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MARYLAND GAZETTE.

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BY REQUEST.

(Continued from our last.)

THE ſupreme court of the United States have unanimouſly decided—1ſt, that the nomination is the ſole act of the preſident and is completely voluntary: and 2dly, that the appointment is alſo the act of the preſident, and voluntary, although it can only be performed by and with the advice and conſent of the ſenate; they proceed to conſider and ſo ſtate, that appointment is the *ſole* act of the preſident.—They expreſsly declare that the laſt act of the preſident in making an appointment, is the ſignature of the commiſſion—their words are; he has then acted on the advice and conſent of the ſenate to his nomination. The time for deliberation has then paſſed. He has decided. His judgment on the advice and conſent of the ſenate *concurring* in his nomination, has been made and the officer is appointed. The opinion of the preſent governor of Maryland had never extended ſo far, but had he not been convinced by their reaſoning, he ſhould not have oppoſed his own opinion to their authority; having offered to relinquiſh it on the opinion of either the legiſlature or judiciary here differing with him; ſo far as to ceaſe to act, by reſigning. This able and elaborate opinion of the ſupreme court, muſt have its weight throughout the legal world, and that the terms advice and conſent are not now imperative or obligatory; is the ſupreme law of the land; any thing in the conſtitutions or laws of the ſeparate ſtates to the contrary notwithſtanding. The governor, the council and the legiſlature are bound to ſupport that deciſion as law by their oaths, and although the Civil Officer cannot now undertake to ſay, how far that deciſion can determine a queſtion, ariſing under the conſtitution of Maryland; yet he can ſafely ſay, that all thoſe functionaries would be expoſed to very ſerious difficulties, in giving different deciſions on the ſame words, in their different capacities as citizens of the United States, and citizens or officers of this ſtate, and they would expoſe the people of Maryland to a painful and dangerous dilemma, acting under a certainty that the one, or the other conſtitution was unqueſtionably violated.

Why ſhould the people or the government be involved in ſuch dangerous embarraſſments? there has been no legal deciſion on the conſtitution of the ſtate contrary to that of the United States. A practice in council, not expoſed to public obſervation, frequently varying, and ſometimes oppoſite, as extracts will prove, and contrary to deciſions of the legiſlature, will not certainly be oppoſed to common reaſon, immemorial and unvaried *public* uſage, legal underſtanding, and the ſupreme judicial authority of our national government.

It will be ſeen that the ſupreme court decided on the word *appoint*, independently of the word nominate, the latter term is uſed in the federal conſtitution, where the preſident never perſonally meets the ſenate, and to avoid thoſe cavils which had already exiſted; but although the preſident of the United States has no power of propoſing or negotiating a treaty excluſive of the general authority reſulting from the terms *making treaties*, yet it muſt be well recollected that after negotiating the Britiſh treaty, ſubmitting it to the ſenate, and obtaining the advice and conſent of two thirds of that body, the late preſident Waſhington deliberated a long time whether he would ratify it or not. As ſoon as it was known that the ſenate had adviſed the ratification, addreſſes poured in upon him from all parts of America, praying him to reject it.—Although the advocates of that treaty were numerous, reſpectable for their wealth and eminent for their talents, yet it is not recollected that one ſolitary opinion appeared that the advice and conſent of the ſenate was obligatory on him; or that he was not ſtill at full liberty; to reject or ratify at his own diſcretion. Nomination therefore wholly unimportant to decide the import of appointing by and with the advice and conſent even where it is uſed, has been lugged into this controverſy although unknown to our conſtitution and laws—it has been connected with the term *veto*, which firſt excited the public odium, and deſtroyed a conſtitutional power, juſt eſtabliſhed by the French people themſelves. It was the magic ſpell that firſt raiſed all the furies of France and blaſted perhaps for ever, the fair hopes of twenty-five millions, of the votaries of freedom —It is hoped that it has been uſed with no ſuch nefarious deſigns here, and it is believed it will be attended with no pernicious conſequences—it probably was only deſigned to confuſe a plain queſtion, and in this view it certainly entitles the Friend of Candour to rank among the phenomena of natural hiſtory next to a *fiſh*, which diſcovers the inſtinctive ſagacity, of muddying the water to elude purſuit.

With the foregoing obſervations, we have conducted our reply, without any material omiſſion to our knowledge, to the 34th ſection of the conſtitution organizing the board of council; with the true conſtruction of which, the pretenſions of the council to the powers they have exerciſed, and the arguments of their friendly advocate muſt ultimately ſtand or fall. Admitting here the full force of the rule he cites, which we have always urged,—*that all the parts of the conſtitution muſt be conſidered together and ſo construed as to render the whole one regular and conſiſtent act*—our obſervations that follow will be more full and particular, and we hope and expect that they will prove entirely concluſive.

The Friend to Candour, thus commences; *The convention having as before ſtated veſted in the governor and council the right of appointments; and having alſo intruſted to them all other executive buſineſs not confided to the governor alone.* We have been early on our guard againſt this attempted fallacy; and have already referred the reader to the conſtitution itſelf, to prove, that the laſt diviſion of this ſentence from the word appointments, is an artful miſtatement and its diſingenuous and deceptive deſign will be now developed and expoſed. By attending to the order which the conſtitution obſerves, its true conſtruction will become ſtill more evident. The firſt diviſion of this ſentence, (which is entirely incorrect as a citation), is from the 48th ſection of the conſtitution; diſtantly poſterior to ſection 34, on which he is commenting; and the laſt diviſion which is the direct *reverſe of the truth in fact and effect*, is from the 33d ſection, prior to it in order. Strictly ſpeaking, the power of appointing to office, will be found to be no new power veſted in the governor by ſection 48. It was a power that had been inveſted in that officer from the firſt ſettlement of Maryland, preſerved by the declaration of rights, recognized and eſtabliſhed as a part of the conſtitution, (unalterable and irrepealable but in the conſtitutional mode,) by the 33d ſection. The 48th ſection in reality does no more than limit the governor in its exerciſe, *by requiring the advice and conſent of the council*, without which expreſs reſtriction, he might have *alone* exerciſed this power by the conſtitution and laws of Maryland. This remark is here intended to illuſtrate and connect our obſervations on this ſubject, but it is altogether unneceſſary in proving the citation of the Friend to Candour to be the reverſe of the truth. Section the 33d ſhould be particularly attended to, as it organizes *conſtitutionally* the general executive powers of the ſtate: Its own words can beſt explain its meaning—"The gover-" nor, by and with the advice and conſent of the council, " may embody the militia, and when embodied ſhall *alone* " have the direction thereof, and *ſhall alſo have the directi-* " *on* of all the regular land and ſea forces under the laws of " this ſtate, but he ſhall not command in perſon, unleſs *ad-* " *viſed* thereto by the council, and then no longer than they " ſhall approve thereof; *and may alone exercise all other the* " *executive powers of government where the concurrence of the* " *council is not required according to the laws of this state.*" So directly the reverſe therefore is this poſition of the Friend of Candour from the truth—that the convention intruſted to the governor and council *all other executive buſineſs*, not confided to the governor alone—that by the expreſs effect of this general grant to the governor alone, in order to enable him to require their advice and conſent to his exerciſe of *thoſe other executive powers*, and in order to compel them to give their advice and conſent thereto, there muſt be a ſpecial law directing their concurrence in the particular caſe, and all other executive buſineſs of whatever nature it be, is expreſsly and conſtitutionally confided to the governor *alone*—The poſition therefore of the Friend of Candour which immediately follows as an inference from theſe premiſes, *that the governor and council were conſtituted into one board* for the tranſaction of all *ſuch* buſineſs as had not been confided to the governor *alone*, muſt fall "like the baſeleſs fabric of a viſion." Here then ſtands fully expoſed the great object of this deception, thus artfully contrived, which has ſtated the direct reverſe of the real conſtitutional proviſion, as true. Notwithſtanding this bold attempt to erect themſelves, with the governor, by a fabrication, into a board for the general executive buſineſs of the ſtate, and as ſuch to legalize all their uſurpations in his preſence or abſence, they muſt, as far as the conſtitution can prevail, remain a board ſtill, to adviſe the governor *expreſsly, and only to adviſe and conſent to his acts in ſuch ſpecial caſes as may by law be required*; who confers with them to hear the diſcuſſions and reaſons they may offer for that advice, and *decide, if they are divided*; but who is ſtill to act after that advice and conſent is obtained on his own reſponſibility, and who is alone, without conſulting them, *to exerciſe all other the executive powers of government*, whatever may be their nature, whether derived from the laws exiſting before the revolution and unrepealed by the convention; or created by new laws and ſubſequent legiſlatures—But of this more fully hereafter.

This diſtinction, or rather theſe words of the 33d ſection preſerved ſteadily in view, will be alone ſufficient to deſtroy the pretenſions of the council; but they form only a very minute part of thoſe uniform, conſiſtent, connected and unanſwerable arguments, which reſult from our conſtitution and laws, as will appear from the following obſervations.

Some young men, born as it were yeſterday, ſeem to look back to the convention and the conſtitution as to the creator and creation of a new world, or at leaſt to believe, that all that preceded was a chaos yielding not one ray of light: Before they undertake to conſtrue the conſtitution of this ſtate, they ſhould firſt examine its records and laws, and depend in ſome degree on thoſe who were men and public officers before that period They would then obſerve that the convention, (after aſſerting this firſt and moſt important truth reſulting from the principles of the revolution, "*that all government* originates from the people,") proceed to declare, (as we have ſtated,) "that the inhabitants of Maryland are of right entitled to all the laws ariſing either from common or ſtatute law in force and in practice in this ſtate on the 1ſt of June, 1774, ſubject however to ſuch alterations as had been or might be made by the convention or future legiſlatures."

It was on this baſis that they proceeded to eſtabliſh a conſtitution or ſyſtem of organic laws, unalterable and irrepealable by any ſingle act of a future legiſlature. By this conſtitution they preſerve the three great departments of government as eſtabliſhed and derived from the common law —the Legiſlative, Executive and Judiciary; but theſe they declare ought to be for ever *thereafter ſeparate and diſtinct*: The principal laws relative to the organization of theſe departments they have rendered part of the conſtitution, conſequently unalterable and irrepealable, (as has been obſerved,) by an ordinary act of the legiſlature; but all other laws in force on the 1ſt of June, 1774, (all of which neceſſarily preſcribed duties to ſome of theſe departments,) are equally in force now, unleſs expreſsly or by neceſſary conſtruction repealed by the conſtitution or ſubſequent legiſlatures; with this diſtinction, that they now remain, not conſtitutional laws, but repealable by ordinary legiſlative acts.

We muſt ever keep in view this fundamental principle when about to decide the true conſtruction of the conſtitution, which without it muſt have remained a dead letter and never could have been brought into action, as will appear by the following obſervations:—The conſtitution organizes the legiſlative body in many reſpects differently from what before exiſted, but the power conferred on the delegates by ſection 10, of propoſing to, or receiving bills from, the ſenate; and on the ſenate by ſection 11, of exerciſing their judgment in paſſing all laws, cannot be conſidered as deſcribing or defining the nature or extent of the objects, to which thoſe bills or laws muſt relate, or the forms or modes in which they were to progreſs and be executed; thoſe remained dependent on the colonial laws in force on the 1ſt of June, 1774, derived from the common law, and other ſources deſcribed in the conſtitution, except as altered by the convention.—The ſame general principle extends more forcibly to the *judiciary*: By the conſtitution, ſection 36, "*three per-* " *ſons of integrity, &c.* ſhall be appointed judges of the " court now called the Provincial Court, thenceforth to be called and known by the name of the General Court:" And the county and inferior courts are no otherwiſe organized or noticed by the conſtitution, than by providing for the appointment of the juſtices and clerks, and permitting a juſtice of peace to ſerve in the general aſſembly, which was otherwiſe prohibited by the general ſeparation of the legiſlative and judicial departments, as eſtabliſhed by the declaration of rights. Yet all theſe courts proceeded without heſitation or queſtion under the colonial laws and uſages in force in 1774, without which they could not have iſſued a proceſs, much leſs have tried a cauſe. In the executive department, the governor, and the council to adviſe the governor in certain caſes, were preſerved as the known and eſtabliſhed functionaries of that department; but the legiſlative and judicial powers which both had exerciſed prior to the revolution, were deſtroyed, not only by the general proviſion of the declaration of rights ſeparating the three departments; but alſo by the conſtitution organizing other depoſitories on whom they were conferred. The words uſed by the conſtitution are ſtrong and clear: Section 25 provides, that a perſon of wiſdom, experience and virtue, ſhall be choſen governor. Here is no creation of a new office; a new mode only is preſcribed of appointing an officer to diſcharge the duties of an office already known to the laws, and the inhabitants of Maryland from their firſt emigration; ſubject to ſuch changes and limitations as the conſtitution and ſubſequent laws ſhould make. Section 26. Five of the moſt ſenſible and experienced men are to be choſen *the council to the governor*. Words could not be more expreſs and emphatical—the word *the* even definitely refers to a body and official duties then exiſting and already known to the laws:—this deſcription itſelf, and all the laws and uſages then known in Maryland, conſtitute them a body, *only to adviſe the governor in the diſcharge of certain ſpecified executive powers*: The conſtitution throughout expreſsly recognizes and directs this, as the only mode in which they ſhall act, except in the appointment of their clerk, and the deviſing a great ſeal, exceptions which aroſe from very peculiar circumſtances in the preceding hiſtory of Maryland, and which will be hereafter noticed.

In order more clearly to exhibit the executive powers of the governor under the conſtitution and laws of Maryland; the following analyſis is offered —

The GOVERNOR may *alone*

1. Appoint and notify one of the two days, or a day between, for the meeting of the aſſembly, where the two houſes differ on the day of adjournment. Sect. 29.
2. Have the direction of the militia when embodied. Sect. 33.
3. Have the direction of the regular land and ſea forces of the ſtate. Sect. 33.
4. Grant pardons and reprieves for any crime, except in ſuch caſes where the law may otherwiſe direct. Sect 33.
5. Lay embargoes, not exceeding thirty days, during the receſs of the legiſlature. Sect. 33.
6. Compel any veſſel to ride quarantine, ſuſpected to be infected with the plague. Sect 33.
7. Commiſſion as ſheriff the ſecond of the two perſons firſt returned, on the death or diſqualification of the firſt. Sect. 41.
8. Commiſſion a regiſter of wills on the joint recommendation of both houſes of aſſembly. Sect. 42.
9. Suſpend or remove any militia officer in purſuance of the ſentence of a court-martial. Sect. 48.
10. Sign all commiſſions and grants. Sect. 57.
11. Sign every bill paſſed by the general aſſembly. Sect. 60.

The GOVERNOR, with the advice and conſent of the council, may

12. Appoint a treaſurer in the receſs of the aſſembly till they meet. Sect. 13.
13. Call the aſſembly before the time to which they are adjourned, giving ten days notice. Sect. 29.
14. Embody the militia. Sect. 33.
15. Command the militia and regular forces *in perſon*, but no longer than the council approve. Sect. 33.
16. Appoint a regiſter of wills during the receſs of the legiſlature till they meet. Sect. 42.
17. Appoint a ſheriff when both the perſons returned ſhall die, refuſe to ſerve, or become diſqualified. Sect. 41.
18. Appoint clerks of general and county courts in caſe of vacancies during the vacations of ſuch courts. Sect. 47.
19. Appoint a chancellor, judges, juſtices, &c. and all civil and military officers, (overſeers of roads excepted, &c.) Sect 48.
20. Suſpend or remove a civil officer who has not a commiſſion during good behaviour. Sect. 48.
21. Suſpend or remove any regular officer of the land or ſea ſervice. Sect. 48.

And, laſtly, 22. The governor may *alone* exerciſe all other the executive powers of government, where the concurrence of council is not required by the laws of this ſtate. Sect. 33. Theſe other executive powers could no more be *expreſsly* enumerated, defined or fixed, by the conſtitution, than the other powers of the legiſlative or judiciary departments—which remain undefined thereby; and could it have been done, it would have been improper and abſurd, unleſs the convention had been gifted with the divine attribute of foreknowledge; as they would then become part of the conſtitution, and unalterable by the ordinary acts of future legiſlatures.

The powers, therefore, of the governor, to be exerciſed by him alone, *under this laſt general clause*, are 1ſt, ſuch as exiſted under the laws of the ſtate in 1774, not abrogated or altered by the conſtitution or ſubſequent laws; and 2dly, ſuch executive powers as are created by, or ariſe under, ſubſequent laws. On theſe we muſt remark, that his executive powers derived from the laws in force in 1774, muſt be ſuch, and ſuch only, as were created, adopted or recognized, by the laws and practice of Maryland, and not ſuch as were merely executive powers *in England or Great Britain*; and that all ſuch, unleſs ingrafted into the conſtitution, remain ſtill ſubject to repeal or alteration by ſubſequent laws; which may alſo require him to exerciſe