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MARYLAND GAZETTE.

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A CIVIL OFFICER OF MARYLAND.—CONTINUED.

THESE obſervations will materially aſſiſt in elucidating *the next clauſe* of the ſection, which appears to be the great pivot, around which all the arguments to deſtroy the powers of the governor and confer them on the council, ſeem to turn as it were in a circle; but which a correct examination will prove to be equally clear, and conſiſtent with every other part of the conſtitution. The words are, *that the governor for the time being ſhall preſide in the council, and be entitled to vote on all queſtions in which the council ſhall be divided in opinion.* The governor being the agent, as we have already ſhewn, on whom all executive powers are conferred by every part of the conſtitution; and the buſineſs the council are to tranſact; being to deliberate and decide on their advice and conſent to *ſuch* executive acts of the governor *as require their concurrence by the laws of this ſtate*; by the expreſs and uniform words of every clauſe of the ſame inſtrument, which authoriſes them to do any act at all, except in the two trifling inſtances frequently mentioned; it naturally follows, that when they are convened to deliberate on that advice and conſent, the governor ſhould be preſent to confer with them, not only to explain his own motives of action, but hear the motives of ſuch advice as they may ſuggeſt in diſcuſſion. Public decorum would certainly require that the chief magiſtrate ſhould preſide when officially preſent; but the Friend to Candour can ſee no benefit that can reſult from this perſonal conference, and that conſequent deliberation and diſcuſſion, ſo neceſſary to produce a concurrent act. Are not theſe the means which all deliberative bodies are frequently obliged to reſort to, when their concurrence is neceſſary to form an act? Is it not in its nature ſtill more eſſential in executive proceedings, where ſyſtem, ſecrecy and promptitude, are the characteriſtic features?—It was for the benefits to be derived from this conference, and to explain the motives of advice, that the *governor of Maryland ever had preſided in the council, when convened on executive buſineſs.* It is the common law and cuſtom of England, and probably of every civilized country in the world, where there is a chief executive magiſtrate, and a council to adviſe him. Although it may not appear from the journals whether he ever voted to decide the opinion of council before the revolution, and although it is almoſt certain he did not, as it was naturally and generally improper for him to adviſe himſelf, yet the reaſon is evident, when we reflect that it was *unnecessary*, as the council held their ſeats at his pleaſure, and he could, if they ultimately diſagreed, appoint ſuch as would concur with him. And it will be ſeen that the governor, if he thoſe to take the reſponſibility on himſelf, never conſidered the advice and conſent of council as legally neceſſary to the validity of an executive act. Perhaps it was really not ſo before the conſtitution; but the convention having rendered the council independent on the governor, and *their concurrence* being made neceſſary to enable him to act on the moſt important executive buſineſs, natural reaſon, it ſhould ſeem, dictated the propriety, that where the council were equally divided, the judgment of the governor ſhould decide, and that he ſhould vote, in order that the deciſion ſhould be entered on the journal as that advice and conſent, without which he could not poſſibly act. For theſe plain and evident reaſons the convention have directed, that in this *only* caſe the governor ſhall vote; and doubtleſs it is the only caſe he could vote, conſiſtently with the whole theory and language of the conſtitution. But the Friend to Candour obſerves, unleſs he acts as a member, it is not the advice of council; we ſhall not vulgarize our language by calling this play upon words, a *quibble*. But this writer is certainly the firſt pupil of the ſchool of reaſon that ever gravely contended, that thoſe who had authority to lay down a general rule could not make a ſpecial one; or, that having admitted the general principle, the convention could not provide for an exception, ſo reaſonable and neceſſary as this muſt appear to be.

But the queſtion now occurs, how can the governor's preſiding, or voting on *ſuch ſpecial* caſes, (and if all the council attend to their duty, as the convention muſt have contemplated, or any number except four, he never can vote,) *deſtroy* the power expreſsly veſted in him of acting, or exerciſing all executive powers of government, either with or without *the concurrence* of council? How can that deprive him of the uſe of his deliberate reaſon and judgment as governor, the officer who is the expreſs agent in every executive act? How can it enable the council to act? This is not only by implication to deſtroy the *express* powers of the governor, but by *implication* alſo to give them to the council. Can they view the governor in the light of a political ſumpter mule, who may be led to council as an aſs goes to market, where his maſters eaſe him of his load, and turn him aſide to browſe on thiſtles and thorns: He exiſts, they admit, as an integral officer, to iſſue death warrants, &c. but all his other powers become common property, over which he has no control, unleſs they ſhould diſagree in the diviſion of the ſpoil. The Indian, who with his murderous tomahawk has cleft the ſkull of his adverſary, vainly imagines that he inherits all his faculties and powers. But ſurely the council cannot believe, that if the governor is defunct, his powers to act are to remain with them; for when he ceaſes to exiſt as conſtitutional governor, their preſident muſt *immediately* call the aſſembly to ſupply his place: Sect. 32. The convention would not admit the idea of any but a conſtitutional governor continuing, even for a ſhort time, to exerciſe the powers attached to the chief magiſtrate; perhaps it has been the dread of this proviſion that led, to the invention of a convenient half-alive ſtate for him, to legalize under his name their own acts; as the mayors of the palace formerly preſerved the pageants of the ſecond race of France.

It is admitted, it is certain, the governor could derive no authority *merely* as preſident, (if he had been declared ſo,) from his being governor; but *vice verſa*, the converſe muſt hold good, and he could loſe no authority as governor by being made preſident. By an act paſſed in March, 1774, governor Eden, and the governor for the time being, is created preſident of the board of truſtees of Charlotte-Hall ſchool; this act has been amended by ſeveral acts ſince the revolution, and the truſtees may now tranſact buſineſs without the preſence of their preſident, who remains the governor for the time being. No one could imagine that the governor gained any authority as preſident by being governor, or that he loſt any as governor by being made a preſident; the idea is too abſurd. No one, it is preſumed, will contend, that if the power had not been conferred on the governor of preſiding in council, and voting on thoſe ſpecial caſes, that his full and *integral* powers as governor, derived from the conſtitution and laws would not have remained entire. It is then aſked, can additional powers conferred on an officer deſtroy thoſe already poſſeſſed? Can expreſs powers be deſtroyed by implication? that the power of preſiding, and voting in a particular caſe, ſhould deſtroy by implication or merge the power of acting as governor, which is granted generally in every caſe, is contrary to every principle of reaſon hitherto received among mankind. The doctrine of *merger* in law is rarely applied, and can only apply, where the poſſeſſor of an inferior or imperfect title gains a ſuperior and perfect title, the leſs or worſe may be merged in the greater or better title, but that the governor, by gaining a trifling power, which *may poſſibly never be exerciſed*, and which *cannot poſſibly be exerciſed*, where all the conſtitutional functionaries are attending their duty, ſhould loſe the high and important powers he had ever poſſeſſed and had been conſtitutionally confirmed, is contrary to all natural and legal reaſon. But it ſeems admitted that it does not deſtroy thoſe powers which by the conſtitution he is to exerciſe ſolely; with reſpect to them he ſtill remains, it ſeems, an *integral* governor: And why ſhould it deſtroy thoſe which he is to exerciſe with the concurrence of council? Are they inconſiſtent? are not his *integral* powers neceſſary to fulfil the conſtitution in theſe caſes? if he has no independent power as governor, but muſt act ſolely as an occaſional member of the board, can it be a *concurrent* act when he does not *vote* at all? *Can it be a concurrent act even when he may happen to vote?* Is it not then a *joint* act, which is the reverſe of *concurrent*, the conſtitutional term? This, it ſhould ſeem, muſt be concluſive as to legal conſtruction. But as the neceſſity is admitted of his remaining at all times an integral governor in the exerciſe of his ſole powers, we may inquire into the propriety of his preſerving and uſing thoſe intellectual faculties which qualified him for the diſcharge of the one when he comes to diſcharge the other. If they are ſo important as to require that the judgment of the governor ſhould be aſſiſted by the advice of others, it certainly is more neceſſary for him to exert the energies of *his* mind alſo; and is it poſſible that the convention, when they directed him to take the advice and conſent of others before he performed thoſe duties, meant that he ſhould relinquiſh all his powers of rationality with reſpect to them, unleſs his adviſers, *by poſſibility*, ſhould happen to divide. As the convention could not poſſibly intend this, ſo they never could foreſee ſuch a conſtruction. A governor ever had preſided over the executive council in Maryland before, without any ſuch effect being produced. The name of preſident could not alter the legal effect, for we ſee the preſident of the United States uſes his deliberate judgment, even where aſſiſted by the advice and conſent of the ſenate. But it ſeems that the convention could only have had in view their own preſident, or the ſpeaker of the houſe or other deliberative body, and by directing him to preſide in council, they intended to deſtroy, by implication, the *express* power they had already veſted in him—on thoſe ſubjects at leaſt where the concurrence of the council is required. This is the amount of the reaſoning of the Friend to Candour. But what analogy could he diſcover between the governor, a chief magiſtrate, whoſe official duties had exiſted from the firſt ſettlement of Maryland, had been recognized and rendered conſtitutional powers by the convention, who veſts in him all executive power with or without the advice of council, and a preſident or ſpeaker, officers elected in the ſame manner as the other members of the body over whom they preſide, at the ſame time, and to diſcharge the ſame duties; who are ſeparated from their aſſociates only by an election among themſelves, and who remain always *primi inter pares*. Had the convention known a *preſident or ſpeaker*, had they created *theſe officers*, with powers, *by and with the advice and conſent of the ſenate and houſe of delegates*, to paſs laws—then there might be ſome analogy in the caſes, but it would ſtill have been a ſlight one. But having now proceeded ſo far, we are obliged to conclude our obſervations *on this clauſe* by a *painful remark*, that the Friend to Candour *has been fabricating again*. Let him examine this ſection better, and he will find it to be directly the reverſe of what he ſtates it to be. The governor of Maryland never had been, nor is he now, preſident of the council; there ever has been ſince the year 1716 another preſident of the council known to the law; and ſo far is it from being true, *that the governor* and council are by this ſection conſtituted into *one board* for the tranſaction of *any* buſineſs, much leſs *all other executive buſineſs*, that the language of the ſection has moſt cautiouſly and directly *guarded againſt any ſuch inference, or confounding the powers of the governor and council together. Firſt, the members of the council;* (not the governor and council,) or any three or more, ſhall conſtitute *a board*. The governor is not named, and the board is conſtituted without him. Then follows, the governor for the time being ſhall preſide *in council*, and ſhall vote when *the council* are divided; but when the firſt named of the council preſides in his *abſence*, and votes as governor, (and he muſt qualify as ſuch, as we ſhall ſee, to enable him to do ſo,) it is expreſſed, he ſhall vote in all caſes where the *other members* diſagree. Here then we find that the governor is neither *preſident* nor *member of council*, nor *member of the board*, by this article, he is to preſide in council, and vote in a ſpecified caſe, but he remains governor ſtill, with all his powers veſted in him by the other parts of the conſtitution, and after the advice and conſent of council has been decided, the buſineſs of the board ends; then it remains with his deliberate judgment to determine, whether he will concur therewith before he finally acts. The language of the conſtitution is expreſs, the governor, *with the advice and conſent of council, may appoint officers; may embody the militia; call the aſſembly, &c. &c.*

This leads to the laſt clauſe of this ſection which will be found equally perſpicuous with every other part of the conſtitution: The words are—" and in *abſence of the governor, the firſt named of the council*, ſhall preſide, (not the firſt named of thoſe who may happen to be convened or preſent, at any particular time, as has been ſtrangely conſtrued,) and *as ſuch* ſhall vote in all caſes where the other members diſagree in their opinion." All therefore that now remains in examining this article, is to aſcertain what is the conſtitutional or legal *abſence* of the governor. This we ſhall find can only be the abſence defined and eſtabliſhed by ſect. 32, *the death, reſignation, or removal out of this ſtate, of the governor*, and poſſibly the caſe of extreme ſickneſs and inability to perform the duties, under the law of 1716. This law, it muſt be obſerved, is a perpetual law—it has always been acted under, was in force in 1774, and being no wiſe inconſiſtent with, or repealed by, the conſtitution, may be, and by the beſt opinion the Civil Officer can form, *is ſtill in force*. When therefore the firſt named of the council preſides and votes, it muſt be *as governor*—the words in the clauſe, *as ſuch*, cannot be conſtrued ſo as to make either grammar or ſenſe in any other manner; for he is in no part of the ſection called *preſident*—the words are *ſhall preſide*—the words therefore, *as ſuch*, cannot refer *to a verb*; there is no ſubſtantive in the preceding part of the ſentence to which they can either grammatically or intelligibly refer, *but the governor*. By referring to ſect. 32, we find the caſes there enumerated when the firſt named of the council *ſhall act as governor, and qualify in the ſame manner*, and ſhall immediately call a meeting of the general aſſembly, giving not leſs than 14 days notice, at which meeting a governor ſhall be appointed for the reſidue of the year. The firſt named of the council then can only act as governor by the conſtitution in the caſes here ſpecified; and to do this he muſt qualify as ſuch: This ſection therefore, 32, renders this clauſe of 34 abſolutely neceſſary, to authoriſe the firſt named, *acting as governor and qualified as ſuch*, to preſide in council, and as ſuch to vote where the other members diſagree, and that there may be a governor or a qualified officer for the board to adviſe; and the words vote as ſuch, *i. e.* vote as governor, fixes, by neceſſary reference, that abſence of the governor, and qualification of the firſt named of the council, which *are here meant and underſtood by the convention.*—And the meaning and effect of the clauſe will not be varied if the law of 1716 is in force, for that law has always been conſtrued, underſtood and practiſed under, as requiring the preſident to qualify as governor; thus it appears, from the journal of executive proceedings, " that on the 3d May, 1752, governor Ogle died—on the " next day, it is thus entered, his excellency Samuel Ogle, " late governor of this province, being dead, and the ho- " nourable Benjamin Taſker taking his place as preſident, " the ſeveral oaths of government appointed to be taken by " act of aſſembly of this province, and alſo the uſual oaths " taken by the governors of this province at the times of " their qualifications, (changing only what is neceſſary to be " changed,) and alſo the following oath, were adminiſtered " to the ſaid Benjamin Taſker, &c any other interpretation, was it conſiſtent with grammatical conſtruction, would involve the greateſt of poſſible abſurdities; that is, although the firſt named of the council, on the death, removal or reſignation, of the governor, cannot act without qualifying, and muſt immediately call the aſſembly; yet by meeting in the *absence* of the governor, he may go on through the whole year, exerciſing the duties of governor without qualifying or calling the aſſembly. He, and two of the council, or indeed any three or more; may meet under the preſent conſtruction, and if when thus convened, they conſtitute a board to tranſact any buſineſs not confided to the governor alone, they may meet at any other place as well as at the ſeat of government, or where the governor reſides; of courſe they may tranſact the buſineſs without his poſſible knowledge—they may meet at the ſeat of government at their own lodgings, and laſtly, they may meet in the council chamber, without apprizing him, as they frequently have done, and tranſact the executive buſineſs without the governor, and without the qualification of the firſt named of the council; and the governor is as effectually excluded from all participation in the duties of the office, not only for the *reſidue*, but for the whole year, and every year, as if dead, reſigned or removed; notwithſtanding the conſtitution has ſo effectually guarded againſt the exerciſe of the duties of this officer by any other than a governor, and qualified as ſuch, permitting only to the firſt named of the *council*, qualified as *governor, to act during the time requiſite, to call the aſſembly.*

It has not hitherto been examined in what particular mode the governor is to act when he preſides in council; that depends on the forms heretofore practiſed, and the conſtitutional proviſions; we have only hitherto contended, that whether the governor has the *right* he always had exerciſed prior to the convention of propoſing, or whether the council may originate, or whether the governor ſhall both originate and alſo deliberate after their advice and conſent, agreeably to the determination of the ſupreme court of the United States; the theory and conſtruction of our conſtitution require, that he ſhall exerciſe the faculties of a rational being in diſcharge of *all the duties* aſſigned to him, inſtead of holding an intermediate, ſemi-vital exiſtence, between the inanimate pen he guides, and the animals who guide him, if the expreſſion can be uſed with propriety where no perſonal offence is intended.

To the foregoing obſervations on the principles and conſtruction of the conſtitution, it remains to add ſome remarks on the ſtyle and language that has been uſed in our laws, ſubſequent to the revolution: Theſe frequently preſcribe duties to be performed by the *governor and council*, inſtead of the conſtitutional formulary, by the governor, with the advice and conſent of council. This is neither eſſential to the queſtion relative to the Suſquehanna commiſſioners, (for in theſe the language of the conſtitution was obſerved,) nor to the general conſtruction of the conſtitution itſelf—but the object of this addreſs is, to offer information and reflections to aſſiſt the public mind in deciding an important conſtitutional queſtion, and not to carry a particular point. We therefore have taken occaſion to obſerve, that this looſe language in our ordinary legiſlation cannot poſſibly create any change in the conſtitution; whenever the governor and council are named, they are named as conſtitutional organs, and when they are to act, they can only act in the manner preſcribed by that inſtrument: This principle is admitted by all; for otherwiſe the governor and council muſt act jointly, and the governor vote on all occaſions as another member: If they act as conſtitutional governor and council, they muſt act *concurrently*, with the