a small band of expert attorneys, the country party developed its own program for supervising the courts, not in the interests of English authority but of the country. The crown had in the meantime restored the province of Maryland to the Lords Baltimore, who now bore the full brunt of country party attacks. Smarting under a severe depression in the tobacco trade, militant representatives of Maryland planters assaulted the palatine authority of the Lord Proprietor for ten years. They threatened to reduce the fees which provided all proprietary officers their income. They denied his Lordship's right to collect certain export duties on tobacco. Finally

⁵ Seymour's speech opening the spring session of 1707, ARCHIVES, XXVII, 4-5.

⁶ Several features of the Seymour assizes deserve elaboration. This instructive episode will be given fuller treatment in a forthcoming article.

they even questioned Baltimore's authority to veto acts passed by the assembly. The more aggressive spokesmen of the country party demanded the introduction of English statute law into Maryland and preached political solutions to their economic ills — crop quotas, paper money, and the like. And they continually eyed the Maryland courts. Scarcely a year passed without a demonstration of country party determination to divorce the courts from proprietary control. At session after session delegates to the assembly formulated oaths binding Maryland judges to disregard instructions from higher authority in the administration of justice and to follow the law.⁷ The noise they created emphasized the importance of the "court question" in these years when major constitutional problems were debated. The echoes in England focused official attention on the battle between Lord Baltimore and his faithful tenants in Maryland. Baltimore's secretary feared that the ministry might even go to the length of taking the province back under crown control.

In the end Charles, Lord Baltimore, made a personal visit to Maryland to settle the constitution on the spot and thus to end the noisy debate. Whatever the citizenry thought of the Lord Proprietor's actions in 1732-33 while he was in the province, Baltimore himself was surely entitled to regard his accomplishments with satisfaction. First of all he removed from debate in the assembly most of the negotiable issues. He established by proclamation tables of fees for payment of chief officers in the proprietary government. He ordered the collection of export duties which the assembly claimed unauthorized. He reorganized the system of collecting his quit-rents. All these actions were naked exercise of the prerogative. In the second place Baltimore projected a renovation of the proprietary staff in Maryland. Many of the recruits who shortly afterward took office proved to be the ablest lieutenants ever to serve the Lords Baltimore in the century and a half of Maryland colonial history.⁸

Charles, Lord Baltimore, was never one to make records of his doings, let alone give reasons for them. Even for the most important matters historians must depend on his actions as reported by contemporaries to tell nearly the whole story. For the rest inference must suffice.

⁷ This constitutional struggle is discussed at length in LAND, *DULANYS OF MARYLAND* (1955), 62-85, and BARKER, *BACKGROUND OF THE REVOLUTION IN MARYLAND* (1940), 117-139.

⁸ Baltimore's visit is also discussed at greater length in LAND, *DULANYS OF MARYLAND* (1955), 125-132, and BARKER, *BACKGROUND* (1940), 134-139.

Undoubtedly the court question came up for discussion within the inner circle of proprietary advisers. The question was of first importance and had been debated between proprietor and province in the bitterest verbal battle of the century. Consequently, it was not one to meddle with unwarily or lightly. The presumption is strong that Baltimore, after deliberating with his advisers, determined to add the whole membership of his Council of State to each of the county benches. Actual performance of this task he left to his viceregent, Governor Samuel Ogle, a staunch supporter of the proprietary prerogative. In early August, 1733, Ogle began issuing the commissions.

Again we are left to conjecture when we inquire into the motives for this alteration of lower court panels. Did Baltimore expect that the councillors would regularly take their places as senior justices — and, of course, as prerogative men — at county court sessions? Or did he regard this “court packing” merely as a reserve weapon, a threat to any intransigent county bench that the local justices would be outvoted unless they mended their independent ways? Or did he perhaps hope that occasionally a councillor would attend the court sessions in his home county and thus bring along a breath of that superior learning, as well as the sense of duty to authority, that Seymour had once found conspicuously lacking among the inferior judiciary?

Unfortunately the record tells us little, for the results of this unusual proceeding were all but negligible. In the first trial of strength between the agents of the new proprietary dispensation and the county courts the courts packing machinery, if court packing was intended, failed to operate. Late in 1733 Daniel Dulany, newly appointed Agent and Receiver General, began a campaign to recover all and sundry the rights and prerogatives of Lord Baltimore usurped by the country courts. At the November court in Baltimore County Dulany served notice on the justices that his Lordship had decided to resume his “ancient and undoubted” right of issuing all ferry licenses in the county and warned them against granting licenses as they had customarily done there several years past.⁹ A court properly packed with councillors should have returned a submissive and entirely satisfactory answer. At the session that took Dulany’s letter under consideration not a single councillor appeared on the panel of justices.

⁹ Court Proceedings of Baltimore County, Liber H W S No. 9, folios 126-127.

And the court behaved most intractably. Not only did the justices deny Baltimore's claim to sole authority over ferry licenses but vigorously asserted "the undoubted right of this court" to license all such public necessities. Moreover in framing their reply they ignored Dulany, the Agent and Receiver General, entirely and sent the minute of their action directly to the governor.¹⁰

There are excellent reasons why Lord Baltimore should never have expected his councillors to add attendance at the county courts to their schedules. Besides their legislative duties as members of the upper house during assembly time and as the governor's advisers when called together as the Council of State at other times, all of them were men of large affairs — planters, merchants, land speculators, entrepreneurs. Regular court duty would have made almost intolerable demands on their leisure. At any rate they were conspicuously absent, at least as justices, from sessions of the county courts. The practice of adding the councillors to the county benches in the commissions continued, but the records themselves suggest that the practice shortly became a mere formality. After 1735 the commissions of the peace were directed "To all the members of his Lordship's council" and to specified local justices — the only persons actually named — who would actually preside.¹¹

The date is significant. By 1735 the constitutional crisis that had brought Baltimore from the pleasures of London to the capital of his palatinate had passed. Resistance and criticism were never entirely suppressed. But until the years immediately before the Revolution the proprietary regime did not face dire threats to its existence. Evidently the Maryland establishment had not seen fit to employ the weapon provided by the new commissions of the peace on such side issues as the licensing of ferries. After 1735 no emergency sufficiently ominous arose to call the councillors out to the county seats.

Now if it is asked whether any councillor ever sat as county justice, the answer must be yes. A single instance redeems the record from blankness.¹² In 1748 at the first meeting of the court in newly-organized Frederick County

¹⁰ *Ibid.* The Lord Proprietor never succeeded in making good his claim in the face of provincial determination expressed by the courts and in the assembly. GOULD, MONEY AND TRANSPORTATION IN MARYLAND, 1720-1765, Johns Hopkins University Studies in Historical and Political Science, XXXIII, 139-142.

¹¹ Commission Records, 1726-1786, *passim*.

¹² If there are other instances I have not found them while turning the pages of these stately old libers.

Daniel Dulany the Elder attended the session. By virtue of his rank as councillor he took precedence over the other judges present and sat at this and several subsequent sessions as Chief Justice. His long experience as judge in admiralty and in the testamentary court enabled him to expedite organization of the new county court and to get the judicial business at Frederick Town well started. It is only fair to add that Dulany had private motives, only remotely connected with the Lord Proprietor's welfare, for going to Frederick County as a judge.¹³ Even so, this unique instance rescues the curious judicial arrangement of Charles, Lord Baltimore, from barren results.

¹³ LAND, *THE DULANYS OF MARYLAND* (1955), 195-197.