Reed.

Sept. 10, 1948

COMPLIMENTS OF

HALL HAMMOND

ATTORNEY GENERAL

ANNUAL REPORT

AND

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

MARYLAND

1947

HALL HAMMOND
ATTORNEY GENERAL

20th Century Printing Co.
Baltimore, Md.

ATTORNEYS GENERAL OF MARYLAND

Luther Martin	1778
William Pinkney	1805
John Thomas Mason	1806
John Johnson	1806
John Montgomery	1811
Luther Martin	1818
Nathanial Williams, Assistant Attorney General	1820
Thomas B. Dorsey	1822
Thomas Kell	1824
Roger B. Taney	1827
Josiah Bayley	1831
George R. Richardson	1845
Robert J. Brent	1851
*Alexander Randall	1864
Isaac S. Jones	1867
Andrew K. Syester	1871
Charles J. M. Gwynn	1875
Charles B. Roberts	1883
William Pinkney Whyte	1887
John P. Poe	1891
Harry M. Clabaugh	1896
George R. Gaither, Jr	1899
Isador Raynor	1900
William S. Bryan, Jr	1904
Isaac Lobe Straus	1908
Edgar Allan Poe	1912
Albert C. Ritchie	1916
Alexander Armstrong	1920
Thomas H. Robinson	1924
William Preston Lane, Jr	1930
Herbert R. O'Conor	1934
William C. Walsh	1938
William Curran	1945
Hall Hammond	1946

*The office of Attorney General was abolished by the Constitution of 1851, but was re-established by the Constitution of 1864.

STATE LAW DEPARTMENT

Hall Hammond	Attorney General
Richard W. Emory	Deputy Attorney General
J. Edgar Harvey	Assistant Attorney General
Richard W. Case	Assistant Attorney General
Joseph D. Buscher	Special Assistant Attorney General for the Comptroller of the Treasury
Robert E. Clapp, Jr.	Special Assistant Attorney General for the State Roads Commission
Aaron A. Baer	Special Assistant Attorney General for the Employment Security Board
Philip T. McCusker	Special Attorney for the State Accident Fund
Clarke Murphy, Jr.	Law Clerk
Mrs. Anne Davis Greer	Chief Clerk
Miss L. Erma Leonard	Law Stenographer
Miss Margaret E. Holliday	Law Stenographer
Miss Agnes T. Conroy	Senior Typist

Offices: 1901 Baltimore Trust Building,
Baltimore 2, Md.

TABLE OF CONTENTS

ANNUAL REPORT FOR 1947

	Page
Annual Report for 1947	1
Summary of Litigation for 1947	4
Cases Disposed of in the United States Circuit Court of Appeals	4
Cases Disposed of in the District Court of the United States for the District of Maryland	4
Cases Pending in the United States District Court for the District of Maryland	6
Criminal Cases Tried in the Court of Appeals	6
Civil Cases Tried in the Court of Appeals	8
Cases Pending in the Court of Appeals	15
Cases Finally Disposed of in the Lower Courts	16
Report of Special Assistant Attorney General for the State Roads Commission	34
Report of Special Assistant Attorney General for the Comptroller of the Treasury	40
Report of Special Attorney for the State Accident Fund	42
Report of Special Assistant Attorney General for the Maryland Employment Security Board	44
Cases Pending in Lower Courts	50
Financial Statement of the State Law Department for Fiscal Year beginning July 1, 1946, and ending June 30, 1947	56

OFFICIAL OPINIONS

Alcoholic Beverages	58
Aviation	69
Baltimore County	72
Banks and Trust Companies	76
Board of Examiners of Public Accountants	83
Board of Public Works	86
Budget	89
Clerks of Courts	91
Conservation	97
Constitutional Law	121
County Commissioners	144
Criminal Law	146
Dental Examiners	152
Department of Public Welfare	153

	Page
Education	157
Elections	160
Engineers	173
Fines and Forfeitures	174
Fines and Penalties	177
Governor	179
Health	182
Insurance	185
Justices of the Peace	190
Laws	205
Libraries	209
Licenses	211
Marriages	230
Maryland Training School for Boys	233
Medical Examiners	235
Merit System	237
Montgomery County Junior College	254
Motor Vehicles	258
Offices	295
Officers—Sheriffs	297
Pensions	298
Police Commissioner	305
Racing Commissioner	311
Real Estate Commission	321
Register of Wills	323
Retail Sales Tax	327
Retirement System	330
Sheriffs	331
Small Loans	335
State Employees	338
State Hospitals	342
State Police	344
State Roads Commission	346
Statutes	383
Taxation	387
Time	496
Trial Magistrates	501
University of Maryland	508
Veterans	512
Water Pollution Control Commission	514
Workmen's Compensation Law	516
Zoning	519

Annual Report for 1947

January 1st, 1948.

Hon. Wm. Preston Lane, Jr.
Governor of Maryland,
Annapolis, Md.

DEAR GOVERNOR LANE:

Pursuant to the provisions of Section 8 of Article 32A of the Annotated Code of Maryland, I am submitting herewith, a report of the business and proceedings of this Department from December 20th, 1946, when I assumed the office of Attorney General, to January 1st, 1948. The written official opinions rendered by the Department during the above period follow this report. I am also enclosing a detailed statement of the receipts and disbursements of the Department for the fiscal year beginning July 1st, 1946 and ending June 30th, 1947.

There were one hundred and three cases disposed of during the year and sixty-three are still pending, although partially tried. These cases do not include those handled by the Assistants assigned to the State Roads Commission, the Comptroller, the Employment Security Board and the State Accident Fund. Special reports by these Assistants are included in this Report.

There were ten criminal cases tried in the Court of Appeals and twenty-eight civil cases, and we appeared on behalf of the State in all of them. We appeared also in the U. S. Circuit Court of Appeals, the U. S. District Court for the District of Maryland, as well as the Circuit Courts for

the various Counties and the several Courts of Baltimore City. The cases involved covered a wide range of subjects, such as habeas corpus proceedings, a suit brought under the informer section of the United States Code; eviction suits; disorderly conduct, murder, bastardy, rape, assault and battery; arson, false pretenses and conspiracy; taxation, constitutional law, suspensions and revocations of motor vehicle licenses; mandamus suits, injunctions, replevins, elections, attachments and numerous other proceedings.

Attorney General Hammond, Deputy Attorney General Emory and Assistant Attorney General Harvey attended the National Association of Attorneys General meeting in Boston in October. The case of *United States vs California,* 322 U. S. 19, familiarly known as the "tidewater lands case", was the subject of considerable discussion at the meeting. In addition to that case, many other topics of general interest were considered.

On January 1st, 1947, I appointed Mr. Richard W. Emory as Deputy, and Mr. Richard W. Case as Assistant Attorney General in place of Mr. T. Barton Harrington who resigned as of January 1st, 1947. On February 28th, 1947, Mr. Albert A. Levin resigned as Special Assistant Attorney General for the Employment Security Board and I appointed Mr. Aaron Baer as his successor on March 1st, 1947. The Budget of 1947-1948 provided for a part time Law Clerk for this Department, and on October 1st, 1947, I appointed Mr. Clarke Murphy, Jr., of Baltimore to this position.

With the passage of the Retail Sales Tax Act at the Legislative Session of 1947, a great deal of time was spent in conferring with those charged with the administration of the law, and the increase in the number of court cases was due partially to the passage of this law.

During the 1947 Session of the Legislature, which convened on January 1st, we maintained an office at Annapolis

and at least one Assistant was present at all times to confer with and aid the various members of the Legislature and the Committees. All bills passed at the session were examined by us before being submitted to you for your signature.

A special Session of the Legislature was called on November 5th, 1947, primarily for the purpose of enacting enabling legislation pertaining to the taxing powers of the Mayor and City Council of Baltimore. In addition to that Act, there were seventy-eight other laws enacted.

We noted a marked increase during the year in the number of inquiries concerning the Blue Sky Law of Maryland, and there were more registrations this year than in the last two years. We have continued to cooperate with the Securities & Exchange Commission in connection with the securities law.

During the year numerous conferences were held with the various State officials and Departments, and many problems were solved without the necessity of court action.

With kind regards, I am,

Sincerely yours,

HALL HAMMOND,

Attorney General.

SUMMARY OF LITIGATION FOR 1947

CASES DISPOSED OF IN THE UNITED STATES CIRCUIT COURT OF APPEALS

Dorsey Edmondson vs. Edwin T. Swenson, Warden, etc. No. 5686. Edmondson filed a petition for a writ of habeas corpus before the Hon. W. Calvin Chesnut, one of the Judges of the District Court of the United States for the District of Maryland. The petition was denied by Judge Chesnut without granting a hearing and from the denial, an appeal was taken to the Circuit Court of Appeals. That appeal was dismissed by the Court. Mr. Harvey represented the Warden.

United States of America, Ex Rel. Clarence B. Bernard vs. Patrick J. Brady, Warden. No. 5652. This was an appeal from an order of the District Court of the United States for the District of Maryland (Chesnut, J.) refusing to issue a writ of habeas corpus upon the appellant's petition therefor. An appeal in forma pauperis was then taken to the above Court. On December 5th, 1947, the Court dismissed the appeal. Mr. Harvey represented the Warden.

CASES DISPOSED OF IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

United States of America, on Relation of Frederick W. Shinn, vs. State of Maryland and Standard Oil Company of New Jersey. This was a suit brought by Frederick W. Shinn as an informer under Section 232 of Title 31 of the U. S. Code, to recover from the State of Maryland and five oil companies, Maryland taxes allegedly illegally collected by the State of Maryland from the five oil companies, on sales of gasoline to the Federal Government and agencies and departments thereof, from the period of about 1944 to

1946. The suit was without any basis whatsoever, since the State did not require payment of gasoline taxes on sales to the Federal Government and its agencies. The Court dismissed the suit when the plaintiff failed to comply with certain technical requirements of the informer's statute. Mr. Emory represented the State.

Roscoe F. Walter vs. William P. Lane, Governor, Hall Hammond, Attorney General, etc. and C. & P. Telephone Company. This was a suit in which Roscoe F. Walter sought an injunction to prevent the Public Service Commission from putting into effect a temporary rate increase pending the proceedings for a permanent increase in telephone rates. The Governor and the Attorney General were made parties to this proceeding and a motion was made on their behalf to have the suit dismissed as to them, on the ground that they were not proper or necessary parties. The motion to dismiss as to the Governor and the Attorney General was granted but only after argument on the merits. Mr. Emory represented the Governor and the Attorney General.

Garfield A. Berlinsky vs. Helen Eisenberg, et al, and the Sheriff of Baltimore City. This was an action brought against the Safe Deposit and Trust Company and others, including the Sheriff of Baltimore City, questioning the legality of certain ejectment proceedings. This office was advised by attorneys for the defendants that the original petition had been dismissed and the case settled. Therefore, no answer was filed. Mr. Buscher handled the matter for the office.

Philip B. Fleming vs. Earl E. Uhlfelder and Sheriff Deegan. This proceeding began by a complaint filed in the above Court, by the Administrator of the Office of Temporary Controls and involved an attempt at eviction of a tenant by his landlord. As the Sheriff had no personal interest in the matter an answer was filed submitting his rights to the Court. Mr. Harvey represented the Sheriff.

Cases Pending in the United States District Court for the District of Maryland

Melissa Jane Rowe vs. Walter L. Green, Silas W. Weltmer, Superintendent of Spring Grove State Hospital.

Mary Ethel Stafford vs. Walter Gorsuch, W. Henry Gsell, Sheriff, and Dr. Charles V. Taylor, Superintendent of the Eastern Shore State Hospital.

Criminal Cases Tried in the Court of Appeals

William F. Brack vs. State of Maryland. No. 50, October Term, 1946. This was an appeal from the Criminal Court of Baltimore. The appellant was indicted for acting in a disorderly manner and after being found guilty by the verdict of a jury, he was sentenced to pay a fine of $25.00 and costs. The appeal was from that sentence. The judgment of the lower Court was affirmed. Mr. Harvey represented the State.

Weldon Jones, Jr. vs. State of Maryland. No. 90, October Term, 1946. This was an appeal from the Criminal Court of Baltimore where the appellant was found guilty of murder in the first degree, and after a motion for a new trial had been overruled by the Supreme Bench, he was sentenced to be hanged. The judgment of the lower Court was affirmed. Mr. Harvey represented the State.

Sanford S. Hahn vs. State of Maryland. No. 92, October Term, 1946. On July 2, 1946, the appellant was indicted for the offense of bastardy by the Grand Jury of Baltimore City. On October 18, 1946, the appellant filed a special plea of limitations, to which the appellee on the same day filed its traverse. Thereafter the Criminal Court of Baltimore City, sitting as a jury, found the appellant guilty as charged. Upon judgment being imposed, the appellent appealed. The judgment and sentence of the lower Court were

reversed and the case remanded for a new trial. Mr. Case represented the State.

Vernon F. Weinecke vs. State of Maryland. No. 93, October Term, 1946. The indictment charged the appellant with three crimes: (1) assault with intent to commit rape, (2) assault with intent to have carnal knowledge of a female child under the age of 14 years, and (3) assault and battery. The appellant entered a general plea of guilty to all three charges and was sentenced to be hanged. The judgment of the lower Court was affirmed. Mr. Emory represented the State.

Ross J. Abbott vs. State of Maryland. No. 103, October Term, 1946. This was an appeal from a judgment of the Circuit Court for Dorchester County in which the appellant entered a plea of guilty to an indictment charging him with murder, and, after hearing evidence, the Court determined that the appellant was guilty of murder in the first degree and sentenced him to hang. The appeal was dismissed. Mr. Harvey represented the State.

James S. O'Connell, R. B. Sanner vs. State of Maryland. No. 160, October Term, 1946. This was an appeal from a judgment of the Criminal Court of Baltimore. The appellants were charged in two indictments, each containing four counts, with false pretenses and conspiracy, and the appellant O'Donnell was sentenced to two years in the Maryland Penitentiary, and the appellant Sanner to eighteen months in the Maryland House of Correction. The judgments of the lower Court were affirmed. A motion for reargument was denied on July 21st, 1947. Mr. Harvey represented the State.

Robert Whitlock Snyder vs. State of Maryland. No. 7, October Term, 1947. The appellant was found guilty by a jury of murder in the first degree without capital punishment, and from the judgment of the Circuit Court for Montgomery County that he be confined in the Maryland Peni-

tentiary for the balance of his natural life, he took this appeal. The judgment of the lower Court was affirmed. Mr. Harvey represented the State.

Rose Davis vs. State of Maryland. No. 12, October Term, 1947. This was an appeal from the Criminal Court of Baltimore. The appellant and others were indicted for violating the law relating to lotteries, and from the judgment and sentence imposing upon her a fine of $100.00 and costs, Rose Davis appealed. The appeal was dismissed with costs. Mr. Harvey represented the State.

Milton Herring vs. State of Maryland. No. 13, October Term, 1947. The appellant was convicted of bastardy in the Circuit Court for Garrett County and, from the order requiring him to give bond in the sum of $500.00 conditioned upon his paying the mother or other person having custody of the child the sum of Seven Dollars per month until the child reached sixteen years of age, plus the expenses of confinement and reasonable funeral expenses in the event of the child's death, this appeal was taken. The judgment of the lower Court was affirmed with costs. Mr. Harvey represented the State.

I. William Parker vs. State of Maryland. No. 17, October Term, 1947. This was an appeal from the judgment of the Circuit Court for Wicomico County following the trial and conviction of the appellant on an indictment charging him with bastardy. The judgment of the lower Court was reversed and a new trial awarded. Mr. Harvey represented the State.

Civil Cases Tried in the Court of Appeals

Hyman A. Pressman vs. W. Lee Elgin, Commissioner of Motor Vehicles. No. 39, October Term, 1946. This was an appeal from a judgment of the Superior Court of Baltimore City, entered after the Court had sustained, without leave to

amend, a demurrer filed by the appellee to the appellant's petition for a writ of mandamus. The order of the lower Court was reversed and the cause remanded. Mr. Harvey represented the Commissioner.

J. Leroy Wright, Warden of the Maryland House of Correction vs. John Sas, Jr. and J. Leroy Wright, Warden, vs. Robert Dehaven. No. 48, October Term, 1946. These were appeals from two orders of the Hon. C. Gus Grason, releasing the appellees from imprisonment in the Maryland House of Correction. The orders were reversed and the appellees remanded to custody. Mr. Harvey represented the Warden.

State of Maryland ex rel. William Bergen vs. J. Leroy Wright, Warden, Maryland House of Correction. No. 63, October Term, 1946. Bergen filed a petition for a writ of habeas corpus in the Baltimore City Court, and from an adverse order he took an appeal. He was discharged from custody by reason of the expiration of his sentence while the case was pending in the Court of Appeals and when it was reached in due course the Court dismissed it. Mr. Harvey represented the State.

Joseph H. A. Rogan, et al. Constituting the State Tax Commission of Maryland vs. Baltimore & Ohio Railroad Company. No. 70, October Term, 1946. This was an appeal from the order of the Circuit Court of Baltimore City, Hon. Emory H. Niles presiding, reversing the decision of the State Tax Commission, and requiring the Comptroller of the Treasury of the State of Maryland to cause to be paid to the Baltimore and Ohio Railroad Company, the sum of $55,190.35 with interest at the rate of 6% from September 27, 1943. The decree of the lower Court was reversed and the case remanded for the passage of a decree in accordance with the opinion of the Court, with costs. Judge Markell filed a dissenting opinion. The Attorney General and Mr. Emory appeared for the State Tax Commission.

State Tax Commission of Maryland vs. Western Maryland Railway Company. No. 74, October Term, 1946. This was an appeal from the decree of the Circuit Court of Baltimore City, Hon. Emory H. Niles presiding, requiring the State Tax Commission to ascertain the Maryland proportion of the gross receipts of the appellee on the basis of the "main track" mileage, rather than the "all track" mileage basis, and to assess the tax on such basis for the years 1942, 1943 and 1944. A motion to dismiss the appeal was denied. The order of the lower Court was reversed and the assessments sustained. The Attorney General and Mr. Emory represented the State Tax Commission.

Maryland & Pennsylvania Railroad Company vs. Joseph H. A. Rogan, et al. Constituting The State Tax Commission. No. 108, October Term, 1946. This case was tried with No. 74 above, as the same question was involved. The order of the lower Court was reversed and the case remanded for further proceedings.

Eldred A. Cromwell vs. Robert Jackson, Clerk of the Circuit Court for Allegany County. No. 76, October Term, 1946. This case involved the constitutionality of the present local liquor law for Allegany County, which law was enacted by Chapters 5 and 58 of the Acts of the Special Session of the General Assembly of Maryland of 1933. Former Attorney General William C. Walsh represented the Clerk of the Court in attempting to uphold the constitutionality of the statute involved. Since this action was in the form of a declaratory judgment, this office was made a party to the suit and supplied certain information which was incorporated in the brief of the appellee. This office took no part in the hearing of the case before the Court of Appeals. The order of the lower Court was reversed in part and affirmed in part and the case remanded for entry of a judgment as therein directed.

Roscoe Degrange vs. J. Leroy Wright, Warden of the Maryland House of Correction. No. 77, October Term, 1946.

This was an appeal from an order passed by Hon. Herman M. Moser, an Associate Judge of the Supreme Bench of Baltimore City, remanding the appellant to the custody of the Warden of the Maryland House of Correction, following a hearing on a petition for a writ of habeas corpus. The order of the lower Court was affirmed without costs. Mr. Harvey represented the Warden.

Dorsey Edmondson vs. J. Leroy Wright, Warden of the Maryland House of Correction. No. 78, October Term, 1946. This was an appeal from an order passed by Hon. Joseph Sherbow, one of the Judges of the Supreme Bench of Baltimore City, denying the appellant a writ of habeas corpus. The order of the lower Court was affirmed without costs. Mr. Harvey represented the Warden.

John A. Hickman vs. Patrick J. Brady, Warden of the Maryland Penitentiary. No. 79, October Term, 1946. This was an appeal from the refusal of the Hon. Frederick Lee Cobourn to grant the writ of habeas corpus as requested by the appellant. The order of the lower Court was affirmed without costs. Mr. Harvey represented the Warden.

Emerson Davis vs. Patrick J. Brady, Warden of the Maryland Penitentiary. No. 81, October Term, 1946. This was an appeal from an order passed by the Hon. C. Gus Grason, Chief Judge of the Third Judicial Circuit, denying the writ of habeas corpus and dismissing Davis' petition therefor. The order of the lower Court was affirmed without costs. Mr. Harvey represented the Warden.

John C. Munder, et al. vs. Public Service Commission of Maryland. No. 85, October Term, 1946. This office represented the Public Service Commission in this matter and joined with the Consolidated Gas & Electric Light & Power Company, a co-defendant, in a motion to dismiss the appeal in the Court of Appeals, and in a brief on the merits. When the case was called, the Court of Appeals dismissed the appeal after argument of the appellant and without hearing argument on behalf of the Public Service Commission.

State of Maryland ex rel. John L. Renner vs. J. Leroy Wright, Warden, etc. No. 97, October term, 1946. This was an appeal from an order passed by Hon. James E. Boylan, Jr., in the Circuit Court for Carroll County, denying the writ of habeas corpus, as requested by the appellant. The order of the lower Court was affirmed. Mr. Harvey represented the Warden.

State of Maryland vs. Walter Haas and John Hatgimisios. No. 114, October Term, 1946.

State of Maryland vs. Martin Vitkow, Keenan W. Langham. No. 115, October Term, 1946. These were appeals by the State from two orders passed by the Criminal Court of Baltimore, requiring the State's Attorney and Police Commissioner of Baltimore, to permit counsel for the appellees, who were under indictment on six charges of murder and two of arson, to examine copies of statements made by said appellees following their arrest, and to have copies thereof. The petitions for writs of certiorari were dismissed, and the appeals in both cases dismissed. Mr. Harvey represented the State.

Joseph H. A. Rogan, Chairman, etc. State Tax Commission vs. Robert E. Cook. No. 116, October Term, 1946. On May 2nd, 1946, the appellee was discharged by the State Tax Commission as tax assessor for Anne Arundel County. On May 23, 1946, the appellee filed a petition for a writ of mandamus in the Baltimore City Court to compel the appellant to reinstate him to his former position. After hearing, the lower Court passed an order issuing the writ of mandamus, which reinstated the appellee to his former position as tax assessor for Anne Arundel County. From this decree the State Tax Commission appealed. The order of the lower Court was reversed and the petition dismissed. The Attorney General and Mr. Case represented the State Tax Commission.

James Rexroad vs. Warden of the Maryland House of Correction. No. 136, October Term, 1946. This was an ap-

peal from the refusal of the Baltimore City Court to grant the appellant a hearing on a petition for a writ of habeas corpus. The order of the lower Court was affirmed. Mr. Harvey represented the Warden.

Joseph P. Connor, Register of Wills for Baltimore County vs. Josephine Mary O'Hara, etc. No. 141, October Term, 1946. On June 22, 1946, Josephine Mary O'Hara and Joseph P. Connor filed a Special Case Stated in the Circuit Court of Baltimore City to determine the amount of inheritance tax due from the estate of James F. O'Hara, Jr. An opinion sustaining the appellee's position was filed by the lower Court on December 6th, 1946, and an appropriate decree was signed on December 20th, 1946. On December 21st, 1946, the appellant appealed from the aforesaid decree to this Court. The decree of the lower Court was affirmed in part and reversed in part and the cause remanded for decree in accordance with the opinion. The Attorney General and Mr. Case represented the Register of Wills.

Frank Copeland vs. J. Leroy Wright, Warden of the Maryland House of Correction. No. 153, October Term, 1946. This was an appeal from the refusal of Judge Emory H. Niles sitting in the Baltimore City Court to issue a writ of habeas corpus upon the appellant's petition. The order of the lower Court was affirmed. Mr. Harvey represented the Warden.

Ernest Nance vs. Warden of the Maryland House of Correction, No. 166, October Term, 1946. This was an appeal from the refusal of the Hon. E. Paul Mason, one of the Judges of the Supreme Bench of Baltimore City, to issue a writ of habeas corpus upon the appellant's petition therefor. The order of the lower Court was affirmed. Mr. Harvey represented the Warden.

J. Leroy Wright, Warden, vs. State of Maryland ex. rel. Lawrence W. Iser. No. 1, October Term, 1947. This was an appeal from an order passed by the Hon. J. Howard

Murray, one of the Judges of the Circuit Court for Baltimore County, discharging Iser from the custody of the appellant following a hearing on habeas corpus. The order of the lower Court was reversed. Mr. Harvey represented the Warden.

State, ex. rel. James Burger vs. J. Leroy Wright, Warden of the House of Correction. No. 2, October Term, 1947. This was an appeal from the refusal of the Hon. J. Howard Murray, an Associate Judge of the Third Judicial Circuit, to grant the appellant the writ of habeas corpus. The order of the lower Court was affirmed. Mr. Harvey represented the Warden.

Howard Walker vs. J. Leroy Wright, Warden of the House of Correction. No. 22, October Term, 1947. This was an appeal from the refusal of the Hon. Emory H. Niles, one of the Judges of the Supreme Bench of Baltimore City, to grant the appellant the writ of habeas corpus. The order of the lower Court was affirmed without costs. Mr. Harvey represented the Warden.

James A. Rountree vs. J. Leroy Wright, Warden of the House of Correction. No. 23, October Term, 1947. This was an appeal from the refusal of Judge Robert France, one of the Judges of the Supreme Bench of Baltimore City, to issue a writ of habeas corpus upon the appellant's petition. The order of the lower Court was affirmed without costs. Mr. Harvey represented the Warden.

Charlie H. Blount vs. J. Leroy Wright Warden of the House of Correction. No. 26, October Term, 1947. This was an appeal from the refusal of Chief Judge W. Conwell Smith, of the Supreme Bench of Baltimore, to grant the appellant a hearing on his petition for a writ of habeas corpus. The order of the lower Court was affirmed. Mr. Harvey represented the Warden.

J. L. Stanton vs. J. Leroy Wright, Warden of the House of Correction. No. 29, October Term, 1947. This was an

appeal from an order passed by the Hon. Robert France, one of the Judges of the Supreme Bench of Baltimore City, denying the appellant's petition for a writ of habeas corpus. The order of the lower Court was affirmed without costs. Mr. Harvey represented the Warden.

Terrie Walker vs. J. Leroy Wright, Warden of the House of Correction. No. 30, October Term, 1947. This was an appeal from the refusal of the Hon. Robert France, one of the Judges of the Supreme Bench of Baltimore City, to grant the appellant the writ of habeas corpus. The order of the lower Court was affirmed without costs. Mr. Harvey represented the Warden.

Jerome J. Gebhart vs. Richard P. Hill. No. 41, October Term, 1947. This was a case where the constitutionality of Chapter 13 of the Acts of 1947, which permitted minor veterans to participate under the G. I. Bill of Rights, was challenged. The Attorney General's office joined with attorneys for Hill, the defendant below, before the Circuit Court for Baltimore County. The Circuit Court held in favor of the defendant, thereby upholding the validity of the law. On appeal this office joined in the brief and participated in the case with attorneys for the appellee. The Court of Appeals held in favor of the appellee with costs to the appellant. Mr. Joseph Buscher represented the State.

Cases Pending in the Court of Appeals

Ben Frank & David Mazor vs. State, No. 70, October Term, 1947.

Ollie Smith, Jr. vs. State, No. 71, October Term, 1947.

Bruce Davis vs. State, No. 75, October Term, 1947.

Joseph R. Jewett vs. State, No. 114, October Term, 1947.

James V. Laguardia, et al. vs. State, No. 127, October Term, 1947.

John King vs. State, No. 130, October Term, 1947.

County Commissioners of Anne Arundel County, etc. vs. Justin G. Buch, No. 142, October Term, 1947.

William B. Duncan vs. State, No. 148, October Term, 1947.

Alfred Morris Cunningham vs. State, No. 150, October Term, 1947.

CASES FINALLY DISPOSED OF IN LOWER COURTS

Western Union Telegraph Company vs. State Tax Commission. In the Circuit Court of Baltimore City. This was an appeal from a decision of the State Tax Commission assessing gross receipts taxes against the Western Union Telegraph Company under Section 95(a) of Article 81 of the Code, for the year 1944, and including in such assessment, receipts from messages transmitted by agencies of the United States Government. The basis of the appeal was that it was improper for the Commission to include in the gross receipts against which the tax was assessed, receipts from telegrams sent by the United States or any agency thereof. The case was settled under an agreement between the Western Union and the Commission by which 50% of the receipts from telegrams sent by the Government and its agencies were included in the gross receipts against which the tax was assessed. A companion case including the assessment for the year 1945 was also filed and similarly disposed of. Mr. Hammond represented the Commission.

John A. Heinz, et al. vs. John H. Bouse, Register of Wills for Baltimore City. In the Circuit Court of Baltimore City. The plaintiffs filed a bill of complaint in which they asked that certain real estate therein described be declared to be the property of a partnership and therefore not subject to inheritance taxes. The Court held that the property in ques-

tion was owned by the partnership and therefore free from inheritance tax. This case was tried by former Attorney General Curran while he was in office, but it was not included in his report for 1946.

Jerome B. Cohen vs. Harry Misler, Guarantee Motors, Inc. and W. Lee Elgin, Motor Vehicle Commissioner. In the Circuit Court No. 2 of Baltimore City. The plaintiff instituted foreclosure proceedings involving numerous motor vehicles. The relief asked against the Commissioner of Motor Vehicles was that he be enjoined from transferring certificates of title to the motor vehicles involved in the proceeding. An answer was filed stating that that defendant had no interest in the proceeding and that he would abide by any order passed in the premises. Mr. Harvey represented the Commissioner.

Canton National Bank, etc. vs. Adam Abtuibette Kolarkoski, et al. In the Superior Court of Baltimore City. A judgment had been obtained by the Bank against the defendants who filed a motion to strike it out after an execution had been issued and placed in the hands of the Sheriff. In passing an order requiring the plaintiff to answer the motion, the Court directed that the Sheriff withhold proceedings under the execution then in his hands. As the Sheriff was not a party no answer was filed in his behalf. Mr. Harvey advised the Sheriff.

Joesph F. McJilton vs. John F. Heath, et al. State Board of Electrical Examiners and Supervisors. In the Baltimore City Court. McJilton filed a petition for a writ of mandamus to require the defendants to reinstate his license to practice as a master electrician in Baltimore City. A demurrer was interposed in behalf of the Board and the demurrer was sustained with leave to file an amended petition in fifteen days. To the amended petition a demurrer was filed and the demurrer was sustained without leave to amend. Mr. Harvey represented the Board.

Robert R. Marhenke vs. Wm. Preston Lane, Jr., Governor of Maryland, and Rodney Collier. In the Court of Common Pleas. The plaintiff filed a petition for a writ of mandamus, the purpose of which was to call into question the qualifications of the defendant Collier who had been appointed a member of the Board of Examiners of Moving Picture Operators. The plaintiff filed an order of dismissal before an answer was filed Mr. Harvey represented the Governor who was named as one of the defendants.

Blake D. Merson, et al. vs. County Commissioners of Montgomery County. In the Circuit Court for Montgomery County. A bill of complaint was filed against the County Commissioners of Montgomery County for the purpose of securing a judicial declaration that Chapter 833 of the Acts of 1947, relating to dumps in Montgomery County, was invalid. A copy was served on the Attorney General, but in as much as it involved only a local matter, no defense was asserted by this Department. Mr. Harvey represented the office in the matter.

Agnes Monroe vs. Gwendolyn Tripps, et al. & Chief Judge Allan W. Rhynhart. In the Circuit Court No. 2 of Baltimore City. A bill of complaint filed by the plaintiff against Judge Allan W. Rhynhart of the People's Court, and two other defendants, was the outgrowth of a case which had been pending in the People's Court. The relief asked against Judge Rhynhart was that he be restrained from deciding or proceeding further with the case in that Court. His rights were submitted on answer. Mr. Harvey represented Judge Rhynhart.

Henry Jackson Tallent vs. Hamilton R. Atkinson, Police Commissioner and George J. Brennan. In the Baltimore City Court. An action of replevin was filed against the Police Commissioner and his Secretary, involving the custody of money in the amount of $245.00 and the registration and title papers to a certain automobile. As the defendants claimed no right of possession to the property the case

was settled. Mr. Harvey represented the Commissioner and Mr. Brennan.

United Artists Corporation vs. Benjamin Hance, et al. Board of Motion Picture Censors. In the Baltimore City Court. This case involved an appeal from the State Board of Motion Picture Censors in refusing to permit the motion picture "The Outlaw" to be shown in Maryland. After a full hearing the action of the Board was affirmed. Mr. Harvey represented the Board.

Joseph Kadans vs. Charles A. Anderton, et al. Supervisors of Elections of Baltimore City. In the Circuit Court No. 2 of Baltimore City. Kadans filed a bill of complaint in which he asked that the Board of Supervisors of Elections of Baltimore City be required to make rules and regulations for the guidance of voters and candidates. A demurrer was filed in behalf of the defendant and it was sustained without leave to amend. Mr. Harvey represented the Supervisors.

Thomas W. Binebrink & Dewey Chambers vs. Motor Vehicle Commissioner. In the Circuit Court for Caroline County. Binebrink and Dewey Chambers filed separate appeals from the action of the Commissioner of Motor Vehicles in suspending their respective licenses and registrations following a collision in which they were involved. The suspensions were made pursuant to the provisions of Chapter 456 of the Acts of 1945. Motions to dismiss the appeals were filed in each case upon the ground that the Commissioner of Motor Vehicles had no discretion in the matter and that suspensions were by the terms of the Act mandatory, and that appeals were permitted only in cases where suspension or revocation was not mandatory. The cases were fully argued before Chief Judge Knotts and Judge Horney and the motions to dismiss the appeals were granted and the appeals dismissed. Mr. Harvey represented the Commissioner.

William Thomas Harman vs. Frank Hudes, et al. and Motor Vehicle Commissioner. In the Circuit Court of Baltimore City. A bill of complaint was filed to require the Commissioner of Motor Vehicles to issue a title to the motor vehicle described therein, and to obtain other relief against the other persons named as defendants. As the Commissioner had no interest in the proceeding an answer was filed submitting his rights to the Court. Mr. Harvey represented the Commissioner.

Helwig & Leitch, Inc. vs. Irene C. Cochrane and Motor Vehicle Commissioner. In the Circuit Court of Baltimore City. The plaintiff filed a bill for an injunction and thereafter an answer was filed by this Department in behalf of the Commissioner of Motor Vehicles who was one of the defendants. Before the case was reached for trial an order of dismissal was filed by the plaintiff. Mr. Harvey represented the Commissioner.

Joseph H. Kircher vs. Marion Barron and Motor Vehicle Commissioner. In the Circuit Court No. 2 of Baltimore City. A bill of complaint was filed for an injunction to restrain Marion Barron, one of the defendants, from assigning the certificate of title to a motor vehicle or from creating a lien thereon during the proceedings involving said vehicle. The Commissioner of Motor Vehicles was made a party and the relief asked against him was that he be enjoined from issuing a new certificate of title. As the Commissioner had no interest in the proceeding an answer was filed submitting his rights to the Court. Mr. Harvey represented the Commissioner.

Ralph E. Boose vs. Motor Vehicle Commissioner. In the Circuit Court for Montgomery County.

Joseph Irven Busbee vs. Motor Vehicle Commissioner. In the Circuit Court for Cecil County.

Frank Butler vs. Motor Vehicle Commissioner. In the Circuit Court for Dorchester County.

Stephen A. Carroll vs. Motor Vehicle Commissioner. In the Circuit Court for Montgomery County.

Joseph J. Culotta vs. Motor Vehicle Commissioner. In the Baltimore City Court.

Beverly F. Denston vs. Motor Vehicle Commissioner. In the Circuit Court for Worcester County.

Andrew James Evans vs. Motor Vehicle Commissioner. In the Circuit Court for Worcester County.

Robert Wilson Green vs. Motor Vehicle Commissioner. In the Circuit Court for Carroll County.

Brice Harding vs. Motor Vehicle Commissioner. In the Circuit Court for Dorchester County.

Nettie Levinia Harding vs. Motor Vehicle Commissioner. In the Circuit Court for Dorchester County.

Lee Davis Johnson vs. Motor Vehicle Commissioner. In the Circuit Court for Dorchester County.

Francis E. Kennedy vs. Motor Vehicle Commissioner. In the Circuit Court for Baltimore County.

Woodrow A. Pritchett vs. Motor Vehicle Commissioner. In the Circuit Court for Dorchester County.

John Frederick Simmons vs. Motor Vehicle Commissioner. In the Circuit Court for Dorchester County.

Fred Stewart vs. Motor Vehicle Commissioner. In the Circuit Court for Dorchester County.

Charles M. Stunkel vs. Motor Vehicle Commissioner. In the Circuit Court for Prince George's County.

John W. Tomlinson vs. Motor Vehicle Commissioner. In the Circuit Court for Allegany County.

Alvin Leroy Ward vs. Motor Vehicle Commissioner. In the Circuit Court for Cecil County.

William H. Ward vs. Motor Vehicle Commissioner. In the Circuit Court of Baltimore City.

Leroy Weber vs. Motor Vehicle Commissioner. In the Circuit Court for Montgomery County.

John Frederick Wineke vs. Motor Vehicle Commissioner. In the Baltimore City Court.

Reginald Henry Wingate vs. Motor Vehicle Commissioner. In the Circuit Court for Dorchester County.

The above cases against the Commissioner of Motor Vehicles were appeals from revocations and suspensions of the appellants' licenses to operate a motor vehicle, and the Commissioner was represented by Mr. Harvey.

George D. Willard vs. John J. Schissler, et al. and Police Commissioner. In the Circuit Court of Baltimore City. This was a suit by Willard, as father and next friend of Raymond Willard, an infant, against John J. Schissler, Administrator, and the Police Commissioner of Baltimore City, to recover a wallet and its contents ($124.00) which was found by the infant plaintiff in an abandoned house in Baltimore City. The wallet and its contents were given into the custody of the Police Commissioner for safe keeping by the infant pending actual ownership . An answer was filed on behalf of the Police Commissioner admitting possession and submitting the determination of the question to the Court. The Court held the infant entitled to the wallet and its contents. Mr. Buscher represented the Commissioner.

Francis H. Walter vs. Muriel G. Lacy and Sheriff Deegan. In the Superior Court of Baltimore City. This was an action against Muriel G. Lacy for damages arising from the use of an automobile. The automobile subsequently came into the possession of the Police Department and was turned over to the Sheriff of Baltimore City, and an attachment was issued against said Sheriff for the automobile. An answer was filed on behalf of the Sheriff admitting possession of the automobile and submitting the question to the jurisdiction of the Court. Mr. Buscher represented the Sheriff.

State of Maryland vs. Troy Friend and Sherman Frazee. In the Circuit Court for Garrett County. Subsequent to the arrest of the two defendants in this case on charges of violating Chapter 722 of the Acts of 1943 (Forest Conservancy Districts Act) the constitutionality of said Forestry Act was challenged. After a hearing in the matter, the Court gave this office the opportunity to file briefs and to argue the constitutionality of the statute. In accordance therewith, briefs were prepared and the case was argued before said Court and the constitutionality of the Act upheld. Mr. Buscher represented the State.

State of Maryland vs. Keystone Mutual Casualty Company of Pittsburgh, Pa. In the Circuit Court of Baltimore City. It came to the attention of the Insurance Commissioner that the Keystone Mutual Casualty Company of Pittsburgh, Pa. had been taken over for liquidation. In order to protect the interest of policyholders within this State it appeared desirable that a Receiver be appointed to protect, for the policyholders in the State of Maryland, all of the assets of the Company located within the State. Upon petition of this office, the Insurance Commissioner was appointed Receiver, and in accordance with the petition, the Circuit Court of Baltimore City appointed local counsel to the said Receiver. Mr. Buscher represented the Insurance Commissioner in the proceeding.

Joseph A. Rampello, etc. vs. Hamilton R. Atkinson, etc. In the Circuit Court of Baltimore City. This was an injunction proceeding against the Police Commissioner to restrain his office from arresting the operators of G. I. Taxicabs for operating their vehicles from a stand located on the Holabird Signal Depot, pending a ruling of the Public Service Commission of Baltimore City in the matter. Subsequent to the hearing thereon the injunction was dismissed by the plaintiffs. Mr. Buscher represented the Commissioner.

Berry M. Roache vs. Roy D. Bland & Judge James J. Hennegan, People's Court Judge. In the Baltimore City Court. This was an appeal from a decision of Judge Hennegan of the People's Court. The Judge was made a party to the appeal and an answer was filed on his behalf, submitting to the jurisdiction of the Court, and also stating that the said Judge would abide by such orders or decrees as might be passed in the matter. Mr. Buscher represented Judge Hennegan.

Philadelphia Electric Power Company and the Susquehanna Power Company. Before the State Tax Commission. This case involved the payment of a recordation tax in the amount of approximately $26,000 by the Philadelphia Electric Company and the Susquehanna Power Company for the recordation of a so-called Supplemental Trust Indenture. The Power Companies objected to the payment of the said tax and appealed to the State Tax Commission. The question came on for hearing before the Commission, and December 30th, the Commission ruled in favor of the claimants, holding that the said tax was not payable. From this appeal the Attorney General, on behalf of the State and the State Comptroller, took an appeal to the Baltimore City Court. Mr. Buscher represented the State.

Ilia Chasanowitch vs. Wm. F. Monaghan, Supervisor of the Taxicab Bureau. In the Baltimore City Court. This was an appeal from an order of the Supervisor of the Taxi-

cab Bureau dated February 23rd, 1944, under which the plaintiff's taxicab driver's license was suspended for a period of ten days. The appeal, although entered, was never prosecuted and we are informed by the attorney for the plaintiff that he is unable to locate his client and that he is considering the matter closed. Mr. Buscher represented the Taxicab Bureau.

Samuel Goldberg vs. John H. Souers, Jr., Chief of Police, etc., and Marvin I. Anderson, State's Attorney for Anne Arundel County. In the Circuit Court for Anne Arundel County. This was a bill for a Declaratory Judgment brought by the plaintiff and others against the Chief of Police of Ferndale, Md., and the State's Attorney for Anne Arundel County, to construe a statute relating to the return of money confiscated by the police as a result of a gambling raid. This office in representing the State's Attorney, demurred to each of the bills on the grounds that the State's Attorney did not have actual or constructive possession of the money so confiscated and had no physical control over same. Before the demurrers came on for hearing the attorneys for the plaintiffs filed a stipulation in the Circuit Court for Anne Arundel County asking that the demurrers so filed be sustained. Mr. Buscher represented the State's Attorney.

Morris Waller vs. John H. Souers, Jr., Chief of Police, and Marvin I. Anderson, State's Attorney. In the Circuit Court for Anne Arundel County. This was a suit brought against the Chief of Police of Ferndale, Md., and the State's Attorney for Anne Arundel County, under the Declaratory Judgment Act, to determine whether or not the plaintiff herein was entitled to the return of the sum of $2427.00 in currency which was taken by the Police from the person of the plaintiff at the time of his arrest on a charge of operating a lottery. A demurrer was filed as to the State's Attorney and prior to the hearing thereon it was stipulated by counsel for the plaintiff that the demurrer should be sustained as to the State' Attorney. Subsequent to the hearing

of the case on its merits a compromise settlement for the distribution of the money was reached between the plaintiff and the defendant. Mr. Buscher represented the State's Attorney.

Hamilton Crandall vs. John H. Souers, Jr., Chief of Police, etc., and Marvin I. Anderson, State's Attorney, etc. In the Circuit Court for Anne Arundel County. This is a companion to the above *Waller* case, and involved the sum of $1,066.00, Mr. Buscher represented the State's Attorney in this case.

In the Matter of Barry M. Hartle. The Auditor's report dated November 27th, 1945, disclosed a shortage in the accounts and records of Barry M. Hartle, deceased, former Treasurer for Washington County, for the years 1929 and 1930, in the amount of $513.18. Demands were made upon the surety company to pay this amount and they contended that they were not liable since a release was given by the Comptroller to Mr. Hartle prior to his death. However, this release could not be produced nor did the Comptroller's records show one was ever given. Compromise negotiations were then entered into and as a result the surety agreed to pay 50 per cent of the amount due. A check for $256.59, representing this amount, was paid by the company to the State under date of December 15th, 1947. Mr. Buscher handled the matter for the Comptroller.

Re: hearing before State Board of Registration for Professional Engineers and Land Surveyors. One, Walter F. Moore, a professional engineer of Oxford, Md., had sworn charges placed against him under the provisions of Section 19 of Article 75½ of the Annotated Code of Maryland. As a result of these charges, it became the duty of the State Board of Registration for Professional Engineers and Land Surveyors to hear the charges and determine whether or not the license of the party complained against should be revoked. The charges were heard in the Circuit Court room of Dorchester County at Cambridge on September 12th, and

the entire Board was present. As a result of the hearing the charges were dismissed. Mr. Buscher represented the Board at the hearing.

J. Millard Tawes, Comptroller, et al. vs. Christian Kahl, et al. In the Circuit Court for Baltimore County.

Re: Bond of ex-Sheriff C. Ross Mace of Baltimore County.

These cases involved the distribution of $900.00 pollution fine imposed by the Criminal Court of Baltimore County in 1939; a $500.00 default under the bond of former Sheriff Mace, and various fines resulting from convictions of the bird, game and fish Articles of the Code, now in the hands of the Baltimore County authorities. Agreement was reached between the attorney to the Board of County Commissioners of Baltimore County, and approved by said Board, and between this office representing the Board of Public Works, and approved by said Board, whereby the pollution fine in the amount of $900.00 was to be paid one-half to the State Comptroller and one-half to Baltimore County. The rights of the State to the $500.00 default under the bond of former Sheriff Mace was to be retained by Baltimore County, and the pollution fines then in the hands of Baltimore County, as well as all pollution fines paid to said County in the future, were to be remitted to the Comptroller of the State of Maryland. Mr. Buscher represented the Comptroller of the State.

Hyman A. Pressman vs. James J. Lacy, Comptroller, et al. In the Superior Court of Baltimore City. The petition for a Declaratory Judgment filed in this case alleged that the Maryland Retail Sales Act was unconstitutional by reason of the fact that the Governor of Maryland forced the passage of the law against the will of the majority of the Legislators. The petition further alleged that the Governor, with the aid of other persons, made threats and promises to members of the Legislature and publicly ridiculed other tax measures proposed by them. It was con-

tended that the Governor thereby usurped the power of the Legislature in violation of Article 8 of the Maryland Declaration of Rights which requires the Legislative, Executive and Judicial branches of the Government to be separate and apart. After argument the Court held that the allegations contained in the petition were too indefinite to amount to coercion or usurpation of the functions of the legislative body by the Governor, and that the Retail Sales Act was valid and constitutional. The Court also held that the Uniform Declaratory Judgments Act was a proper method of procedure to decide the arguments raised in the case. The Attorney General and Mr. Case represented the State officials.

Ralph Norton, et al. Chester F. Clagett, George P. Plummer vs. Milton T. Allen, Supervisor of Assessments of Montgomery County, and Joseph H. A. Rogan, et al. State Tax Commission. In the Circuit Court for Montgomery County. In these cases the Supervisor of Assessments for Montgomery County appealed to the State Tax Commission of Maryland from an order of the County Commissioners of Montgomey County establishing certain assessments on taxpayers' properties. Before the State Tax Commission, the taxpayers moved to dismiss the appeals on the ground that they had not been taken within thirty days from the action complained of, as provided by Section 191A of Article 81 of the Code. The Commission refused to dismiss the appeals and reversed the action of the County Commissioners. The taxpayers appealed to the Circuit Court for Montgomery County, which reversed the State Tax Commission, and held that since the appeals were not taken to the State Tax Commission within thirty days from the action of the Board of County Commissioners, the Supervisor had no standing in Court. Subsequent appeals by the State from the decision of the Circuit Court for Montgomery County to the Court of Appeals of Maryland were dismissed, since the result reached by the Court was changed by Chapter 648 of the Acts of 1947. Mr. Case represented the State Tax Commission.

Morrow Brothers, Inc., vs. James J. Lacy, State Comptroller. In the Circuit Court of Baltimore City.

Lord Baltimore Hotel Company vs. James J. Lacy, State Comptroller. In the Circuit Court of Baltimore City. These were petitions for declaratory decrees in which the plaintiffs sought to have the Retail Sales Act declared unconstitutional as applied to them. A demurrer was filed to the petition on the ground that the Uniform Declaratory Judgments Act did not afford the proper method of proceeding in the case. The Court sustained the demurrer on the ground that the plaintiff should have exhausted his administrative remedies before proceeding in Court by way of a petition for a declaratory decree. Mr. Case represented the Comptroller in both cases.

George A. Mahone, et al. vs. James J. Lacy, State Comptroller. Before the Comptroller of the Treasury of the State of Maryland. This case involved the question of whether the sale of meals served daily to members of the Engineers' Club of Baltimore was subject to the Maryland Retail Sales Act. The Comptroller ruled that such sales were for consumption on the premises where sold, and fell within the terms of Section 259(f)(1) of Article 81 of the Annotated Code. Mr. Case represented the Comptroller.

Robert I. Black vs. Bertram Boone, Secretary of State. In the Circuit Court for Anne Arundel County. In this case the petitioner sought a writ of mandamus to compel the Secretary of State to refer the Retail Sales Tax Act to the vote of the people at the next ensuing election, under the terms and provisions of the Referendum Amendment, Article 16 of the State Constitution. The defendant demurred to the petition upon the theory that the Act involved was a law which made an appropriation for maintaining the State Government, and was, therefore, exempt from the terms of the Referendum Amendment. The Court upheld the State's contention and sustained the demurrer. The Attorney General and Mr. Case represented the Secretary of State.

Walter C. Clarke, Register of Wills for Montgomery County vs. Union Trust Company of the District of Columbia, Executor of the Estate of Edward L. Morrison, Deceased. In the Circuit Court for Montgomery County. This case presented the question of whether a part of the net estate of Edward L. Morrison, which passed at his death to the Imperial Council of the Ancient Arabic Order of the Nobles of the Mystic Shrine for North America, was subject to the Maryland inheritance tax. The taxpayer contended that the bequest was tax free by reason of the fact that it was made to a charitable institution. The State contended that the bequest was subject to the tax because the charity in question did not carry on a substantial part of the activities and work in the State of Maryland. The case was argued before Judge Woodward and Judge Prescott on December 2, 1947, and was held sub curia. Mr. Buscher and Mr. Case represented the Register of Wills.

Leonard Wheatley vs. Edwin Warfield, Jr., et al. Conservation Commission. In the Circuit Court for Dorchester County. This was a suit to set aside an oyster lease. The case was tried and the decision of the Court was in favor of the Department of Tidewater Fisheries. Mr. Emory represented the Commission.

William E. Wenger vs. Daniel B. Chambers, Jr. et al. Board of Supervisors of Elections of Baltimore City. In the Circuit Court No. 2 of Baltimore City. This was a suit to require the Board of Supervisors of Elections of Baltimore City to strike the plaintiff's name from the specimen ballots and voting machines to be used in the primary election on April 1st, 1947. The Board resisted on the ground that the request of the plaintiff to have his name stricken off was made less than thirty days before the election, which is the statutory time for withdrawal. The case was tried and decided in favor of the plaintiff. Mr. Emory represented the Board of Supervisors.

Benjamin Shoemaker vs. State of Maryland. In the Circuit Court for Worcester County. This case involved the

question of whether food served from a stand situated on the boardwalk at Ocean City, Maryland, was subject to the Maryland Retail Sales Act. The Comptroller ruled that such sales were taxable and the petitioner, for violating this rule, was convicted by the Trial Magistrate for Worcester County. The petitioner then brought a writ of certiorari for the purpose of reviewing the conviction. The Circuit Court held that Rule 9 was unconstitutional in so far as it attempted to define the word "premises" as "the entire boardwalk". The proceedings before the Trial Magistrate were, therefore, reversed. Mr. Emory represented the Comptroller.

Charles Knott, et al. vs. John E. Clark, et al. Commissioners of Tidewater Fisheries. In the Circuit Court for St. Mary's County. A confessed judgment was entered against the State in this case because the survey revealed that the bottom was a natural bar. Mr. Emory represented the Commission.

James Goddard, et al. vs. Edwin Warfield, et al. Tidewater Fisheries. In the Circuit Court for St. Mary's County. A confessed judgment was entered against the State in this case because the survey revealed that the bottom was a natural bar. Mr. Emory represented the Commission.

Thomas Dize, Frank Bozman, et al. vs. Edwin Warfield, Jr., et al. Department of Tidewater Fisheries. In the Circuit Court for Somerset County. This was a protest against the granting of a lease of certain oyster bottoms in Somerset County. The case was won on demurrer to the petition, for the reason that the plaintiffs failed to file their protest within the thirty day statutory period. Mr. Emory represented the Tidewater Fisheries Department.

Ralph D. Larrimore vs. Department of Tidewater Fisheries.. In the Circuit Court for Talbot County. This was a proceeding to prevent the issuance of an oyster lease in

the Choptank River, brought under Section 12(j) of Article 72 of the Code. A survey by the Department of Tidewater Fisheries revealed that the oyster bottom in question was definitely a natural oyster bar; judgment against the Department of Tidewater Fisheries was permitted to be entered by confession. Mr. Emory represented the Commission.

W. J. Elliott vs. Amos S. Creighton. In the Circuit Court for Dorchester County. There were two cases brought by W. J. Elliott against Amos Creighton, Commander of the Patrol Fleet of the Department of Tidewater Fisheries, for seizing the plaintiff's boat. One was a suit in trespass for $2,000 in damages and the other was a replevin action for the recovery of the boat. Employees of the Department of Tidewater Fisheries seized the boat when it was being used illegally to dredge oysters in the Choptank River. All of the people on the boat at the time of the illegal use escaped, so that it was impossible to secure a conviction and an order confiscating the boat. Pleas were filed and demurrers to the pleas were overruled after argument. With the cases at issue they were settled by the return of the boat because it was felt that the boat should not be retained in view of the fact that the State was not in a position to secure an order of confiscation. Mr. Emory represented Amos Creighton.

The American Bank Stationery Company vs. J. Millard Tawes and the State Tax Commission. In the Baltimore City Court. This was an appeal from a deficiency assessment of the State income taxes. The plaintiff allowed the appeal to lie dormant on the docket from October 31st, 1942 until October 22nd, 1947, at which time the plaintiff was persuaded to dismiss the appeal and to pay the court costs. The Comptroller's Office advised that the tax deficiency had been paid. Mr. Emory represented the Comptroller.

Samuel J. Shapos vs. Hamilton A. Atkinson, Police Commissioner, and George J. Brennan. In the Superior Court

of Baltimore City. This was an action against the Police Commissioner of Baltimore City for the recovery of a watch in the possession of the Commissioner allegedly belonging to the plaintiff. An answer was filed on behalf of the Commissioner confessing possession and stating that they had complied with a writ of replevin in the case by delivering the same to the Sheriff of Baltimore City. A judgment was rendered in favor of the plaintiffs. Mr. Harrington represented the Commissioner and Mr. Brennan.

Guy G. Gantz vs. Board of County Commissioners for Washington County. In the Circuit Court for Washington County. This was an appeal from a decision of the State Tax Commission sustaining an assessment of certain property owned by a Church and formerly used as a parsonage, but at the time of the assessment occupied by the sexton. The question involved was whether the property was exempt from taxation under Article 81, Section 7(4) of the Code. The case was tried and the decision of the Commissioners sustained. Mr. Clapp represented the Commissioners.

Report of Robert E. Clapp, Jr., Special Assistant Attorney General for the State Roads Commission

The year 1947 brought a vast increase of work to the office of the Special Assistant Attorney General for the State Roads Commission. As one of his platform pledges, Governor Lane proposed a modernization of the entire highway system of the State with additional funds to be transferred from the State to the Counties. The carrying out of this pledge entailed a complete revision of the laws relating to the operation of the State Roads Commission and to the distribution of revenues derived from gasoline taxes, motor vehicle excise taxes, fines and forfeitures resulting from motor vehicle violations and other income of a like nature. A revision was also required of bridge legislation of the State in preparation for the construction of a crossing of the Chesapeake Bay. These changes were embodied in two bills, now Chapters 560 and 561 of the Acts of the General Assembly of Maryland of 1947, and on or about February 15, 1947, at the request of the Governor, I was directed to remain in Annapolis for the balance of the session of the Legislature, for the purpose of explaining these two bills to the members, and of supervising any changes or amendments that might be required. Both bills were passed without substantial change, and in addition, during that session I participated in the drafting of a bill increasing the excise tax imposed upon commercial motor vehicles, with a view to increasing the funds available to the State Roads Commission for road construction.

As a result of the above legislation, funds were made available to the Commission for a vastly increased program of road construction. This necessitated a great expansion of the personnel of the Commission, and because of the new legislation, necessitated numerous conferences relating to statutory interpretation.

To aid in the increased work of this office, an additional Special Attorney was authorized, and on July 1st, 1947,

Mr. Ernest N. Cory, Jr., was appointed by the Attorney General to fill this position.

In the Fall of 1947, Governor Lane appointed a Highway Advisory Council to aid in the overall planning of a new road program by the State Roads Commission. I was invited to attend the meetings of this Council as legal consultant, and have served on the sub-committee of the Council relating to rights of way. It is believed that a system has been worked out with the Right of Way Department whereby the obtention of the necessary interests in land can be expedited, and that these problems will in the future be materially lessened. Where it appeared that condemnation might become necessary, appropriate petitions were drafted sufficiently in advance so that when it was finally determined that no purchase could be arranged with a property owner, condemnation proceedings could be promptly entered, upon receiving instructions to do so from the Commission.

There was an increasing demand for conferences between this office and the Commission, the Advisory Council and various Department Heads in order to anticipate possible legal difficulties with respect to future construction and maintenance proposals. These conferences have avoided litigation involving the Commission to such an extent that last year the Commission was involved in the Courts only with respect to condemnation proceedings and to injury to employees resulting in claims under the Workmen's Compensation Law.

In addition to the above increased duties, the normal work of the office continued. I have participated in the trial of numerous condemnation cases and have rendered many written opinions relating to the Commission's problems. The questions involved have related not only to the new legislation but also to other phases of the law, and when it is considered that approximately 2050 persons are employed by the State Roads Commission, that it has the supervision, maintenance, construction and reconstruction

of 4,526.05 miles of State Roads and 3,739.70 miles of County Roads, together with the great number of bridges and the Chesapeake Bay Ferry System, the scope of the work of its legal department of three lawyers can well be realized.

The new construction program has entailed the execution of a vastly increased number of contracts, and these have all been reviewed. In addition, the Commission proposed, during the year 1947, to eliminate the grade crossing in Baltimore County at Halethorpe and Arbutus, and the drafting of a contract between the Commission and the Pennsylvania Railroad for a contribution by the Railroad of a portion of the proposed construction contract was begun.

Another matter in which I participated and which was of importance to the proposed program of road construction, was in connection with the crossing of the Chesapeake Bay. A contract was required with the engineering consultants who were to design and supervise the construction of the crossing, and after prolonged negotiations and numerous conferences between the Governor, the State Roads Commission, the Attorney General and the J. E. Greiner Company and its legal representatives, a mutually satisfactory contract was drafted and executed by the parties concerned.

Under the supervision of this office, 899 examinations were made by the local attorneys at a total expenditure of $29,452.50 during the year 1947. The work of sending out, advising with and passing upon questions of title in connection with these rights of way matters are particularly under the direction of Mr. Frederick A. Puderbaugh, Special Attorney, assisted by Mr. Ernest N. Cory, Jr. This office for many years had made it a practice to have local attorneys in the various Counties examine and pass upon the title to land, which it is desired to use for road purposes, before it is acquired. This plan has been found to work out to the mutual advantage of all parties concerned, and its continuance is recommended.

In conclusion, the following condemnation cases for the purpose of securing rights of way for the State Roads Commission were prepared and filed by this office, and have been tried and determined by verdict of a jury, or were settled out of Court, or pending, as noted:

Anne Arundel County:

Walter E. Green and
Gertrude B. Green, his wife,
Pending.
Harry S. Allen and
Alice M. Allen, his wife,
Vinton Duval Cockey and
Mona Goldborough Cockey, his wife,
Pending.

Carroll County:

John M. Simmons and
Olive M. Simmons, his wife,
Settled.

Cecil County:

George W. Spear, et al.,
and unknown heirs,
Pending.
Alexander Staworesky and
Annie Staworesky, his wife,
Verdict.
John Kutz and
Kate Kutz, his wife,
Pending.
George W. Green and
Leona Green, his wife,
Pending.
Stanley S. Stevens and
Mary E. Stevens, his wife,
Pending.

Winifred Schaefer Estate,
Pending.
Charles C. Bayard,
Pending.
Charles J. C. Rhudy,
Settled.
Brantwood Farms,
Verdict.
Union Memorial Hospital,
a body corporate, residuary devisee,
of Ellen H. Bayard, deceased, et al.,
Pending.
The Order of the Society of
Divine Savior,
Pending.
H. Boyns Crowgey and
Lottie S. Crowgey, his wife,
Pending.
Wilmer H. S. Bouchelle,
Pending.

Kent County:

H. Clayton Johnson,
Settled.

Prince George's County:

Harley W. Leizear and
Marion Leizear, his wife,
Pending.

Somerset County:

Duncan Brothers,
Pending.
Fred C. Haizlip and
Gertrude Haislip, his wife,
Pending.
Arthur W. Lankford and

Meta S. Lankford, his wife,
Pending.
Stanley E. Lankford and
Beatrice P. Lankford, his wife,
Pending.

Talbot County:

Alexander Fountain Estate,
Verdict.
The Isla Corporation of Easton,
Pending.

Wicomico County:

William Parks Young,
Pending.

Report of Joseph D. Buscher, Special Assistant Attorney General for the Comptroller of the Treasury.

As Special Assistant Attorney General for the Comptroller of the Treasury, this Assistant was assigned to advise the Comptroller and his staff. In that capacity, he has examined as to form and legal sufficiency, all fidelity bonds given to the State by all public officials and by all employees who by statute are required to give bond. In addition, this Assistant has examined as to form and legal sufficiency all contracts for the construction and improvement of public buildings for the State and its agencies, and has further examined as to form and legal sufficiency all performance bonds given in connection with said contracts. This Assistant has also prepared numerous deeds and leases used in connection with the purchase and sale of property by the State of Maryland, and examined as to form and legal sufficiency all other deeds and leases prior to their approval by the Board of Public Works.

In addition, he has been in frequent communication with the Comptroller and members of his staff relative to the fiscal problems of the State and has attended numerous conferences in relation thereto.

This Assistant has handled cases and represented the Comptroller and other State agencies in various court cases in the Courts of Baltimore City and the several Counties of Maryland, as well as the Court of Appeals of Maryland. In addition thereto, he appeared before the State Tax Commission on tax questions of vital interest to the Comptroller.

At the designation of the Governor, he investigated and heard all requests for extradition made by the executive authorities of the other States upon the Governor of this State. In this capacity, he has presided at the extradition hearings held in the State House at Annapolis, and conferred with and made recommendations to the Governor relative to the disposition of these cases.

Further, this Assistant has been appointed an advisory member of the Atlantic States Marine Fisheries Commission, and as such, during the year 1947, attended two meetings of said Commission in New York City. He also is one of five members appointed by said Atlantic States Marine Fisheries Commission as a Special Drafting Committee to draft proposed amendments to the Fisheries Compact, and said amendments are now before the full Commission for adoption prior to their submission for approval to the various States and the Congress of the United States. In this capacity, this Assistant attended one meeting of said Drafting Committee in Boston, Mass., where the tentative drafts of amendments were discussed and studied.

The Attorney General maintained an office at the State House during the Regular Session of the 1947 Legislature, and during the Special Session thereof, held in November, 1947, and this Assistant spent his entire time in Annapolis, assisting in the preparation of legislation and advising Members of the Legislature, the Governor and the State Departments regarding the legality and constitutionality of proposed and pending legislation. One of the important functions of the Attorney General during the legislative sessions is to attend, when requested, meetings of the various Legislative Committees, for the purpose of advising said Committees on the various legal aspects of pending legislation. This Assistant was assigned and performed much of this work.

This Assistant also, on numerous occasions, at the request of the Attorney General, has represented other State agencies and Departments in the courts and in other legal capacities throughout the year.

The cases assigned to this Assistant and disposed of, or pending, appear elsewhere in this Report.

Report of Philip T. McCusker, Special Attorney for the State Accident Fund

During the year two changes occurred in the membership of the Commissioners of the State Accident Fund. Albert H. Blum of Baltimore City was appointed to succeed John A. Sherman of Baltimore City, and Royden S. Meise of Wicomico County was appointed to succeed Frank J. Bauer of Baltimore City. William B. Lebherz of Frederick was elected Chairman of the Commissioners, Albert H. Blum was elected Vice-Chairman, and John P. Stafford of Talbot County remained Secretary. The fifth member of the Commission is Edmund J. McGarry of Baltimore City.

In April, 1947, the offices of the State Accident Fund were moved from the Calvert Building to the second floor of the Paramount Building, 31 Light Street.

Cases tried before the State Industrial Accident Commission by this Assistant are enumerated as follows:

> Baltimore City 121; Bel Air 4; Elkton 1; Hyattsville 1; Rockville 1; Cumberland 26; Hagerstown 8; Oakland 1; Frederick 4; Westminster 3; Salisbury 15; Cambridge 8; Easton 5.

Nine (9) cases were tried before the Medical Board for Occupational Diseases, eight (8) of which were tried in Baltimore and one (1) in Hagerstown.

Two cases were tried on appeal in Baltimore City.

Twenty-one (21) cases were disposed of by final settlement agreements.

At the end of the year twelve (12) appeals from orders of the State Industrial Accident Commission were pending in the courts, eight (8) in Baltimore and one in each of the four following Counties: Wicomico County, Frederick County, Allegany County and Garrett County.

On January 1st, 1947, there was outstanding $15,628.78 as overdue premiums on State Accident Fund policies due from policyholders. During 1947 $2,221.72 representing delinquent accounts was referred to this Assistant for collection. The total amount collected in 1947 on these accounts amounted to $8,198.09. There are a few debtors who are paying their indebtedness off in installments.

Report of Aaron A. Baer, Special Assistant Attorney General for the Maryland Employment Security Board

During the year, counsel for the Employment Security Board obtained five hundred and fifty-eight (558) judgments amounting to $104,488.99. From previous years, there were on hand three-hundred and twenty-one (321) uncollected judgments amounting to $115,421.24. Judgments collected during the year totaled $59,346.82 and twenty-eight (28) judgments totaling $8,099.36 were marked off as uncollectible. During the year, one hundred and eleven (111) liens totaling $16,277.99 were prepared for recordation, but payment of same was enforced prior to recording.

In enforcing collection of the judgments mentioned, counsel was required to issue executions in two hundred and twenty-eight (228) cases. Claims were filed in fifteen (15) bankruptcy cases, four (4), Orphans' Court cases, and eighteen (18) receivership cases, involving a total of $20,-850.16. Ten (10) of the aforesaid cases were brought to a close and resulted in the collection of $2,060.68.

Subpoenas were issued for the appearance of ninety-three (93) employers who failed to file reports and/or pay contributions. We received seventy-seven (77) cases involving payment of benefits to representatives of deceased claimants and closed seventy-one (71) of them.

We learned of one hundred and ninety-four (194) sales of businesses under the Sales in Bulk Act and took all necessary steps in these cases to protect our claims, if any. We handled twenty-nine (29) complaints involving forged checks, of which sixteen (16) cases have been closed. We reviewed four hundred and twenty-four (424) fraud cases and referred same to the State's Attorney's Office for prosecution.

During the year thirty-six (36) appeals were entered in the Courts from decisions of the Board. There were also

pending in Court seventeen (17) appeals taken in 1946. We disposed of twenty-seven (27) cases, which included the seventeen (17) which were instituted in 1946. There are now pending in the Courts twenty-seven (27) appeals from the year 1947.

Following is a list of the completed appeals:

Thelma M. Anthony vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The claimant was denied benefits by the Board because she was found to be unavailable for work. The case was heard by Judge Mason, who sustained the Board's action.

Eva H. Judy vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The claimant was awarded benefits by the Board, but filed suit through error. The case was dismissed upon her attorney filing a motion to dismiss.

Helen Miller vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The claimant was denied benefits by the Board because she was found to be unavailable for work. The case was heard by Judge Mason and the Board's action was sustained.

Pauline Mellott vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The claimant appealed from a decision of the Board holding her unavailable for work, and when the case was heard by Judge Mason he affirmed the Board's decision.

Amos Bittinger vs. Russell S. Davis, et al. In the Circuit Court for Garrett County. The claimant was denied benefits by the Board because he was found to be unavailable for work. The case was heard by Judge Henderson and the Board's action was sustained.

Elza S. Short vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The claimant

was denied benefits because she was found to be unavailable for work. Judge Mason affirmed the decision of the Board.

L. Burgess Walmsley vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The claimant was denied benefits because the Board found him to be unavailable for work. The decision of the Board was affirmed by Judge Mason.

Joseph L. Brazezicki vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The claimant was denied benefits by the Board because he was found to have left work, without good cause. The decision of the Board was sustained by Judge Mason.

Oliver C. Lilly vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The claimant appealed from a decision of the Board holding that he left work voluntarily, without good cause. The Board's decision was affirmed by Judge Mason.

John B. Swagler vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The claimant was denied benefits by the Board because he was found to have left work voluntarily, without good cause. Judge Mason affirmed the Board's decision.

Anthony P. Schasny vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The claimant appealed from a decision of the Board holding that he left work voluntarily, without good cause. The Board's decision was affirmed by Judge Mason.

Pauline R. Crocker vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The claimant was denied benefits by the Board because she was found to have left work voluntarily, without good cause, and also that she was unavailable for work. The case was heard by Judge Mason, who sustained the Board's decision.

Black B. Bailey, Jr., vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The claimant was denied benefits by the Board because he was found to have left work voluntarily, without good cause. The claimant failed to appear at the time of trial, and the case was dismissed in open court.

Paul W. Forni vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The claimant in this case appealed from the Board's decision holding him to have left work voluntarily, without good cause. When the case reached court for trial Mr. Baer filed a motion that the case be remanded to the Unemployment Compensation Board for the purpose of preparing a proper record, in conformity with sub-section (g) of Section 6 of the Unemployment Compensation Law. The case was thereupon remanded for the purpose of taking testimony. Subsequently, a new suit was filed by the claimant, because the Board denied him benefits on the ground that he had left work voluntarily, without good cause. This case was heard by Judge Sherbow and the Board's action sustained.

Abdul Kareem vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The Board held that this claimant had failed to apply for available and suitable work. The claimant failed to appear when the case was called for trial, and Judge Mason dismissed the case in open court.

Lloyd Sterling, Jr., vs. Unemployment Compensation Board. In the Superior Court of Baltimore City.

Samuel W. Cobbs vs. Unemployment Compensation Board. In the Superior Court of Baltimore City.

Alonzo Adams vs. Unemployment Compensation Board. In the Superior Court of Baltimore City.

Frank Aversa vs. Unemployment Compensation Board. In the Superior Court of Baltimore City.

In these four cases listed above the same question was involved. The Board found that the claimants had failed, without good cause, to apply for available and suitable work. The claimants either failed to appear or the Board's decisions were upheld.

American Smelting and Refining Company vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. In this case the Board's decision was that certain employees who were laid off because of lack of work prior to the commencement of a strike were entitled to benefits during the strike period. The employer appealed, and the decision of the Board was reversed by Judge Sayler. An appeal was filed to the Court of Appeals and the decision of Judge Sayler was overruled, thus affirming the Board's decision.

Steamship Trade Association of Baltimore, Inc., vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. This case involved an interpretation of Section 5(d) of the Unemployment Compensation Law in reference to a labor dispute. The Board held that certain employees were entitled to benefits. Upon appeal being taken by the employer, the case was heard by Judge Mason and the decision of the Board affirmed. The employer subsequently filed an appeal which is now pending in the Court of Appeals.

Robert Brown, et al. vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The Board denied benefits to various claimants holding that their unemployment was due to a stoppage of work which existed because of a labor dispute. The Board's decision was affirmed by Judge Sherbow and thereupon an appeal was filed by the claimants to the Court of Appeals. On November 13, 1947, the Court of Appeals affirmed the deci-

sion of the Superior Court, thus upholding the Board's decision.

Arthur Metz, et al. vs. Coal Operators, et al. In the Circuit Court for Allegany County. The claimants were denied benefits by the Board because the Board held that their unemployment was due to a stoppage of work which existed because of a labor dispute. The case was heard by Judges Huster and Henderson and the Board's decision was affirmed.

Harold D. Saunders vs. Unemployment Compensation Board, et al. In the Court of Appeals of Maryland. The question involved in this case was whether or not the claimants' unemployment was due to a stoppage of work which existed because of a labor dispute. The Board's decision was in the affirmative and was upheld by Judge Tucker in the Superior Court of Baltimore City on December 23rd, 1946. The claimants appealed from Judge Tucker's decision and on July 5, 1947, the Court of Appeals affirmed the decision of the lower Court, thus sustaining the Board's decision.

Edward Bartowski, et al. vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. The claimants were denied benefits by the Board because their unemployment was due to a stoppage of work which existed because of a labor dispute. A motion of dismissal was filed by the attorney for the claimants.

Eddie's Super Markets, Inc., vs. Unemployment Compensation Board. In the Superior Court of Baltimore City. This appeal raised the question as to whether or not an experience rating earned by a partnership could be transferred to two corporations formed by said partnership. The Board's decision was that the experience rating could not be transferred. Judge Mason reversed the decision of the Board.

Charles L. Brown vs. Unemployment Compensation Board, et al. In the Superior Court of Baltimore City. The plain-

tiff was denied benefits by the Board because he was found to have been discharged for misconduct in connection with his work. The case was heard by Judge Mason and the Board's action was sustained.

In connection with the twenty-seven (27) cases open and pending in the Courts as of December 31st, 1947, ten (10) relate to claimants' failure to apply for available and suitable work, four (4) involve claimants' leaving work voluntarily, without good cause, three (3) concern the misconduct of an employee in connection with his work, one (1) involves the question of whether the claimant made a false statement or representation knowing it to be false and whether the claimant knowingly failed to disclose a material fact, four (4) are concerned with the question of whether claimants are eligible to establish benefit rights under the provision of the Unemployment Compensation Law, and five (5) are concerned with the question of whether claimants are able to work, available for work and actively seeking work.

Of the said twenty-seven (27) cases, nine (9) are pending in the Superior Court of Baltimore City, one (1) in the Circuit Court for Garrett County, thirteen (13) in the Circuit Court for Allegany County, three (3) in the Circuit Court for Baltimore County, and one (1) in the Circuit Court for Washington County.

Cases Pending in Lower Courts

J. William Groves, et al. vs. John F. Williams. In the Superior Court of Baltimore City.

Ralph M. Martin vs. State Board of Funeral Directors and Embalmers. In the Circuit Court for Washington County.

Mrs. Effie Hill vs. Dr. Reuben Hoffman, Superintendent of Henryton Sanatorium. In the Superior Court of Baltimore City.

Gus M. Grayson vs. J. Wm. Groves, et al. Board of Barber Examiners. In the Baltimore City Court.

Maryland Naturopathic Association, Inc. vs. E. H. Kloman, et al., Constituting The Board of Medical Examiners. In the Circuit Court No. 2 of Baltimore City.

Kenneth G. Morgan vs. Fred. Barnickol, etc., et al. In the Circuit Court for Allegany County.

Lewis F. Reecher vs. State Board of Funeral Directors and Embalmers. In the Circuit Court for Washington County.

Edward Jones Atkinson vs. Motor Vehicle Commissioner. In the Circuit Court for Baltimore County.

Sidney Bernandes Batson vs. Motor Vehicle Commissioner. In the Circuit Court for Dorchester County.

Irvin Monroe Bohr vs. Motor Vehicle Commissioner. In the Circuit Court for Carroll County.

Charles Leroy Burger vs. Motor Vehicle Commissioner. In the Baltimore City Court.

John Francis Butler vs. Motor Vehicle Commissioner. In the Circuit Court for St. Mary's County.

George Weldon Carson vs. Motor Vehicle Commissioner. In the Circuit Court for St. Mary's County.

Charles H. Chatham, Jr., vs. Motor Vehicle Commissioner. In the Circuit Court for Wicomico County.

Milton Jenkins Dance, Jr., vs. Motor Vehicle Commissioner. In the Circuit Court for Baltimore County.

Charles P. Eklof vs. Motor Vehicle Commissioner. In the Circuit Court for Baltimore County.

Albert A. Flynn vs. Motor Vehicle Commissioner. In the Baltimore City Court.

Robert Donald Fox vs. Motor Vehicle Commissioner. In the Circuit Court for Harford County.

Wallace Williams Govans vs. Motor Vehicle Commissioner. In the Circuit Court for Harford County. (2 cases).

Boyd L. Harper vs. Motor Vehicle Commissioner. In the Circuit Court for Allegany County.

William Edmond Hastings vs. Motor Vehicle Commissioner. In the Circuit Court for St. Mary's County.

Charles Edward Kappel vs. Motor Vehicle Commissioner. In the Circuit Court for St. Mary's County.

James Tobin Ruhl vs. Motor Vehicle Commissioner. In the Circuit Court for Baltimore County.

Samuel Starliper vs. Motor Vehicle Commissioner. In the Circuit Court for Washington County.

Thomas A. Whittington vs. Motor Vehicle Commissioner. In the Circuit Court for Harford County.

Cecil Wymer vs. Motor Vehicle Commissioner. In the Circuit Court for Harford County.

Lawrence R. Harris vs. Henry J. Kunzig, Inc. In the Superior Court of Baltimore City.

Ernest W. Langhans vs. Henry J. Kunzig, Inc. In the Superior Court of Baltimore City.

Frederick J. Adler vs. State Aviation Commission. In the Circuit Court for Prince George's County.

Baltimore National Bank vs. Horace S. Whitman, et al. In the Circuit Court of Baltimore City.

Brooklyn Engineering Corporation vs. State Tax Commission. In the Circuit Court of Baltimore City.

Justin G. Buch vs. Board of County Commissioners of Anne Arundel County. Before the State Tax Commission.

Clark Sand & Gravel Co. vs. State Tax Commission. In the Baltimore City Court.

Isaac Cohen and Morris Cohen vs. State Tax Commission and Mayor and City Council of Baltimore. In the Baltimore City Court.

College Club of Baltimore, Inc., vs. Appeal Tax Court, et al., and State Tax Commission. In the Baltimore City Court.

Albert J. Fleischman vs. State Tax Commission. In the Baltimore City Court.

Harriet Lane Home for Invalid Children vs. Jennie M. Gray, et al., and Attorney General of Maryland. In the Circuit Court No. 2 of Baltimore City.

The Maryland Oxygen Company vs. Robert France, et al. State Tax Commission. In the Circuit Court of Baltimore City.

Stella Sala and Ignacy Sala vs. Loraencz Janowski. In the Circuit Court No. 2 of Baltimore City.

Stanley Company of America vs. State Tax Commission. In the Baltimore City Court.

Safe Deposit & Trust Company vs. State Tax Commission. In the Circuit Court No. 2 of Baltimore City.

The Rev. John W. Pitcher, et al. vs. State Tax Commission. In the Circuit Court for Baltimore County.

County Commissioners of Queen Anne's County vs. A. Sydney Gadd, Jr., Clerk and Treasurer. In the Circuit Court for Queen Anne's County.

Matthew H. Taggart, etc., vs. Milton A. Reckord, etc. In the Superior Court of Baltimore City.

Morris F. Singer vs. Gilbert A. Grant and Police Commissioner. In the Superior Court of Baltimore City.

Gilbert Goldstein, etc., vs. Hamilton R. Atkinson, Police Commissioner of Baltimore City. In the Circuit Court No. 2 of Baltimore City.

Marlin D. Brubaker vs. Beverly Ober, Superintendent of State Police. In the Circuit Court No. 2 of Baltimore City.

Swope A. Ball, et al. vs. John E. Clark, Tidewater Fisheries of Maryland. In the Circuit Court for St. Mary's County.

Samuel H. Buckmaster, et al. vs. Edwin Warfield, et al. In the Circuit Court for Calvert County.

Karl Fischer vs. Maryland Game and Inland Fish Commission, etc. In the Circuit Court of Baltimore City.

Ernest Forrest, et al. vs. Edwin Warfield, et al. In the Circuit Court for St. Mary's County.

Garner Gibson vs. John E. Clark, et al. Tidewater Fisheries. In the Circuit Court for St. Mary's County.

John W. Hall, et al. vs. Edwin J. Baetjer, et al. Tidewater Fisheries. In the Circuit Court for St. Mary's County.

Bernard Mattingly vs. Edwin Warfield, Jr., et al. Tidewater Fisheries. In the Circuit Court for St. Mary's County.

John P. Mullen, et al. vs. Edwin Warfield, Jr., Tidewater Fisheries. In the Circuit Court for St. Mary's County.

Clarence Poe, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County.

William Taft Tippett, et al. vs. Edwin Warfield, Jr. In the Circuit Court for St. Mary's County.

John Barry vs. George P. Mahoney, et al. In the Superior Court of Baltimore City.

William J. Owen vs. George P. Mahoney, et al. In the Superior Court of Baltimore City.

Scott Daniel Riles vs. George P. Mahoney, et al. In the Superior Court of Baltimore City.

Tressa S. Heller vs. Russell S. Davis, et al. In the Circuit Court of Baltimore City.

Nathan B. Kahl, et al. vs. Bertram L. Boone, Secretary of State, et al. In the Circuit Court for Cecil County.

Commission of Tidewater Fisheries and Amos Creighton vs. Howard E. Hubbard, et al. In the Circuit Court for Dorchester County.

Howard E. Hubbard vs. Amos Creighton. In the Circuit Court for Dorchester County.

New Amsterdam Casualty Company, etc., vs. F. Clayton Stevens, Ind., and in his former capacity as County Treasurer for Queen Anne's County, Md. In the Circuit Court for Queen Anne's County.

Financial Statement of the State Law Department for the Fiscal Year Beginning July 1st, 1946, and Ending June 30th, 1947.

Appropriation		$48,185.00
Appearance fees collected		150.00
Sales of Attorney General's Reports outside of State		80.00
Reimbursement for sundry items		128.24
		$48,543.24
Appearance fees turned into State Treasury		150.00
		$48,393.24
Salaries:		
Attorney General	$8,000.00	
Deputy Attorney General	5,823.00	
Assistant Attorneys General (2)	11,000.00	
Chief Clerk	3,327.00	
Law Stenographers (2)	4,777.41	
Senior Typist	2,103.31	
Extra Clerical Assistance	235.00	
Contractual Services:		
General Repairs	488.95	
Motor Vehicle Repairs	152.46	
Travelling	1,080.54	
Communication	2,115.10	
Printing Annual Report	1,301.44	
New York Attorneys' fee in freight rate case of *New York vs. United States*	3,229.73	
	$43,633.94	
Supplies:		
Office	511.15	
Motor Vehicle	439.42	
Equipment:		
Office	1,049.76	
Educational	984.70	
Fixed Charges:		
Rent	114.50	
Insurance	148.34	
All Other	344.05	
	$47,225.86	47,225.86
Reverted to State Treasury		$ 1,167.38

OFFICIAL OPINIONS

of the

ATTORNEY GENERAL of MARYLAND

ALCOHOLIC BEVERAGES

ALCOHOLIC BEVERAGES — LICENSES — LICENSEE MUST REMAIN RESIDENT OF COUNTY—APPLICATIONS FOR—JOINT OWNERS MUST ALL SIGN AS LANDLORDS—HUSBAND AND WIFE MUST BE LICENSED AS PARTNERSHIP.

March 5, 1947.

Mr. Vance V. Vaughan,
Attorney, Prince George's County
Alcoholic Beverage Control Board.

This is in reply to your letter of February 6, 1947, in which you ask for the opinion of this Department on the three questions answered herein.

1. What action, if any, should be taken by the Prince George's County Board of License Commissioners in the case of a liquor licensee moving his residence outside the County?

It is our opinion that the laws relating to alcoholic beverages indicate that a licensee must remain a resident of the County in which he is licensed to do business. Section 13 (4) of Article 2B of the Annotated Code requires an application for a license to include a statement that the applicant has for two years next preceding been a resident of the County. Section 27 of Article 2B provides for the renewal of licenses as of the first of May each year, and requires a renewal application to state that the facts in the original application are unchanged. Furthermore, in Prince George's County, there is a local law (Section 565E of Article 17 of the Code of Public Local Laws), which authorizes a licensee, who has conducted his business for a period of one year or more, to sell or transfer the same to a purchaser or transferee who need not be a resident of Prince George's County *prior* to such sale or transfer. Section 565E implies that the purchaser or transferee must be a

resident of Prince George's County after the sale or transfer.

While we are of the opinion that these Sections require a licensee to remain a resident of the County, it is questionable whether the Board of License Commissioners may suspend the license under Section 57 on the ground that the licensee has removed his residence from the County. A suspension of the license on the ground of change of residence would have to be based on a finding that it was "necessary to promote the peace or safety of the community", since change of residence is not otherwise referred to in Section 57 as a ground for revocation. The Board can, however, achieve the same result by refusing to renew the license after its expiration on April 30th, and this would seem to be the best way to handle the situation.

2. When one joint owner of the premises applies for a license, must the other joint owners sign the application as a landlord?

Section 13 (15) of Article 2B requires an application to include a statement executed and acknowledged by the owner of the premises assenting to the granting of the license and authorizing inspection and search of the premises without a warrant. We are of the opinion that if there are several owners of the premises, they must all sign such statement. If one of the joint owners is the applicant for the license, the other joint owners must sign as landlord; otherwise, the statutory requirement as to assent of the owner of the premises is not complied with.

3. When a husband and wife use joint funds to establish a liquor business, must both husband and wife sign the application for a license?

We are of the opinion that where joint funds of a husband and wife are used to establish a liquor business, both the husband and wife must apply for a license in the same manner as a partnership application under Section 29 of Article 2B. As you point out in your letter, Section 13 (13) requires an application for a license to include a state-

ment that no person except the applicant is in any way pecuniarily interested in said license or in the business to be conducted thereunder. If joint funds of a husband and wife are used to establish the business, such a statement cannot properly be made. While the use of joint funds may not necessarily constitute the enterprise a partnership, we are of the opinion that in view of the prohibition in Section 13 (13) against granting an individual license to someone who is not the sole owner of the business, the enterprise should be treated as a partnership for the purpose of licensing to sell alcoholic beverages. This office has previously ruled that an application for a license for a partnership must be signed by all the partners.—22 Opinions of the Attorney General 104.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

ALCOHOLIC BEVERAGES — LICENSES — CLUBS AND CORPORATIONS — MAY SUBSTITUTE ONE OFFICER IN WHOSE NAME LICENSE OBTAINED FOR ANOTHER WITHOUT FORMALITIES OF TRANSFER.

March 25, 1947.

Mr. John F. Burns, Executive Secretary,
Board of Liquor License Commissioners.

This is in reply to your letter of March 6, 1947, inquiring about what steps must be taken to change one of the three officers in whose name a corporation has obtained Class A, Beer, Wine and Liquor Off-Sale Licenses for nineteen retail outlets. The licenses were procured under Section 29 of Article 2B of the Code, which provides that "the license shall be applied for by and be issued to three officers of such corporation or club, as individuals, for the use of the corporation or club". We understand that there is to be no change in the corporation for whose use the licenses were

obtained, and that the only change will be to substitute a new individual for one of the three officers in whose names the licenses were issued.

You ask whether it will be necessary to perform all of the formalities of a transfer of the license for the nineteen retail outlets pursuant to Section 31, which authorizes a sale or assignment of a license and provides "that the assignee shall be approved as in the case of an original application." If the substitution of one officer for another is carried out pursuant to Section 31, it will be necessary to advertise, post the nineteen premises and comply with the other requirements of Section 16.

We are of the opinion that while the laws relating to alcoholic beverages might be interpreted as requiring all of the formalities prescribed in Section 16 to be complied with, it would entail useless expense and effort which should be avoided. Article 2B does not contain any provision expressly providing for the substitution of one officer of a corporation for another. We believe, however, that the Board may authorize such a substitution either as a formal transfer of the license or by a simpler procedure prescribed by the Board. Section 61 of Article 2B states that the chairman of the Board shall be the administrative officer thereof and grants him certain powers, including the right to promulgate "rules and regulations to carry out the purposes of this Article". The substitution of one officer of a corporation for another is not a transfer of the license in the real sense. We believe that it is compatible with the purposes of Article 2B for the Board to permit such a substitution without requiring the formalities of a transfer.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

ALCOHOLIC BEVERAGES—SALES BY RECEIVERS.

July 3, 1947.

Mr. Francis A. Michel, Chairman,
Board of Liquor License Commissioners
for Baltimore City.

Paragraph (c) of Section 2 of Article 2B of the Code, as amended by Chapter 996 of the Acts of 1943, under the sub-title "Prohibition Without License and License Exceptions", provides that:

> "No license or permit shall be required in the case of . . . any sheriff, constable, receiver, auctioneer, trustee, attorney, executor or administrator selling alcoholic beverages under an order of Court; but no such sale shall be made except to a license holder, and if the purchaser is a retail dealer, the person making the sale shall pay the taxes imposed by Sections 48 and 49 of this Article before delivery is made to the purchaser."

Recently in the receivership case of the Walnut Grove Night Club, in the Circuit Court No. 2 of Baltimore City, the receivers obtained an order from Judge Dickerson authorizing them to sell at public auction "in relatively small lots" the inventory of alcoholic beverages of the Night Club. The receivers advertised that the sale would be made to the public generally, and some sales were made at the auction to those who were not license holders. The Police Department has taken nine or ten of the bottles so sold as evidence, some of its members having been present to observe the sales. You wish to know your obligations in view of the provisions of the law which we have quoted above.

I conferred yesterday with Judge Dickerson in regard to the matter. He advised me of his recollection that his attention had not been directed to the provisions of paragraph (c) of Section 2 of Article 2B until just about the time of the sale, and that he was inclined to question whether the Legislature could constitutionally control the in-

herent jurisdiction of an equity court to authorize the sale by a receiver appointed by it without the restriction which the Legislature had imposed, in order to secure the most money for creditors, and that the imposition of the restriction would materially limit the bidding and might impair the validity of the sales.

Under the circumstances, and in view of the fact that the receivers who sold and the people who bought were acting pursuant to the direction of a court whose view is that what was done was proper, and since all liquor was tax paid, it is my opinion that you have no obligation to take any action in the present situation. You would be bound by the decision of a court on the question, and in effect the Circuit Court No. 2 has approved in the Walnut Grove case the actions which took place.

However, I suggested to Judge Dickerson that with the greatest respect to the court's indicated views, it seemed to me that a strong case could be made for the result that alcoholic beverages, by reason of the fact that they are peculiarly within the control of the Legislature under its police power, were as susceptible of the regulation which the Legislature imposed as would be, for example, narcotic drugs, and that a persuasive analogy could be drawn of the case of a drug store in receivership in which the court authorized the sale of such drugs without regard to the limitations of the law which restricts their general distribution. I further suggested to Judge Dickerson, as I do now to you, and with this he agreed, that if another case arises in which the provisions of sub-section (c) of Section 2 of Article 2B apply on their face, the issue be raised directly and the point argued fully before the court involved, so that a flat ruling can be made and the law settled for your future guidance.

I think this disposition of the problem is sensible under the facts, and your alertness and vigor in presenting your point of view as to the applicability of the legislative restriction will insure that the rights of the public and your obligations are fully protected.

HALL HAMMOND, *Attorney General.*

ALCOHOLIC BEVERAGES — LICENSES — PROTESTS AGAINST GRANTS OR RENEWAL—PERSON WHO PAYS TAXES ON AUTOMOBILE MAY QUALIFY AS TAXPAYER TO SIGN PROTEST.

July 23, 1947.

Mr. L. Franklin Purnell, Chairman,
State Appeal Board.

You have asked our opinion as to the meaning of the term "taxpayer" in sub-section 53 (d) of Article 2B of the Annotated Code of Maryland, as amended by Chapter 501 of the Acts of 1947. This sub-section pertains to protests against the issuance of an alcoholic beverage license in Queen Anne's County. It reads as follows:

> "(d) QUEEN ANNE'S COUNTY. In Queen Anne's County the advertisement shall be published at least once during a period of one week. On or before the expiration of said period, any ten or more reputable citizens, voters and taxpayers residing in the election district in which the business sought to be licensed would be carried on, may file written objection to the granting of the license."

You ask whether a person who is a resident and voter in the election district in which a business is sought to be licensed and who pays taxes on an automobile but who does not own or pay taxes on real property is qualified to sign a protest under this sub-section. It is our opinion that such a person is qualified to sign a protest as a taxpayer. You will note that sub-section (d) requires the signatures of any ten or more reputable citizens, voters and taxpayers residing in the election district. There is nothing in the sub-section to require that as a taxpayer the person own and pay taxes on real property or any other specific type of property or any particular form of taxes.

In this day of income taxes, excise taxes, privilege taxes, sales taxes and numerous other taxes, we believe that a person may qualify as a taxpayer without owning real property and paying taxes thereon.

In support of the above opinion, we call to your attention sub-section 53 (b), which relates to protests in counties other than Queen Anne's in which there is no Board of License Commissioners. Sub-section (b) reads:

> "(b) PROTEST. A protest shall not be valid to delay the issue of such a license unless the same has been signed by ten or more reputable citizens of the State who are real estate owners in the voting precinct in which the business sought to be licensed is to be carried on."

You will note that in this sub-section a person to be qualified to sign a protest must be a real estate owner. This requirement as to ownership of real estate is not contained in sub-section (d) pertaining to Queen Anne's County.

You further ask whether the change in the method of taxing automobiles effected by Chapter 99 of the Acts of 1947 alters the right of an owner of an automobile to sign a protest as a taxpayer. By Chapter 99 the former property tax upon automobiles was abolished. The owner of an automobile, however, is charged a $15.00 license fee, payable to the Commissioner of Motor Vehicles, who must remit $5.00 to the County in which the owner resides and $2.50 to the special taxing area in said County in which the owner of the automobile lives. The owner, therefore, does in effect continue to pay a tax to the County and taxing district of his residence. We believe, therefore, that Chapter 99 does not change the right of an owner of an automobile to qualify as a taxpayer in the County and taxing area of his residence.

RICHARD W. EMORY, *Deputy Attorney General.*

ALCOHOLIC BEVERAGES—QUESTIONS CONCERNING PLACE OF SALE OR DELIVERY—GARAGE OR STOREROOM AS PLACE OF BUSINESS—OUTSIDE SOLICITATION PROHIBITED.

August 18, 1947.

Mr. Francis A. Michel, Chairman,
Board of Liquor License Commissioners.

This is in reply to your letter of August 6, 1947, in which you ask our opinion first as to whether the Board should grant a Class A beer and wine license for a business operated out of a garage or storeroom. The alcoholic beverage laws clearly require every retail licensee to have a permanent place for business from which all sales must be made. In fact, the license is granted for the particular place designated. There is nothing in the law prohibiting a garage or storeroom from being that place. We are of the opinion, however, that the Board may by rule or regulation restrict such Class A licenses to orthodox retail establishments if the Board deems such action advisable from the point of view of public policy and administration of the liquor laws.—18 Opinions of the Attorney General 103, 130.

Your second inquiry is whether a Class A beer and wine licensee may engage in outside solicitation of sales. The answer is emphatically no. Section 100 of Article 2B of the Annotated Code provides as follows:

> "100. OUTSIDE SOLICITATIONS BY RETAILERS PROHIBITED. No retail dealer shall be permitted to employ any solicitor or salesman for the purpose of soliciting, outside of the licensed place of business, orders for the sale of any alcoholic beverages within this State, and no sale of alcoholic beverages may be consummated outside of the licensed place of business. Nothing herein contained shall prohibit the receiving of orders by mail, telephone or messenger and the filling of such orders by delivery."

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

ALCOHOLIC BEVERAGES—QUESTIONS RESPECTING PARTICULAR CLASSES OF—RESTAURANTS—HOTELS—MAY SELL FOR CONSUMPTION OFF THE PREMISES AND MAKE DELIVERIES BY TRUCK.

September 26, 1947.

Mr. Francis A. Michel, Chairman,
Board of Liquor License Commissioners.

This is in reply to your letter of September 19, 1947, inquiring whether a holder of a Class B beer, wine and liquor license, under Section 17 of Article 2B of the Annotated Code of Maryland, may make deliveries of alcoholic beverages by truck.

A holder of such a license is authorized "to keep for sale and sell all alcoholic beverages at retail at any hotel or restaurant at the place therein described, for consumption on the premises *or elsewhere*". This provision is the same as Section 19, which pertains to Class D beer, wine and liquor licenses—taverns. The words "or elsewhere" definitely authorize the holder of such a license to make both on and off sales. We see no reason why a licensee in making off sales may not make delivery by truck. Our opinion in this matter is confirmed by the last sentence of Section 100 of Article 2B, which provides that a retailer may fill orders by delivery. We believe that a holder of a Class B license is a retailer because of Section 1 (i) of Article 2B, which provides that a " 'retail dealer' means a person who deals in or sells any alcoholic beverage to any person other than a license holder".

HALL HAMMOND, *Attorney General.*

ALCOHOLIC BEVERAGES—TRANSFERS OF, WHEN PERMITTED AND PROCEDURE—ENLARGEMENT OF LICENSED PREMISES IS EQUIVALENT OF TRANSFER.

November 3, 1947.

Mr. Francis A. Michel, Chairman,
Board of Liquor License Commissioners.

This is in reply to your letter of October 23rd, inquiring whether the Board's regulation prohibiting the granting of a license in a prohibited zone, known as Area 1, will prevent any existing licensee from enlarging his premises. We understand that the Board has established the prohibited zone, known as Area 1, pursuant to Section 34 of Article 2B of the Annotated Code of Maryland, which provides that the Board "shall have full power and authority by rules and regulations to limit and restrict, in accordance with a definite standard, the number of licenses which they shall consider sufficient for any neighborhood".

Under Section 62 of Article 2B, a holder of a license may be permitted to transfer his place of business to some other location. We believe that for an existing licensee to enlarge the licensed premises, a transfer must be approved under Section 62. Although Section 62 requires that the new location be approved as in the case of an original application for license, such transfer when made is endorsed upon the existing license and is not the equivalent of the granting of a new license. We, therefore, advise you that you may authorize an existing licensee to enlarge his premises without violating your regulation pertaining to the prohibited zone known as Area 1.

RICHARD W. EMORY, *Deputy Attorney General.*

AVIATION

AVIATION—TREATMENT OF FARM CROPS BY AIRCRAFT DUSTING PERMISSIBLE—NEGLIGENT OPERATION OF AIRCRAFT.

November 12, 1947.

Mr. Ernest N. Cory,
State Entomologist,
University of Maryland.

Your letter of November 5, 1947, states that during the past year certain farmers have contracted with commercial aviation concerns for the treatment of their crops by airplane dusting or spraying. You ask whether this practice is made unlawful by the terms of Section 9 of Article 1A of the Annotated Code of Maryland (1939 Edition), which provides that it shall be a misdemeanor to drop any object except loose water or loose sand ballast from an aircraft while in flight in this State.

Chapter 896 of the Acts of 1947 recreated the State Aviation Commission and, among other things, redefined the offense relating to the reckless operation of aircraft. In this connection, Section 92 of Chapter 896, *supra*, provides as follows:

> "It shall be unlawful for any person to operate an aircraft in the air, or on the ground or water, while under the influence of intoxicating liquor, narcotics, or other habit-forming drug, or to operate an aircraft in the air or on the ground or water, in a careless or reckless manner so as to endanger the life or property of another."

Chapter 896, *supra*, also provides that all laws and parts of laws which are inconsistent with the provisions of that Act are repealed to the extent of such inconsistency.

Repeals by implication are not favored by the Courts, the rule of construction being that seemingly inconsistent statutes should be reconciled and read in conjunction with one another whenever possible. In our opinion, Section 9 of Article 1A, supra, may be read in conjunction with Section 92 of Chapter 896, supra, without doing violence to any principle of logic or sound common sense.

Section 9 of Article 1A, *supra,* flatly prohibits an aeronaut from dropping any substance from an aircraft while in flight in this State, except loose water and loose sand ballast. Section 92 of Chapter 896, *supra,* contains no such prohibition but provides in lieu thereof that it shall be unlawful for any person to operate an aircraft "in a careless or reckless manner so as to endanger the life or property of another". When these two statutes are read together, the result is that the dropping of any substance from an aircraft while in flight in this State is a crime if done in a careless or reckless manner or in such a way as to endanger the life or property of another.

For the purposes of this opinion, we assume that the treatment of farm crops by airplane dusting or spraying will be done in a careful and prudent manner and that the life or property of no person will be endangered thereby. That being the case, we hold that such activities may be carried on in this State without attendant criminal consequences.

Related to the general problem presented in this case is a recent Act by the General Assembly of Maryland, i.e., Chapter 780 of the Acts of 1947. This Act authorizes and empowers the State Board of Agriculture, through the State Entomologist or its duly authorized officer or agent, to determine the necessity of and to employ airplane dissemination of insecticides, fungicides and bactericides to control or eliminate certain injurious insects and diseases. Section 63A (a) of this Act specifically provides that the State Board of Agriculture is authorized and empowered to control the spread of injurious insects and diseases by airplane dissemination of insecticides, fungicides and bactericides, the pro-

visions of Section 9 of Article 1A of the Annotated Code of Maryland (1939 Edition) or any other existing provision of law to the contrary notwithstanding. While this Act is limited in scope to the eradication of injurious insects and diseases by the State Board of Agriculture, it does not, in our opinion, prevent private persons from contracting with commercial aviation concerns for the treatment of their crops by airplane dusting or spraying so long as those activities are carried on in a careful and prudent manner and are not done in such a way that the life or property of any person will be endangered thereby.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

BALTIMORE COUNTY

BALTIMORE COUNTY—COUNTY PLANNING COMMISSION HAS PLANNING AUTHORITY IN COUNTY NOTWITHSTANDING THE STATUTE THAT CREATED THE ZONING COMMISSION.

October 21, 1947.

Mr. I. Alvin Pasarew, Director,
Maryland State Planning Commission.

As a result of your correspondence, and conferences, the latest of which was held on September 30th, certain questions concerning the power of the Baltimore County Planning Commission must be answered.

Under the provisions of Chapter 599 of the Acts of 1933, which is a general State-wide planning and zoning enabling Act, the Baltimore County Commissioners have recently appointed the Baltimore County Planning Commission. You ask what authority this Commission has in view of the provisions of Chapter 715 of the Acts of 1939, Chapter 247 of the Acts of 1941, Chapter 877 of the Acts of 1943, and Chapter 502 of the Acts of 1945. These are all local Acts affecting only Baltimore County.

Chapter 715 of the Acts of 1939 was repealed and re-enacted by Chapter 247 of the Acts of 1941, and Chapter 502 of the Acts of 1945 repealed and re-enacted Chapter 247 of the Acts of 1941. Chapter 877 of the Acts of 1943 merely authorizes the County Commissioners of Baltimore County to make special exemptions to the provisions of the zoning regulations and provides for special permits for uses under the zoning regulations of said County, is not applicable and need not be considered here.

We are now confronted with the question of what effect Chapter 502 of the Acts of 1945 has upon the general planning and zoning Act, which is Chapter 599 of the Acts of 1933.

Section 72B sub-section (a) gives the County Commissioners of Baltimore County authority to regulate and restrict the height and size of buildings, percentage of lot that may be used, the setback of buildings from street, etc. of all building in Baltimore County. It also provides that the regulations must be in accord with a comprehensive plan and shall be designed to reduce congestion, eliminate other dangers and be for the betterment of the public welfare of the County.

Sub-paragraph (b) provides that the County Commissioners may divide the County into districts or zones to accomplish this purpose.

Sub-paragraph (c) provides that the County Commissioners shall determine manner of regulations and restrictions and the boundaries of such zones, and further provides that Zoning Commissioner shall recommend boundaries of said zones and regulations to be enforced therein, and provides for holding of public hearings on the boundaries and regulations.

Sub-paragraph (d) provides for appointment of Zoning Commissioner, and allows County Commissioners to vest certain duties and authorities in Zoning Commissioner relative to *zoning regulations and restrictions.* It also provides that County Commissioners may impose certain duties on the building inspectors.

Sub-paragraph (e) provides for the establishment, powers and duties of the Board of Zoning Appeals.

Sub-paragraph (f) provides for appeal to the Circuit Court from decision of the Board of Zoning Appeals.

Sub-paragraph (g) provides for the procedure by the court in case of appeal.

Sub-paragraph (h) provides the mechanics to be used by County Commissioners in keeping records under the Act, and further provides that County Commissioners shall have power to employ necessary personnel for the administration of the Act, and allows the Commissioners to levy a tax to pay such personnel.

Sub-paragraph (i) provides for penalties for failure to comply with regulations promulgated under the Act.

Sub-paragraph (j) provides that the County Commissioners, Zoning Commissioner, Board of Zoning Appeals or any person whose interest is affected by any violation of regulations, may maintain an injunction in the Circuit Court, enjoining the restriction of any building in violation of the regulations adopted under the Act.

It is here noted that this entire statute refers only to zoning and does not vest the Zoning Commission with any planning powers.

In examining the State-wide planning and zoning enabling Act (Chapter 599 of the Acts of 1933), we find under Title I, Section 2 that the law states:

> "Any municipality is hereby authorized and empowered to make, adopt, amend, extend, add to, or carry out a municipal plan as provided in this Act and *create by ordinance a Planning Commission with powers and duties herein set forth . . . .*"
> Section 6 of the same Title provides in part:
>
> *"It shall be the function and duty of the Commission to make and adopt a master plan for the physical development of the municipality* including any areas outside of its boundaries which in the Commission's judgment bear relation to the planning of such municipality . . . ."
> Section 11 of the same Title provides, among other things:
>
> ". . . In general, the Commission shall have *such powers as may be necessary to enable it to fulfill its functions, promote municipal planning, and carry out the purposes of this Act.*"

The Act next provides for the promulgation of exhaustive zoning legislation. We are informed that the County Commissioners of Baltimore County never have, by ordinance

or otherwise, invested any of the zoning powers provided for in this Act in the Planning Commission, and that Baltimore County's zoning is now controlled entirely by the provisions of Chapter 502 of the Acts of 1945, and Chapter 877 of the Acts of 1943. A detailed study of Chapter 502 of the Acts of 1945, as outlined above, disclosed that nothing therein contained affects the planning functions and duties imposed upon the Planning Commission created by the Board of County Commissioners pursuant to Chapter 599 of the Acts of 1933, and if the Planning Commission was created by proper ordinance, it is endowed and empowered with all of the duties pertaining to planning as set forth in Chapter 599 of the Acts of 1933.

It is our opinion that the Acts relating to zoning in Baltimore County, under which the Zoning Commissioner and the Board of Zoning Appeals were created, are not in conflict with Chapter 599 of the Acts of 1933, and the functions of the Baltimore County Planning Commission, created pursuant to this Act, in so far as they relate to planning, are not in conflict with the Acts relating to zoning.

At our recent conference, some discussion occurred on the advisability of consolidating the personnel and functions of the Planning Commission with those of the Zoning Commissioner. Since this is entirely a local matter which should be determined by Baltimore County, we are not expressing an opinion on this question.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

BANKS AND TRUST COMPANIES

BANKING INSTITUTIONS—VOTING TRUSTS—QUALIFICATIONS OF DIRECTORS IN STATE BANKS—PERMISSIBLE TO FORM VOTING TRUST OF SHARES IN STATE BANKS—OWNER OF VOTING TRUST CERTIFICATES MAY QUALIFY AS OWNERS OF STOCK FOR CERTAIN PURPOSES.

January 13, 1947

Mr. John W. Downing,
Bank Commissioner.

Your letter of January 6th states that the stockholders and directors of a State bank intend to form a voting trust covering the shares of bank stock owned by them. You ask whether, in our opinion, it is permissible for a group of stockholders or directors of a banking institution, subject to the provisions of Article 11 of the Annotated Code of Maryland (1939 Ed.), to form a voting trust in the absence of statute.

A decided split in authority exists on the question of the legality of any voting trust agreement, Wormser, *Corporate Voting Trusts* (1918) 18 Col. L. Rev. 137. The courts of highest authority in some States have held that voting trust agreements are valid so long as they are not entered into for an unlawful purpose. *Brightman v. Bates,* 175 Mass. 105, 55 N. E. 809 (1900); *Carnegie Trust Co. v. Security Ins. Co. of America,* 111 Va. 1, 68 S. E. 412 (1910). Similar courts in other States have held that voting trust agreements are void, the rationale of such decision being that voting power is attached to and is inseparable from the real ownership of corporate shares, and that all agreements or devices by which stockholders surrender their voting power are invalid and against sound public policy. *Bostwick v. Chapman,* 60 Conn. 533, 24 Atl. 32 (1890); *Harvey v. Linville Imp. Co.,* 118 N. C. 693, 24 S. E. 489 (1896).

In Maryland the question of whether in general a voting trust agreement is in contravention of public policy has been answered by the Legislature. Section 131 of Article 23 of the Annotated Code of Maryland (1939 Ed.) provides, in substance, that upon certain conditions "a stockholder of any corporation * * * may by agreement in writing transfer his stock to any person or persons for the purpose of vesting in him or them the right to vote thereon, for a time not exceeding ten years." The Section further provides that "every other stockholder, upon his request therefor, may by like agreement in writing also transfer his stock to the same person or persons and thereupon may participate in the terms, conditions and privileges of such agreement."

Because of the peculiar nature of banking institutions, the question presented here is whether Section 131 of Article 23, *supra*, applies to the instant case. In our opinion it does.

Section 131 of Article 23, *supra*, was taken from the laws of New York of 1901 (Ch. 355), the first statute recognizing the validity of voting trust agreements. Cushing, *The Law of Voting Trusts* (2 Ed., 1927) 140. In *In re Morse*, 247 N. Y. 290, 160 N. E. 374 (1928) the Court of Appeals of New York was asked to determine whether a voting trust agreement covering shares of bank stock was valid in light of the terms of the New York statute. In recognizing the validity of such agreements, the Court said, at page 299:

> "Public policy, although an aid to the interpretation of ambiguous statutes, is powerless to create an exception when the language is plain and all comprehensive. However cogent the reasons may have been for not applying the voting trust statute to banks by reason of their peculiar relations with the public, it is enough to say that the legislature did not recognize such reasons as controlling."

We find nothing in Article 11 of the Annotated Code of Maryland (1939 Ed.) which requires a rule of statutory

construction excluding banking corporations from the ambit of Section 131 of Article 23, *supra*. Moreover, we have found no decision or ruling which would impair the persuasive authority of *In re Morse, supra*. To the contrary, the Court of Appeals in *State Tax Commission v. Baltimore County,* 138 Md. 668 (1921), had before it a voting trust agreement covering shares of stock in a banking institution, and, though not specifically passing on the question here involved, did not condemn the agreement. We conclude that stockholders and directors of a banking institution subject to the terms of Article 11 of the Annotated Code of Maryland (1939 Ed.) may form a voting trust agreement covering their shares.

In connection with the question raised by your letter, we call your attention to the provisions contained in Section 35 of Article 11 of the Annotated Code of Maryland (1939 Ed.). This Section provides in part that the director of every bank shall take oath that he is:

> "* * * the owner in good faith of unencumbered stock in the bank, of the par value of not less than one hundred dollars ($100.00) in the case of banks having a capital stock not in excess of twenty-five thousand dollars ($25,000.00); two hundred and fifty dollars ($250.00) in the case of banks having a capital stock of more than twenty-five thousand dollars ($25,000.00) and not in excess of fifty thousand dollars ($50,000.00); five hundred dollars ($500.00) in the case of banks having a capital stock of more than fifty thousand dollars ($50,000.00) standing in his name on the books of the bank. Provided, however, that in determining the amount of stock which a director shall own, only the par value of the common stock shall be considered and capital notes and/or debentures sold or issued by any such banking institution shall not be considered in such calculation. * * *"

The purpose of the requirement found in Section 35 of Article 11, *supra,* is to insure that the directors of State banks have a proprietary interest in the institution in question. That the owners of voting trust certificates are the real and substantial owners of the shares seems well established. *State Tax Commission v. Baltimore County,* 138 Md. 668, 681 (1921); *Smith v. Bramwell,* 146 Ore. 611, 616, 31 P. (2) 647 (1934); U. S. *Independent Tel. Co. v. O'Grady,* 75 N. J. Eq. 301, 71 Atl. 1040 (1909). It has been held that holders of voting trust certificates are "stockholders" within the constitutional provision imposing double liability on bank stockholders, *Ulsh v. State ex rel Fulton,* 50 Ohio App. 189, 197 N. E. 815 (1935), and that such certificate holders may be subject to the claims of corporate creditors in an appropriate case. *John W. Cooney Co. v. Arlington Hotel Co.,* 11 Del. Ch. 286, 101 Atl. 879 (1917). Moreover, it has been indicated that a provision of a charter requiring directors to be stockholders is fulfilled by the ownership of voting trust certificates *Venner v. Chicago City Ry. Co.,* 258 Ill. 523, 101 N. E. 949 (1913).

We conclude that the owner of voting trust certificates in the amounts specified by law may qualify as the owner in good faith of unencumbered stock as required by Section 35 of Article 11 of the Annotated Code of Maryland (1939 Ed.).

HALL HAMOND, *Attorney General*

RICHARD W. CASE, *Asst. Attorney General*

BANKS—FOREIGN—MUST PROCURE LICENSE TO DO BUSINESS IN MARYLAND AS SALES FINANCE COMPANY.

May 16, 1947

Mr. Truman B. Cash,
Administrator of Loan Laws.

You have asked our opinion as to whether an out-of-state bank must procure a license as a sales finance company under Sections 141 to 152 of Article 83 of the Code of Public General Laws in order to purchase Maryland conditional sale contracts.

We are of the opinion that an out-of-state bank must procure a license as a sales finance company in order to purchase Maryland conditional sale contracts. Section 141 of Article 83 exempts banking institutions from the requirement of procuring a license as a sales finance company and Section 151 (m) defines a banking institution as including any national bank and any state bank, trust company or mutual savings institution. Offhand, it would seem that this exemption would include out-of-state banks as well as banks situated in Maryland. It has long been the established law of this State that banks of another state may not do business in Maryland.—See 4 Opinions of the Attorney General 166. The exemption of banks from the requirement of procuring a license as a sales finance company must be interpreted as limited to banks which are empowered to do banking business in Maryland. Since an out-of-state bank is not authorized to do a banking business in Maryland, if such a bank wishes to purchase conditional sale contracts and thereby engage in the business of a sales finance company, it must procure a license to do so. This office has previously ruled that a foreign corporation may procure a license as a sales finance company.—See 27 Opinions of the Attorney General 315.

RICHARD W. EMORY, *Deputy Attorney General*

BANKS—INDUSTRIAL FINANCE COMPANIES—COMPUTATION OF REFUND WHERE BORROWER DIES AND LOAN IS SECURED BY LIFE INSURANCE POLICY.

May 22, 1947

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

You have asked our views on the proper method of calculating refunds under the Industrial Finance Law where a borrower, whose loan is secured by life insurance, dies before the maturity of the loan.

Various types of policies may be involved. An existing policy may be assigned as security for the loan so that any balance above the amount due would go to the beneficiary, or the policy provision may be that the amount of the loan shall be paid to the lender and any balance paid to the named beneficiary, or the obligation of the insurance company may be only to pay the loan company the balance due at the time of death.

Section 186, paragraph A4, of Article XI, permits the lender to collect from the borrower, in addition to the authorized interest and charges, premiums actually paid for insuring the lives of those obligated on the loan in an amount not to exceed the gross amount of the contract; and Section 186, paragraph B4, authorizes prepayment of all or any part of an unpaid balance at any time. Upon such prepayment, the borrower is entitled to a refund of interest calculated in the manner set forth in the statute. It is clear to us that, upon the death of a borrower whose loan is covered by insurance, the amount to which the lender becomes entitled is not the unpaid principal balance but such amount less the discount rebate brought about by the satisfaction of his loan before maturity.

Certainly, in the first two examples above given, there could be no question that the beneficiaries of the insurance

on the life of the borrower are entitled as his representatives to the benefits of prepayment which have been made by the insurance company for his benefit. In the third example, no benefit accrues to those who would take from the borrower, but we see no reason why, under the definite intent and purpose of the Industrial Finance Law spelled out in many places, the lender should receive more interest if a loan is prepaid by reason of the death of the borrower than if it were prepaid in any other way. We see no reason also to draw a distinction between various types of insurance coverage. It can plausibly be argued that, if under a contract of insurance which pays only the amount due at death it is established that such amount is not the principal balance unpaid but such balance less the discount rebate, sooner or later competition in the insurance business will bring about some reduction in rates for such coverage, even though slight, and in this way borrowers would be benefited.

HALL HAMMOND, *Attorney General.*

BOARD OF EXAMINERS OF PUBLIC ACCOUNTANTS

BOARD OF EXAMINERS OF PUBLIC ACCOUNTANTS MAY USE EXAMINATIONS PREPARED BY AMERICAN INSTITUTE OF ACCOUNTANTS PROVIDED BOARD MEMBERS FIND SAME TO BE REASONABLY FAIR TEST.

August 29, 1947.

Board of Examiners of Public Accountants.

You state in your recent letter and the correspondence reveals that the American Institute of Accountants is a national organization comprising some 10,500 members throughout the United States. One of the functions of the Institute is to prepare uniform examination questions and problems and to submit same to the various State Boards of Examiners of Public Accountants to be used in examining applicants for the degree of Certified Public Accountant. The general purpose of the various States using the examination questions and problems prepared by the Institute is to bring about uniform examination standards throughout the country and to simplify the issuance of reciprocal certified public accountant certificates. The correspondence further reveals that at least forty-four States and the District of Columbia now avail themselves of and are using the uniform examination questions prepared by the Institute. You now ask us (1) if your Board may legally use the uniform examination questions and problems so prepared by the Institute, and (2) if your Board may so use them, may it lawfully pay the costs thereof out of the funds of the Board.

Section 3 of Article 75A of the Code of Public General Laws (1939 Edition), states in part:

> "The questions propounded at said examinations shall be submitted to the entire Board before

> being adopted, and shall be certified by the said Board as a reasonable and fair test of the candidates' qualifications, and as reasonably susceptible of answer or solution in the time allowed."

No other limitation has been placed upon the Board by the Legislature. Under the law, it, therefore, appears that it is within the discretion of the Board as to what method shall be used in preparing the questions propounded at the examination, provided said questions are submitted to the entire Board before being adopted and are certified by the Board as reasonable and fair. If the Board should see fit to use the questions as prepared by the American Institute of Accountants and they are submitted to the entire Board and adopted after found to be a fair and reasonable test, susceptible of being answered in the time allowed, we see no objection to their use.

In considering the propriety of paying the American Institute of Accountants for this examination service, an examination of the budget discloses that no provision is made therein from the appropriation to your Board to pay for such services. However, Section 4 of Article 75A provides that the Board may charge for examination and issuance of certificates such fee, not to exceed $25, as may be necessary to meet the actual expense of such examination and the issuance of such certificates. There is no limitation or restriction imposed by the statute that would restrict the Board from paying the cost of this service from the fee collected from the applicants, provided said cost does not exceed the maximum amount set forth in Section 4, as quoted above, and does not exceed the budget of your Board.

The opinion of the Attorney General of Ohio (Opinion 1099, June 11, 1946) is not applicable under the present state of facts and the Maryland statute being construed. That opinion contemplates that the questions of the Institute will be used by the Ohio Board without prior examination and approval by the Board, and the Board in so

using the questions is improperly delegating authority which the Legislature delegated solely to the State Board of Accountancy of Ohio. This is not so in the present case since you state the questions and problems of the Institute will be submitted to the entire Board and will not be adopted unless found to be a reasonable and fair test of the candidates' qualifications and susceptible of answer in the time allowed.

In view of the aforegoing, it is our opinion, therefore, that the Board (1) may legally use the uniform examination questions and problems prepared by the American Institute of Accountants, provided said questions are submitted to the entire Board and found to be a fair and reasonable test of the candidates' qualifications prior to being adopted, and (2) the Board may lawfully pay for the costs of said questions from the fee allowable for examinations and issuance of certificates under the provisions of Section 4 of Article 75A, provided said cost does not require the charging of a greater examination fee than allowable thereunder and is within the budget provisions of your Board.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

BOARD OF PUBLIC WORKS

BOARD OF PUBLIC WORKS—BOARD MAY PERMIT AN ERRONEOUS BID TO BE REFORMED OR WITHDRAWN.

June 27, 1947.

Mr. Joseph O'C. McCusker, Secretary,
Board of Public Works.

The Board of Public Works wishes to know whether it has legal authority to allow the low bidder for certain work at Spring Grove Hospital either to increase his bid to correct a mechanical error or to withdraw his bid.

The facts, as we have been told them, are as follows: The Davis Construction Company submitted a bid of $109,-750. In preparing the bid, an estimator in the employ of the Company got up work sheets as to the items involved, including one covering job overhead in the amount of $10,-625. When the summary sheet, intended and supposed to contain the totals of all the work sheets, was prepared, the job overhead sheet was overlooked. In other words, the bid which the Company intended to submit was $120,-375, and the fact that the bid actually submitted was $109,-750 was due to carelessness in overlooking the omission of the job overhead item from the total estimated price. The bid which was intended to be submitted is considerably lower than the next bid.

In the case of *Baltimore City v. Robinson Construction Company,* 123 Md. 660, the Court of Appeals ruled that bids filed under the Charter provisions of the City were irrevocable and could not be withdrawn or altered after filing. The case arose on a suit at law for a return of the deposit. The Court distinguished the case of *Moffet v. Rochester,* 178 U. S. 373, relied on by the claimant, because it was a bill in equity for the reformation of a bid and further

pointed out that all the cases cited were those in equity in which no statute was involved.

In the case of *Moffett v. Rochester,* the Supreme Court granted relief in a situation quite similar to that about which you write, on the ground that the proposal of the bidder in that case was one which he never intended to make and that he was no more responsible for than if it had been the mistake of a copyist or a printer. The Court quoted the language of the Circuit Court of Appeals, as follows:

> "In other words, that the proposal read at the meeting of the board was one which the complainant never intended to make, and that the minds of the parties never met upon a contract based thereon. If the defendants are correct in their contention there is absolutely no redress for a bidder for public work, no matter how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. If, through an error of his clerk, he has agreed to do work worth $1,000,000 for $10, he must be held to the strict letter of his contract, while equity stands by with folded hands and sees him driven into bankruptcy. The defendants' position admits of no compromise, no exception, no m i d d l e ground."

Judge McKenna added that the remarks were so apposite and just that it was difficult to add anything to them. He said:

> "The transaction had not reached the degree of a contract—a proposal and acceptance—nor was the bid withdrawn or cancelled against the provision of the charter. A clerical error was discovered in it and declared and no question of the

> error was then made or of the good faith of the complainant."

Before the time required for the bidder to appear and execute a contract, he filed his bill of complaint in an equity court for reformation of the bid, and the Supreme Court declared that he had the right so to do.

It is my view that the facts in this case are so similar to those in the *Moffett* case that the reasoning and conclusion of the Court apply here with equal force. Since the Board, I am told, is entirely convinced of the accuracy of the facts presented to it and of the good faith of the bidder, I see no reason why it may not permit the low bidder either to reform his bid to that which was intended to be made and which the bidder actually thought was being made, or to withdraw his bid. No statute is here involved.

HALL HAMMOND, *Attorney General.*

BUDGET

BUDGET — GENERAL EMERGENCY FUND — MONEY IN THE GENERAL EMERGENCY FUND MAY BE USED TO PAY THE STATE'S SHARE OF THE SALARIES OF SUPERVISORS OF ASSESSMENTS.

August 18, 1947.

Board of Public Works,
Annapolis, Maryland.

Under the terms of Chapter 706 of the Acts of 1947, the salaries of the Supervisors of Assessments throughout the State were raised, and it was then provided that the salaries should be paid monthly by the several counties and Baltimore City, and "a sum equivalent to one-half of the annual salary shall be paid by the Comptroller of the State of Maryland from general funds to the several counties and the City of Baltimore, such payments to be made to the said counties and Baltimore City quarterly. The several counties and Baltimore City are hereby directed to levy annually such sums as may be required to pay the remaining one-half of these salaries."

House Bill 103, which, as amended, became Chapter 706, did not pass until the final night of the 1947 session. At that time, of course, both the budget and the supplemental budget had become law. When the budget bill was passed, the provision as to the payment of half the salaries of the Supervisors from the general funds of the State was not contemplated. It came into House bill 103 during its passage through the Legislature. Therefore, no funds are provided in the budget for the payment of these salaries which, for the current fiscal year, are estimated to be $107,225.

You ask whether the Board of Public Works may authorize an allotment from the General Emergency Fund for

the payment of the salaries. In our opinion, the Board may properly do so. The budget bill on page 142 of the printed bill provides in Item 1 for a General Emergency Fund of $500,000 for each of the fiscal years, to be used by the Board in supplementing appropriations where it is found that the regular appropriations are insufficient for the operating expenses of the government beyond those which were contemplated at the time of the appropriations in the budget for the fiscal years involved. It is then provided that the General Emergency Fund may be used "for any other contingencies which might arise during the two fiscal years for which adequate provision has not been made in this budget."

There can be no real doubt that the lack of money to pay the State's share of the assessors' salaries is a contingency which has arisen during the fiscal years, and that no provision has been made for the payment of the salaries by the State in the budget. The language last quoted is literally broad enough to authorize the use of the Emergency Fund for the payment of salaries, and also it seems clear that the spirit of the budget item is fully complied with by the use of emergency funds for the suggested purpose.

HALL HAMMOND, *Attorney General.*

CLERKS OF COURT

CLERKS OF COURT—RECORDING—FEE FOR RECORDING AND EXTRACTING DEEDS, MORTGAGES, ETC. — EXTRACTING NOT REQHIRED OF INSTRUMENT NOT CONVEYING REAL ESTATE.

March 31, 1947.

Mr. M. Luther Pittman, Clerk,
Superior Court of Baltimore City.

This is in reply to your letter of March 20, 1947, inquiring about the meaning of Section 12 (A) (14) of Article 36 of the Annotated Code of Maryland and the charges which should be made for the recording of two supplemental indentures offered for recordation by the Baltimore & Ohio Railroad Company and altering the rights of its bondholders.

Your first question is whether Section 12 (A) (14) of Article 36 permits a charge of 15c per one hundred words for recording deeds, mortgages and similar papers and an additional charge of 15c per one hundred words for extracting such papers. The extracting referred to is the preparation of an abstract for the Commissioner of the Land Office, required by Sections 71 and 72 of Article 17 of the Code (see also Article 54, Section 16). The language of Section 12 (A) (14) on its face appears to authorize only a single charge of 15c per one hundred words for both recording and extracting. But as you point out, the history of Section 12 (A) (14) and the charges authorized in the other sub-sections of Section 12 indicate clearly that a charge of 15c per one hundred words may be made for recording and that an additional charge of 15c per one hundred words may be made for each instrument required by Section 71 of Article 17 to be extracted.

Prior to 1943, Section 12 of Article 36 prescribed a charge of 12.5c per hundred words for recording and 15c

per one hundred words for extracting, making a total of 27.5c per one hundred words for instruments required to be both recorded and extracted. When the Section was amended by Chapter 546 of the Acts of 1943, the two charges were combined in sub-section 14. Certainly, with costs rising, the Legislature did not intend to reduce the charge from 27.5c per one hundred words for recording and extracting to 15c. On the contrary, it is our understanding that it was intended to increase the charge for recording and extracting to 30c per one hundred words. This interpretation of sub-section 14 is borne out by sub-section 11 of Article 12 (A), which prescribes a charge of 15c per one hundred words for recording any paper required to be recorded other than in the land or chattel records and by sub-section 21 which prescribes a charge of 20c per one hundred words for recording any paper among the chattel records. Certainly, the Legislature did not intend that instruments should be recorded in the land records and extracted for less than the charge for recordation in the chattel records. Your office is, therefore, entitled to charge 15c per one hundred words for recording and an additional 15c per one hundred words for extracting papers which are required to be extracted by Section 71 of Article 17.

We are of the opinion, however, that the supplemental indentures offered for recordation by the Baltimore & Ohio Railroad Company need not be extracted. Section 71 of Article 17 requires the Clerk to extract every "deed, mortgage, release of mortgage or lease of real estate". It is the purpose of Sections 71 and 72 of Article 17 to require extracts of all conveyances of real estate be forwarded to the Commissioner of the Land Office. The reference to deed, mortgage, release of mortgage or lease of real estate in Section 71 is because such instruments are the customary forms for conveying real estate. While the supplemental indentures offered for recordation by the Baltimore & Ohio Railroad Company may for some purposes be regarded as mortgages, we do not believe that they are mortgages within the contemplation of Section 71 since they do not

convey any real property and there is no need for the Commissioner of the Land Office to record extracts of such instruments in view of the fact that they do not convey any real property in this State.

As noted in the last paragraph of your letter, you are entitled to charge for indexing in connection with the recordation of the supplemental indentures and are directed by Section 67 of Article 17 to charge $1 for each signature which has not been typed.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

CLERKS OF COURTS—RETIREMENT SYSTEM—AGE LIMIT FOR RETIREMENT IS NOT APPLICABLE TO DEPUTY CLERKS OF COURTS.

April 14, 1947.

Mr. Roy S. Melvin, Clerk,
Circuit Court for Dorchester County.

The problem which you present in your letter of April 8th has been answered by several prior opinions of this office. In 26 Opinions of the Attorney General, 337, the Clerk of the Circuit Court of Baltimore County wished to know whether one of his deputy clerks over the age of 70 was required to retire by reason of the language of Chapter 377 of the Acts of 1941—Section 5 (1) (b) of Article 73B—as follows:

> "any member in service who is not an elected member or appointed official of the State and who has attained the age of seventy shall be retired forthwith or on the first day of the next calendar month."

Judge Walsh and Judge William L. Henderson, then his Deputy, concluded that Deputy Clerks are to be classed as public officers by reason of the various constitutional and statutory provisions applicable to them, some of which are discussed in the case of *State v. Turner*, 101 Md. 584 at 591. In that case the Court said in regard to Deputies in the Clerk's office that they "are not mere servants or agents of the Clerk; they are agents and officers of the Court, being appointed, in the language of the constitution, 'to perform, together with (the Clerks) themselves the duties of the said office'."

It follows therefore that your Chief Deputy Clerk has the option of retiring or remaining in service. This opinion is to be limited to Deputy Clerks and is not to be construed as embracing employees of the office, other than Deputies.

HALL HAMMOND, *Attorney General.*

CLERKS OF COURT—OFFICE PERSONNEL—LOST OR MISLAID PROPERTY—PROPERTY MISLAID IN CLERK'S OFFICE TO BE HELD IN CUSTODY BY CLERK.

July 8, 1947.

Mr. John O. Rutherford, Clerk
Baltimore City Court.

We have your letter of May 27, 1947, in which you state that about two years ago a night watchman, then employed in the Baltimore City Court, found a packet containing twenty five dollar bills which had been lodged between the pages of an old docket. It further appears that a binder of these bills reads "National Marine Bank July 1915", that you have contacted Mr. George Carey Lindsay, who was the Clerk of the Baltimore City Court in 1915, and that neither Mr. Lindsay nor any of the persons connected with your office have given any indication that the money was

a part of the receipts of the Baltimore City Court. You ask our advice with regard to the proper disposition of the money in question.

At the outset, we may put to one side the question of whether the past owner of the money may now lay claim to it, since the question here presented is the relative rights of the finder as compared to the owner of the premises in which the property was found. As between these two parties, the applicable rules of law are clear. With respect to mislaid property, the right of possession as against all but the true owner is in the owner or occupant of the premises in which the property is discovered. As to property which has been lost, the finder has a right superior to that of the owner of the premises where the property was found.

While the governing rules may be expressed in simple terms, it by no means follows that their application may be reduced to a pat formula because of the difficulty in each case of resolving whether property has been mislaid or lost. Generally, mislaid property may be distinguished from property which is lost in that the former has been intentionally placed where the owner may again resort to it, while the latter unwittingly passes out of the possession of the owner who thereafter never knows of its whereabouts.

In the present case, we believe that the attendant circumstances add up to the fact that the money in question was mislaid and not lost. This being so, it must follow that your office and not the finder is the proper custodian of the property. While this may seem to be a harsh rule and one which might encourage dishonesty, the fact remains that the rule has been molded by the overwhelming weight of judicial decisions and that financial gain is not the only reward for the honest man.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

CLERKS OF COURT—REGISTERS OF WILLS—REGISTERS ARE AUTHORIZED TO TAKE ACKNOWLEDGMENTS.

November 12, 1947.

Mr. Harry D. Radcliff,
Register of Wills for Frederick County.

Your letter of October 29, 1947, asks whether the Registers of Wills of each County and of the City of Baltimore have the power to take acknowledgments of any instrument or instruments in the State of Maryland.

Under the Uniform Acknowledgments Act, Section 11 of Article 18 of the Annotated Code of Maryland (1939 Edition), the acknowledgment of any instrument may be made in this State before "a clerk or deputy clerk of a court having a seal". In my opinion, a Register of Wills meets this requirement.

In Maryland, a Register of Wills is the clerk to the Orphans' Court, since he is required to act under the direction and control of that tribunal in the same manner "as the clerk of a court of law is under the direction of such court of law".—Section 276 of Article 93 of the Annotated Code of Maryland (1939 Edition). Moreover, the Orphans' Courts are "courts having a seal".—Section 245 of Article 93 of the Annotated Code of Maryland (1939 Edition). It follows, therefore, that a Register of Wills is qualified to take an acknowldgment under the provisions of the Uniform Acknowldgments Act.

RICHARD W. EMORY *Deputy Attorney General.*

RICHARD W. CASE, *Assistant Attorney General.*

CONSERVATION

CONSERVATION—FISH AND FISHING—RIGHT OF RIPARIAN OWNER TO FISH WITHOUT LICENSE.

February 19, 1947.

Mr. D. Ralph Horsey, Clerk,
Circuit Court for Caroline County.

We have your request for an opinion as to the meaning of that portion of Section 104 of Article 99 of the Annotated Code of Maryland which authorizes owners of land, their children, tenants residing on the land and children of tenants to fish on waters adjoining said land without procuring an angler's license. The provision reads as follows:

> "Provided, however, the owners of lands bordering on non-tidal waters, their children, and tenants residing on said lands of said owner and their children residing on said lands with them may fish on said waters adjoining said lands where they reside without procuring an angler's license so to do."

You have asked two questions. The first question is whether this provision permits one of the named persons to fish either from the shore or from a boat. It is our opinion that a person authorized to fish without a license may fish either from a boat or from the shore. Our reason for this opinion is that prior to 1941 the law read (see Article 39, Section 86):

> "Provided nothing in this Section shall apply to owners fishing from shore adjacent to their property bordering on said streams, or to the owner's families, tenants and their families and employees."

This provision obviously required fishing from shore in order to be entitled to fish without a license. The law was amended in 1941; the words "fishing from shore" were left out and, as noted above, the law was enacted to read "may fish on said waters adjoining said lands". We believe that the change in the wording of the law is entitled to be given some effect and that unless fishing from a boat is authorized the re-wording is meaningless.

Your second question is where a boat must be located in order for a person to be entitled to fish without an angler's license.

You will note that the statute reads that the designated persons may fish on said waters "adjoining said lands". We believe that while that person may fish from a boat, the boat must be located only a short distance off the shore from the lands where the persons reside. It is a well known rule of interpretation that such an exemption from a licensing law should be strictly construed.—24 Opinions of the Attorney General 199 and 205. A strict construction of this law requires that the boat be sufficiently close to shore that one might say that the occupants are fishing in waters adjacent to the shore.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

CONSERVATION — OYSTERS — LEASES — CREEKS AND COVES LESS THAN 100 YARDS WIDE—EFFECT OF 1945 RECODIFICATION OF ARTICLE 72.

May 21, 1947.

Mr. Edwin Warfield, Chairman,
Department of Tidewater Fisheries.

This is in reply to your letter of May 13, 1947, in which you ask whether under Article 72, as recodified by Chapter 929 of the Acts of 1945, the entire area beneath a creek,

cove, bay or inlet which is more than one hundred yards wide at its mouth at mean low water is open to oystering by the public, or whether a riparian owner has a special right to oyster bottoms on such a creek, cove, bay or inlet above the point where such body of water narrows to less than one hundred yards in width at mean low water.

Article 72 of the Code had its origin Chapter 87 of the Acts of 1829, which so far as I can determine was the first law in this State for the leasing of oyster beds. The 1829 Act authorized any citizen of this State to appropriate "any area not exceeding one acre in extent" for the purpose of planting oysters. The Act also gave to the proprietor of the adjacent shore "a right of preemption for one acre of superficies, extending along the shore from the ordinary low water mark, in the direction of the main channel . . . provided, that the said location shall be selected and completed on or before the first of January next." The use of the word "superficies," which is defined as the alienation by the owner (the State) of the surface of the soil of all rights necessary for building, and the requirement that the location be selected and completed by January first next make it clear that the proprietor of the adjacent shore had no right to the oyster beds except such as the State might give him. The Act gave to the one acre appropriated by any citizen or preempted by the proprietor of the adjacent shore the name of "depot." It further required the owner of a depot (which in the common parlance of today is called a lease) to "annually deposit, bed, or sow thereon, a quantity of oysters or other shell fish . . . sufficient to preserve the increase and growth" at the peril of being held a non-user, in which event the depot might be adopted by any other citizen. The Act of 1829 also contained this proviso:

> "any proprietor, into whose land a creek, cove, or inlet may make, which at its mouth does not exceed one hundred yards in width, shall have the exclusive right of such creek, cove, or inlet, for the deposit or use of any oysters or other shell fish."

By Chapter 270 of the Acts of 1842 a proprietor of lands lying on any of the navigable waters of this State, the lines whereof extend across and include any cove or arm not navigable by licensed vessels, was given an absolute and exclusive property in all beds and deposits of oysters and shell fish in any such non-navigable cove or arm within the lines of his lands, "provided that said oysters and shell fish shall have been deposited by the owner of said cove." This right of a riparian owner was further extended by Chapter 400 of the Acts of 1846 to include any navigable cove or arm of water within property lines.

These rights of a riparian owner were codified in the Code of 1860 as Sections 15 to 17 of Article 72 (then Article 71). Section 16 reserved to the landowner the exclusive right to any creek, cove, or inlet not exceeding one hundred yards in any breadth at its mouth which makes into the land. This provision was retained in that form when Article 72 was recodified by Chapter 181 of the Acts of 1865 and by Chapter 184 of the Acts of 1867, but when Article 72 was recodified by Chapter 406 of the Acts of 1868, the rights of a landowner in Section 16 (which by the recodification became Section 29) were extended to include not only (1) "the exclusive right to use such creek, cove or inlet, when the mouth of said creek, cove or inlet is one hundred yards or less in width," but also (2) "when the said creek, cove or inlet is more than one hundred yards in width at its mouth, the said owner or owners or other lawful occupant or occupants, shall have exclusive right to use such creek, cove or inlet so soon as said creek, cove or inlet in making into said lands, shall become one hundred yards in width." This section of the oyster laws on waters less than one hundred yards wide, as amended by Chapter 406 of the Acts of 1868, was retained in the law until 1945. In the Code of 1939, it appears as Section 52 of Article 72.

When Article 72 was recodified by Chapter 929 of the Acts of 1945, the General Assembly omitted all references to riparian owners. Not only did the legislature repeal Section 52, but it also repealed Section 50 of the Code of 1939, which Section gave to the landowner the exclusive privilege

to waters within his property lines and the right to appropriate one lot of five acres in waters adjoining his lands. The only reference in the present law as rewritten in 1945 to earlier laws which gave prior rights to landowners is the provision of Section 12 (b) which prohibits the Department of Tidewater Fisheries from leasing "any area beneath any creek, cove, bay, or inlet less than one hundred yards wide at its mouth at mean low water." On its face Section 12 (b) would appear to reserve in the State and the public the exclusive right to waters of a creek, cove, bay or inlet less than one hundred yards wide at its mouth, but when the section is considered in the light of its history heretofore discussed, it seems obvious that the legislature intended by Section 12 (b) to preserve to the riparian owner the exclusive right to such waters which the landowner had enjoyed since 1829. When the legislature in 1945 deleted from the law all reference to waters less than one hundred yards wide of a creek, cove, bay or inlet which at its mouth is more than one hundred yards wide, the conclusion is inescapable that the law as enacted in 1945 reverted to the status as it existed during the period of 1829 to 1868, at which time a riparian owner had no special rights if the creek, cove, bay or inlet was more than one hundred yards wide at its mouth. It is therefore my opinion that the General Assembly by Chapter 929 of the Acts of 1945 took away from the riparian owner and reverted to the State and the public the right to all oyster bottoms on a creek, cove, bay or inlet more than one hundred yards wide at its mouth.

Should anyone question the right of the State by Chapter 929 of the Acts of 1945 to take away such oyster beds from a riparian owner, it is my opinion that such action is constitutional and that the prohibition in Section 40 of Article 3 of the Constitution against the taking of private property for public use without just compensation is not applicable. That which the State hath given, the State may take away. The State owns all lands under waters within the ebb and flow of the tide by virtue of Lord Baltimore's charter from the King. See *Browne vs. Kennedy,* 1821, 5 H. & J. 195, 209;

Sollers vs. Sollers, 1893, 77 Md. 148, 151. It is clear from the word "superficies" in the 1829 Act by which a riparian owner was first given prior right to oyster beds joining his land that title is in the State and that the riparian owner has only a license. It has also been decided by the Court of Appeals that the privilege of locating oyster lots is merely a license which may be revoked. *Phipps vs. State,* 1864, 22 Md. 380. Judge Ritchie stated the law thus in *Hess v. Mueir,* 1886, 65 Md. 579, 593-4:

> "It is perfectly manifest that as under the decision of *Phipps vs. State, supra,* the privilege of locating oyster lots has no elements of a grant by patent, but is simply a license, revocable at the pleasure of the Legislature, it is merely a personal privilege to the recipient, and consequently neither inheritable nor assignable. . . .
>
> "The privilege being created simply by license is subject to be terminated by the State whenever it shall deem the public interest requires it. The security of the license is only in the fairness and sense of justice with which it may be assumed, the state will deal with its citizens.
>
> "The oysters that have been deposited by the holder during the continuance of the license, remain, of course, his personal property, with the right of selling or otherwise disposing of them, but the territory continues subject to the control of the State."

I call your attention to the last paragraph of the above quotation as to the oysters which a riparian owner may have planted in a creek, cove, bay or inlet which by the Act of 1945 reverted to the State. You will note that Judge Ritchie states that these oysters remain the private personal property of the landowner who planted them. I think that conclusion eminently right and just. Thus while the beds in a creek, cove, bay or inlet more than one hundred yards

wide at its mouth above the point where it narrows to less than one hundred yards in width reverted to the State by Chapter 929 of the Acts of 1945, the landowner remains the owner of oysters planted by him and must be given the right to remove the oysters. In fact, it would be an unconstitutional taking of property for a public purpose without compensation to permit the public to take such oysters.

RICHARD W. EMORY, *Deputy Attorney General.*

CONSERVATION — HUNTING LICENSE — OWNERS OF FARM LANDS WHO ARE MARYLAND RESIDENTS NEED NOT LIVE THEREON TO HUNT THEREON WITHOUT A HUNTING LICENSE—OWNERS OF FARMLANDS WHO LIVE OUT OF MARYLAND MUST OBTAIN A NON-RESIDENT HUNTING LICENSE TO HUNT IN MARYLAND.

June 16, 1947.

Mr. George B. Shields,
Chief Deputy Game Warden.

In your recent letter you propound two questions, as follows:

(1) Do owners of farmlands residing in Maryland, not living on their lands, have the right to hunt upon said lands without first procuring a hunting license?

(2) Do owners of farmlands, who are non-residents of the State of Maryland, have the right to hunt on said lands without first procuring a non-resident hunter's license?

The first question involves the interpretation of Section 17 of Article 99, as amended by Chapter 123 of the Acts of 1945. The applicable part of the Section reads as follows:

> "(Who May Hunt Without License.) The owner of farmlands, his children or spouses of children,

> or tenants, or children or spouses of children of such tenants residing on said farmlands shall, without procuring such license, have the right to hunt said enumerated game during the open season for the same on the said farmlands of which he or they are bona fide owners, children or spouses of children of such owners, or tenants, or children or spouses of children of such tenants. The term 'tenant' shall mean a person who holds land under a lease, or as a share-cropper, and resides in a dwelling on the farm or lands, but shall not include any employee of either the owner or the tenant."

In analyzing the statute, it is found that the persons referred to therein are broken down into three classes; namely: (1) the owner, (2) the immediate family of the owner, and (3) the tenant and his immediate family. The first two classes are given the right to hunt on farmlands *owned* without a license. As to the third class, however, the statute specifically states "to tenants, or children or spouses of children of said tenants *residing* on said farmlands" shall have the right to hunt thereon without first procuring a license. If the statute stopped there and nothing followed, it would be reasonable to assume from the wording and punctuation of the statute that the only persons therein enumerated who would have to live on said farmlands to hunt thereon without a license would be the children or spouses of children of such tenants. However, subsequent thereto, in the same section a tenant is defined as "a person who holds land under a lease, or as a share-cropper, and resides in a dwelling on the farm or lands". This places a tenant in the same category as his children or spouses of children and enumerated as class 3 above. It is reasonable to assume, and a well established principle of law, that the Legislature has a reason and a meaning for each section or part of a section that it enacts into law. With this principle before us, it follows that in order to give meaning to each clause and phrase of the above quoted section, we must hold that the owner of

farmlands, his children or spouses of children may hunt thereon without a license but the tenant or his immediate family must actually reside in a dwelling on said land before they may so hunt. We are, therefore, of the opinion in answering this specific question you ask that the owner of farmlands may hunt thereon without a license even though he does not reside on said farmlands, subject to the limitation set forth in the answer to your second question below.

The second question presents less difficulty. Section 15 of Article 99, prior to 1941, provided that a non-resident of the State should pay $15.00 for a hunting license; but the statute further provided "if a non-resident landowner of any county to the assessed value of $500.00, he shall pay a fee of $1.00 which will entitle him to hunt in the county in which his lands are assessed and if he shall desire a state-wide license he may pay a fee of $5.00". This Section (Section 15) was amended by Chapter 708 of the Acts of 1943. As amended, the non-resident of the State is required to pay the sum of $15.50 as a license fee, but the provision above quoted that permitted a non-resident owner to procure a county license to hunt in the county in which his property was located for $1.00 and a State-wide license for $5.00 was eliminated; and it appears obvious to us that in eliminating this provision it was the definite legislative intent that the non-resident, even though he owned property in the State, be required to pay the total non-resident hunting license fee of $15.50, and we so hold.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

CONSERVATION—CRABS AND CRABBING—LICENSE—SPECIAL LICENSE FOR PATUXENT RIVER REPEALED BY LATER GENERAL LAW.

June 17, 1947.

Mr. David H. Wallace,
Executive Secretary.

You have asked our opinion as to whether it is legal to take crabs in the Patuxent River by seine or net and whether a license may be issued for that purpose under Section 106 of Article 39 of the Annotated Code of Maryland.

Section 106 was enacted by Chapter 480 of the Acts of 1935 and prescribed a special annual license for the taking of crabs in the Patuxent River by net or seine, with handle attached. Section 111A of Article 39, which was enacted by Chapter 408 of the Acts of 1941, prohibits the taking of crabs in the waters of this State except by scrape, dip net or trot line. Kent and Queen Anne's Counties are exempt from Section 111A in that hand-drawn net scrapes are permitted to be used in those Counties. Section 111A was amended by Chapter 727 of the Acts of 1947 to permit crabs to be taken in Anne Arundel County by crab seines not exceeding fifty feet in length, except on the Severn River. Section 111A contains no exemption of the Patuxent River.

In view of the fact that Section 111A was enacted subsequent to Section 106 and by its terms is applicable to all the waters of this State, we are of the opinion that Section 106 has, in effect, been repealed and that licenses for the taking of crabs from the Patuxent by net or seine should not be issued.

HALL HAMMOND, *Attorney General.*

CONSERVATION—OYSTERS—WYE RIVER—WATERS WHICH RESIDENTS OF QUEEN ANNE'S AND TALBOT COUNTIES MAY USE IN COMMON.

July 17, 1947.

Mr. John E. Clark, Chairman,
Department of Tidewater Fisheries.

You have asked for our opinion as to the meaning of the following portion of Section 5 (i) of Article 72 of the Code of Public General Laws, as recodified and re-enacted by Chapters 872 and 929 of the Acts of 1945:

> "5 (i) . . . No licensed tonger shall take or catch oysters in the waters of any county other than that in which the license was issued, except, however . . . tongers of Queen Anne's and Talbot Counties may use the south branch of the Wye River and the mouth thereof in common . . ."

The specific words for which you ask an interpretation are "the south branch of the Wye River and the mouth thereof in common."

Prior to 1874, the General Laws of the State permitted a tonger to take oysters only within the County of his residence and provided "that the boundaries of the counties bordering upon navigable waters shall be strictly construed, so as not to permit the residents of either county to take or catch oysters beyond the middle of the dividing channel." By Chapter 181 of the Acts of 1874 several exceptions were made in the General Law limiting tongers to the boundaries of their respective counties and to the middle of the dividing channel. One of these exceptions was:

> ". . . nothing in this Section shall be so construed as to prevent . . . the citizens of Queen Anne and Talbot from using the waters of the Wye River and the mouth thereof in common."

This exception to the County boundaries was retained in the General Laws without change throughout many re-enactments until 1945. It appears in the 1939 Code of Public General Laws in Section 1 of Article 72. In the recodification of the General Laws of 1945, the wording of the exception was changed slightly from "the waters of the Wye River and the mouth thereof in common" to "the south branch of the Wye River and the mouth thereof in common."

We believe that a Local Law repealed by the recodification of 1945 explains Section 5 (i) of the present Article 72 of the Code of Public General Laws and the meaning of the phrase, "the south branch of the Wye River and the mouth thereof." Chapter 381 of the Acts of 1876 which was entitled "An Act to provide for the further protection of the oyster interests in Queen Anne's County," and which was codified as Sections 317 to 321 of Article 18 of the Code of Public Local Laws (1930 Edition) provided as follows:

> "317. The following lines, to wit, from the south point of Wye Island to the southeast point of Bennett's point, thence to the south point of Parson's Island, are established as a boundary for the protection of the oyster grounds in that branch of Wye River, known as 'Back Wye,' and the oyster grounds lying on the land or Queen Anne's side of that part of said boundary extending from the southeast point of Bennett's point to the south point of Parson's Island.
>
> "318. It shall not be lawful for any non-resident of Queen Anne's County to catch by the means of tongs, or by any other means, or in any manner to molest oysters, the protection of which is contemplated by this sub-title of this article, to wit, oysters within or on the land or Queen Anne's side of the boundary herein above specified.
>
> "319. The dividing waters of Wye River, and the waters of St. Michael's River, lying west of the boundary line described in Section 317, and the

waters around Herring Island are opened to the citizens of Queen Anne's and Talbot Counties in common, for the purpose of taking or catching oysters with rakes or tongs.

"320. It shall be unlawful for any person to take or catch oysters with scoop, scrape, or any similar instrument, in the water's of Queen Anne's County, lying west of Kent Island, between Kent point and Cove point, within four hundred yards of the shore.

"321. Any person who shall violate this subtitle of this article, upon conviction thereof before a justice of the peace for Queen Anne's County, shall be fined not less than twenty nor more than one hundred dollars; and upon the refusal and failure to pay said fine, he shall be committed to the county jail until said fine shall be paid; provided, that the said confinement in jail shall not exceed six months."

As already stated, these sections were enacted in 1876, two years after the Act of 1874 which specified that the citizens of Queen Anne's and Talbot Counties might use the waters of the Wye River and the mouth thereof in common. Perhaps Chapter 381 of the Acts of 1876 was specifically intended to make the General Law of 1874 more definite. In any event, this Local Law had the effect of defining the General Law, which we believe was satisfactorily understood by the citizens of Queen Anne's and Talbot Counties until the repeal of the Local Law in 1945 and the revision of the General Law to read "the south branch of the Wye River and the mouth thereof."

You will note that prior to 1945 the Public General Law as modified by the Public Local Law, particularly Section 319 of Article 18, permitted the citizens of Queen Anne's and Talbot Counties to use the following waters in common:

(1) the dividing waters of the Wye River, i. e., the

waters south of a line between the south point of Wye Island to the southeast point of Bennett's Point,

(2) the waters of St. Michael's River lying west of a line between the southeast point of Bennett's Point and the south point of Parson's Island, and

(3) the waters around Herring Island.

We are of the opinion that the Legislature, in 1945, by the recodification of Article 72 of the Public General Laws and by repeal of the Public Local Laws did not intend to change in any way the waters which the citizens of the two Counties might use in common and that those waters which may be used in common are the same today as during the period from 1876 to 1945.

The title to Chapter 929 of the Acts of 1945, which Act recodified the oyster laws, states that the purpose "is to embody all the oyster and clam laws of the State of Maryland, both Public General and Public Local . . . in said new Article 72." Bearing in mind this purpose and the fact that Section 317 of Article 18 of the Code of Public Local Laws reserved to the citizens of Queen Anne's County and waters north of a line drawn between the south point of Wye Island to the southeast point of Bennett's Point, the reason for the change in the wording of the General Law from "the waters of the Wye River" to the "south branch of the Wye River" seems obvious. The Legislature in repealing the Public Local Law sought to amend the Public General Law to include the provisions of both. The Public Local Law reserved to the citizens of Queen Anne's County the waters north of a line between the south point of Wye Island and the southeast point of Bennett's Point: i. e., the water of the north branch of the Wye River, known as "Back Wye,', and in order to give recognition to this provision of the Local Law which was repealed, the General Law was amended to provide that the citizens of the two Counties might use in common the waters of the south branch of the Wye River. This change in the General Law and the title of Chapter 929 of the Acts of 1945 demonstrate an intention on the part

of the Legislature that the Public General Law should permit the same waters to be used in common as theretofore provided by Public General and Public Local Law. In other words, the Legislature, in 1945, sought to continue old rights and not to change rights or create new ones.

It must be admitted that since 1945 the Public General Law has been more ambiguous than prior thereto when the Public Local Law gave a definiteness of meaning to the General Law and to the words "waters of the Wye River and the mouth thereof." While the Public Local Law has been repealed, it was repealed only because the Legislature intended that the Public General Law, as amended in 1945, should have the same meaning and prescribe the use in common of the same waters as had been used in common from 1876 to 1945. We advise you, therefore, that your Commission should enforce the law in the same manner as prior to 1945 and should permit the same waters to be used in common as were used in common prior to the recodification of that year.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

CONSERVATION—OYSTERS—SHELL TAX—PACKER IS LIABLE FOR SHELL TAX ON ALL OYSTERS SHUCKED AT PLANT DURING SEASON OF LICENSE.

October 10, 1947.

Mr. John E. Clark, Chairman,
Department of Tidewater Fisheries.

You have asked our opinion as to who is liable to the State for the ten percent oyster shell tax under the following circumstances.

A, in October, 1946, took out a packer's license for the season of 1946 to 1947. On November 16, 1946, A trans-

ferred the plant to one B, who continued to operate it for the remainder of the season. B did not take out a packer's license but operated the plant on the assumption that he was entitled to do so under A's license.

Section 9 (a) of Article 72 of the Annotated Code of Maryland requires each oyster packer to take out a license, which license is to be in the nature of a contract between the State and the applicant "and it shall provide for the payment of a license fee of twenty-five dollars ($25.00) and shall further provide that the licensee shall turn over to the State of Maryland at least ten percent (10%) of the shells from the oysters shucked in his establishment for the current season * * * or at the discretion of the Commission, its equivalent in money". The license or contract which A obtained under this Section contained the following provision:

> "* * * party of the second part (A) to turn over to the State of Maryland at least 10 per centum of the shells from the oysters shucked, if any, in or at the establishment for which this license is issued for the current season; provided said shells are removed on or before the 20th day of August following expiration of this license; or at the discretion of the party of the first part its equivalent in money, the value thereof being determined at the market value of shells, as of the first day of May following the season for which this contract is executed."

We are of the opinion that the above quoted language of Section 9 (a) and of the license which A obtained renders him liable to the State for ten percent of the shells from the oysters shucked at the establishment for the entire season and not just for the period that A operated the plant, from October to November 16, 1946.

As for B, we are of the opinion that he is liable for a penalty under Section 16 (f) of Article 72 of the Annotated Code for operating the plant without a license. A

license is not transferrable unless the law expressly so provides, and there is no provision for the transfer of a packer's license. We do not, however, see how the State can require B to pay the shell tax since he never contracted to do so.

We, therefore, advise you that the State may require A to pay the shell tax for the full season but may not require B to do so. This opinion is not in any way intended to infer that, as between A and B, A does not have a right of recovery against B for the amount of the tax.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

CONSERVATION—CONSTRUCTION OF SECTION 5, ARTICLE 99 (CODE 1939 ED.)—GAME AND INLAND FISH COMMISSION MUST PUBLISH AND HOLD PUBLIC HEARING ON REGULATIONS ADOPTED UNDER ACT.

October 30, 1947.

Mr. Garner W. Denmead, Chairman,
Game and Inland Fish Commission.

In your recent letter you ask us for an interpretation of Section 5 of Article 99 of the Annotated Code of Maryland (1939 Ed.). That Section provides that certain power to make regulations is vested in the discretion of the Commission and provides a method for putting these regulations into force and effect, and further provides for the punishment for the violation of such regulations.

The particular question you ask is whether it is necessary, in the case of a regulation proposed by the Commission under the provisions of this Section, to advertise same and hold a public hearing thereon.

Section 5 provides:

> "Having a due regard for the distribution, abundance, economic value and breeding habits of wild birds, wild animals, and fish, in inland waters, the Commission is hereby vested with the necessary power and authority to determine when, to what extent, if at all, and by what means it is desirable to enlarge, extend, restrict or prohibit in any degree the provisions of law obtaining in any county in this State for the hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage or export of any wild bird, wild animal, or fish from inland waters, and *may*, upon its own initiative or upon written petition of fifty residents of any county, at least 25 of whom shall hold valid Hunter's License or Angler's License and at least 25 of whom shall be bona fide farmers who actually reside on a farm, propose regulations for such purpose. The full text *of any regulations proposed shall be published ten days before the same may be acted upon and shall name the time and place that the matters mentioned therein will be taken up, at which time any interested citizen shall be heard.* Such publications shall be made in a newspaper published in this State." (Emphasis supplied.)

It is noted that the statute states, in effect, that the Commission may, upon its own initiative, propose such regulations or that such regulations may be proposed upon written petition of fifty residents of any County, twenty-five of whom shall hold valid hunters' or anglers' licenses, etc. The verb "may", as underlined in the above quoted statute, implies that the regulations may be proposed by the Commission or by fifty residents and does not, we think, refer to the publication of the regulations provided for thereafter in the Section. It is further noted that the statute says "the full text of *any regu-*

lations proposed *shall be* published" etc., and to us it seems clear that it was the intent of the Legislature that all regulations proposed under this Section, whether proposed by the Commission or by said fifty residents, must be published ten days before same are acted upon and that a public hearing shall be held thereon as provided for in the Section above quoted.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

CONSERVATION—OYSTERS—CULLING OF UNMERCHANTABLE.

October 31, 1947.

Mr. John E. Clark, Chairman,
Department of Tidewater Fisheries.

This is in reply to your letter of October 30, 1947, in which you ask our opinion on certain matters pertaining to the oyster laws.

First you ask whether the cull law applies to the whole cargo or to only the sample taken for determining the percentage of small oysters in the cargo. It is our opinion that the cull law applies to the whole cargo and that the provision for taking samples is inserted in the law merely for the purpose of assisting your officers in determining the percentage of small oysters in the cargo as a whole. That such is the meaning of the law seems apparent from the language of Section 4 (b) of Article 72 of the Code. Said Section first makes it unlawful for any person to have oysters in his possession which contain more than 5% of shells or oysters less than 3 inches from hinge to mouth. The Section then provides "in ascertaining such percentage the officers or employees of the Department of Tidewater Fisheries are hereby authorized and directed to se-

lect such amount of oysters from any pile, hold, bin, house or place as they think proper."

The Court of Appeals in the case of *Dean v. State* (1903), 98 Md. 80, indicated that the cull law applies to the whole cargo. In that case the Court, after quoting the law, said (page 82):

> "It is apparent, therefore, that under the foregoing section the officer required to do the culling, is authorized, in order to ascertain the percentage of unmerchantable oysters in the cargo to select therefrom any number of bushels he may think proper. In other words so far from being required to cull the whole cargo the officer may cull any portion of it to determine the extent to which the law has been violated."

Of course, a case may arise where a cargo of oysters is made up of loads taken from some bars which contain considerably more than 5% of unmerchantable oysters and loads taken from other bars which contain so small a percentage of unmerchantable oysters as to reduce the percentage on the cargo to below 5%. Governor Ritchie, when Attorney General, ruled in an opinion reported in 2 Volume of the Attorney General, 108, that in such a case your Department may cull the oysters from those bars where the percentage of unmerchantable oysters is more than 5%, and that there is a violation of the law in spite of the fact that the whole cargo does not contain more than 5% of unmerchantable oysters. The application of the cull law to the whole cargo should be qualified to take care of such a situation.

Your second question is as to whether the officers of your Department may order oysters to be put overboard without an Order of Court. It is our opinion that it is not necessary for a Magistrate or other Court to order the confiscation of the oysters, and that the officers of your Department may confiscate unmerchantable oysters and order them put overboard at the time the culling takes place and

without awaiting the trial of the violator. Section 4 (a) of Article 72 provides that "all oysters taken from any of the waters of this State . . . shall be culled upon their natural bed or bar whence taken, and all shells shall be returned to the bed or bar from which they were taken, and all oysters whose shells measure less than 3 inches in length, measuring from hinge to mouth, whether attached to a marketable oyster or not, shall be included in said culling and replaced upon said bed or bar as taken." The Section goes on to provide "and the culling of oysters taken as aforesaid required by this Section shall be actually made and completed before such oysters are thereon or deposited in the hold or bottom of any boat.

Section 4 (b) provides that the officers of your Department, after ascertaining the percentage of small oysters, may "require the same to be culled and disposed of as provided in sub-section (a)." Thus, it is not necessary for the officers of your Department to await a court proceeding in order to require unmerchantable oysters to be returned to the natural bed or bar from which they were taken.

Section 16 (a) of Article 72 provides that, in addition to fine or imprisonment for possessing unmerchantable oysters, the oysters shall be confiscated and returned to the natural bars or beds at the expense of the violator. The Magistrate in finding a person guilty of a violation of the cull law may, therefore, under Section 16 (a) order the confiscation of the oysters but, as pointed out in the preceding paragraph, it is not necessary to await such an order of confiscation before disposing of the oysters. Where officers of your Department have previously disposed of the oysters, we deem it advisable to get an order of confiscation approving their actions.

We believe that your question as to what you should do with unmerchantable oysters in the event of an appeal from the decision of the Magistrate is answered by our advising you that you may confiscate such oysters at the time of the culling without awaiting the action of any

court. If you follow such procedure, you will never be faced with the question of what to do with the oysters in the event of an appeal.

Your third question is as to whether you may require the person in charge of a boat dredging in county waters, as permitted by Section 7 of Article 72, to display a certificate of size and tonnage. Section 7 (b) provides that it shall be unlawful to dredge in Dorchester or Talbot County with a boat exceeding seven gross tons reckoned by rules of Customs House Measurement, or to use a boat exceeding ten and one-half tons reckoned in the same manner to dredge oysters in Somerset County. We are of the opinion that, in the enforcement of this Section of the Law, your Department may require the master of any vessel dredging oysters in waters of these Counties to display a certificate showing that the vessel is within the size permitted by law.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

CONSERVATION — HUNTING LICENSE — ALL PERSONS MUST OBTAIN LICENSE TO HUNT WILD WATER FOWL WHETHER ON OWN LAND OR NOT.

November 21, 1947.

Mr. George B. Shields,
Chief Game Warden,
Game and Inland Fish Commission.

In your letter of November 12th, you ask if, in view of Section 17 of Article 99 of the Code (1943 Supp.), as amended, a person must obtain a license to hunt wild water fowl on marsh land owned by him. The answer to this question involves the interpretation of Sections 17 and 20 of

said Article 99, as amended. The history of these Sections reveals that they were both originally enacted by Chapter 568 of the Acts of 1927, both repealed and re-enacted by Chapter 708 of the Acts of 1943 and again both repealed and re-enacted by Chapter 123 of the Acts of 1947.

Section 17 of said Article 99 provides that the owner of farmlands, his children, spouses of children or tenants, or children or spouses of children of such tenants residing on said farmlands shall have the right to hunt game during the open season without first procuring a hunting license. Section 20 of said Article provides as follows:

> "All persons hunting wild water fowl on any of the land or waters of this State must first procure a hunter's license to so hunt, shoot, or kill * * *."

The question now raised is whether or not the owners of marsh land or their children or tenants can hunt wild water fowl thereon without first procuring a hunter's license in view of the provisions of Section 17 above mentioned. You further state that recently in Wicomico County a defendant was acquitted on a charge of hunting water fowl without a hunter's license on property belonging to his father-in-law.

It is a well known rule of statutory construction that a statute should be so construed as to give effect, if possible, to all of its provisions. See *Havre de Grace v. Bauer,* 152 Md. 521. Another rule of statutory construction is that the legislative intent must be determined from the Act itself if such intent is clearly expressed. In *Maxwell v. State,* 40 Md. 273, the Maryland Court of Appeals said:

> "* * * while a statute should be construed according to the intent of the Legislature which passed it; to ascertain this intent we are first to consider the words employed and interpret them according to their plain, ordinary and natural import having some regard to their order and

> grammatical arrangement. If they are clear, precise and unambiguous, the Legislature must be understood to mean what it has plainly expressed."

Section 17 provides that the owners of farmlands and certain other persons may hunt game thereon without first procuring a hunter's license, and in Section 20, which was enacted and amended at the same time, we find that the Legislature has explicitly stated *"all persons* hunting wild fowl *on any of the lands or waters of this State* must first procure a hunter's license to so hunt, shoot, or kill." To us, it is clear that the statutes in question are not ambiguous or in conflict, Section 17 providing that certain persons may hunt game on their own land without procuring a hunter's license and Section 20 providing that all persons who hunt wild fowl on any of the lands or waters of this State must procure a license.

To hold that persons are not required to procure a hunting license to hunt wild water fowl on their own lands would be to give no effect to Section 20 of Article 99, as amended, and it is not conceivable that the Legislature would have enacted this Section if it were to be nugatory; and since the legislative words are clear, precise and unambiguous when they say all persons hunting wild water fowl on any of the lands and waters of this State must procure a license, it must be understood to mean that the Legislature intended just that.

It is, therefore, our opinion that all persons, whether owners of the land or not, must comply with the provisions of Section 20 of Article 99, as amended, before hunting wild water fowl in this State.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

CONSTITUTIONAL LAW

CONSTITUTIONAL LAW—JURY—LAW MAKING WOMEN ELIGIBLE FOR JURY SERVICE IN CERTAIN COUNTIES BUT NOT IN OTHER COUNTIES.

February 18, 1947.

Hon. William Bolton, Chairman,
Senate Judiciary Committee.

You have asked our opinion as to the constitutionality of Senate Bill No. 99, which, as amended, proposes to make women eligible for jury service in Baltimore City and certain counties of the State, and to retain the ineligibility of women to serve as jurors in other counties of this State. For reasons stated herein, it is our opinion that the proposed Bill, if enacted, will not violate either the Federal or Maryland Constitution.

This Bill presents two constitutional questions: (1) whether, under the Maryland Constitution, women may be declared eligible for jury service, and (2) whether, under the Maryland and Federal Constitutions, women may be declared eligible for jury service in certain counties but not eligible in other counties.

(1) The Maryland Constitution does not prohibit the enactment of a statute declaring women eligible for jury service.

Article 5 of the Bill of Rights of the Maryland Constitution provides "That the inhabitants of Maryland are entitled to the Common Law of England and the trial by Jury, according to the course of that law". Article 15, Section 5, guarantees the right of trial by jury in criminal cases and Article 15, Section 6, guarantees that in civil cases the right of trial by jury "shall be inviolably preserved."

It can be argued that because by the common law of England at the time that the Maryland Constitution was adopted women were not eligible for jury service, the constitutional provisions that the inhabitants are entitled to the common law and trial by jury "shall be inviolably preserved" prohibit the enactment of a statute making such a fundamental change in the jury system as to make women eligible. It is our opinion, however, that this argument is without merit because the common law always recognizes the right of the Legislature to determine who should be eligible for jury service. In other words, the guarantee in the Constitution of trial by jury according to the course of the common law means trial by jury with eligibility for jury service determined by the Legislature as to common law.

The following passages from the opinion of the Supreme Court of Pennsylvania in the case of *Commonwealth v. Maxwell,* 1921, 271 Pa. 378, 114 A. 825, appear soundly reasoned and dispose of any argument that a constitutional provision such as Article 5 of the Bill of Rights prohibits legislation making women eligible for jury service. The Constitution of Pennsylvania provided: "Trial by jury shall be as heretofore and the right thereof remain inviolate". The Court pointed out that at common law eligibility for jury service was a matter for the legislature to determine (271 Pa. 381):

> "At the time the provision we are considering was placed in Pennsylvania's first Constitution, in 1776, justice had been administered in the Commonwealth according to English forms for about a century. Does the word 'heretofore' refer to jury trials as conducted in England or in Pennsylvania? We find the method of selecting juries and the qualification of jurors, at the time of the promulgation of this Constitution, September 28, 1776, was regulated in Pennsylvania and in England by legislation and not

> by common law, in the latter country by the Act of 3 George II, c. 25; 3 Blackstone 361."

The Court went on to point out that "the qualifications of jurors at common law changed and varied" and held, that in guaranteeing trial by jury as at common law, the Pennsylvania Constitution recognized the inherent right of the legislature to alter the qualifications of jurors.

To the same effect are an *Opinion of the Justices of the Supreme Judicial Court of Massachusetts,* 1921, 237 Mass 591, 130 N. E. 685, and a decision of the Supreme Court of Illinois in *People, ex rel. Denny v. Traeger,* 1939 372 Ill. 11, 22 N. E. (2d) 679. The Illinois case involved a constitutional provision that "the right of trial by jury as heretofore enjoyed shall remain inviolate". The Court, in sustaining the right of the legislature to make women eligible for jury service, said (372 Ill. 14):

> "It is settled that no one set of qualifications of jurors was engrafted upon the law by any of the constitutional guarantees. Juror qualifications are a matter of legislative control and may differ from those qualifications known to the common law."

Numerous additional authorities from States other than Maryland could be cited to the same effect.

That the Maryland law is the same as that expounded in the cases cited is clearly indicated by the case of *State v. Glenn,* 54 Md. 572, wherein the Court, after referring to Article 5, Article 21 and Article 23 of the Declaration of Rights and their meaning and effect said:

> "The design, manifestly, of the provisions of the Declaration of Rights to which we have referred, was simply to declare and make firm the pre-existing rights of the people, as those rights had been established by usage and the settled course of the law."

As has been made plain, usage and the settled course of the law included the fact that eligibility for jury service was a matter for statutory determination by the legislature. See also *Danner v. State,* 89 Md. 220.

(2) The Maryland and Federal Constitutions do not prohibit making women eligible for jury service in certain counties but retaining their ineligibility in other counties.

We understand that some members of the legislature are concerned over the validity of proposed Senate Bill No. 99, as amended, because women are made eligible to serve on juries in certain counties but their ineligibility in other counties is retained.

We believe that the decision of the Court of Appeals which has concerned these members of the legislature as to the constitutionality of the Bill is *Bangs v. Fey,* 1930, 159 Md. 548, which held unconstitutional an Act repealing the Declaration of Intention Law because it exempted two counties. We would like to point out that the decision in the *Bangs* case was predicated on Section 5 of Article 1 of the State Constitution, which requires the General Assembly to "provide by law for a uniform registration of the names of all the voters". That decision is the exception and not the general rule since it is well established that, in the absence of some such constitutional provision requiring uniformity, the legislature may either enact local laws affecting certain counties or exempt particular counties or localities from the operation of general laws.

For example, in the case of *Lankford v. The County Commissioners of Somerset County,* 1890, 73 Md. 105, the Court of Appeals held constitutional an Act of 1890 establishing the use of the Australian ballot in elections but exempting nine counties. Judge Alvey said (73 Md. 117):

> "To the Legislature is confided the power to pass laws to regulate the subject-matter of holding and conducting elections; and while it may be a subject of regret that the provisions of the statute under consideration were not given appli-

> cation to the entire State, the exception of the nine counties from their operation does not subject the Act to any such constitutional objection as will invalidate it. No voter is hindered or prejudiced in his right to vote, by the mere difference in the method of conducting the election under the new law from that under the pre-existing law. The object of both laws is the same, the difference consisting only in the form and method of proceeding."

In the case of *Stevens v. State,* 1899, 89 Md. 669, the Court of Appeals said (89 Md. 674):

> "It cannot be successfully contended that the law now under consideration is unconstitutional, because it operates unequally upon the inhabitants of the several parts of the State, and that it discriminates against the residents of Baltimore City, by reason of the fact that a number of counties are excepted from its operations. It has long been the policy of the State of Maryland to enact local laws affecting only certain counties, or to exempt particular counties or localities from the operation of general laws or of some of the provisions thereof."

To the same effect are *Sweeten v. State,* 1914, 122 Md. 634; *State v. Shapiro,* 1917, 131 Md. 168; *Grossfield v. Baughman,* 1925, 148 Md. 330.

There is no provision in the Maryland Constitution requiring uniformity in the selection of jurors. In fact, there is a substantial lack of uniformity in the selection of jurors among the counties of the State as is evidenced by Article 51 of the Code, Sections 6 to 10, and the local laws therein referred to.

The only provision in the Federal Constitution that the proposed Senate Bill No. 99 might be said to violate is the equal protection clause of the Fourteenth Amendment,

which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws". The Supreme Court of the United States in the case of *Gardner v. Michigan*, 1905, 199 U. S. 325, 50 L. Ed. 212, held that the equal protection clause does not prevent a State from providing one method of selecting juries in certain political sub-divisions of the State and providing another method in other political sub-divisions. The following quotation from the opinion in that case demonstrates that there will not be a denial of equal protection if women are allowed to serve on juries in certain counties but not in other counties (199 U. S. 333-334) :

> "The defendant further contends, as he contended in the supreme court of the state, that the act of the Michigan legislature, creating the board of jury commissioners for Wayne county, in which the present trial occurred, denies to accused persons and other litigants in that county the equal protection of the laws. The ground of this contention is, that by the general laws of the state, the officers authorized to make and return the jury list were elected by the people in their several townships and in city wards (Const. art. 11, Sec. 1, *People ex rel. Atty. Gen. v. Detroit*, 20 Mich. 108), and required that jurors should be of those who are assessed on the assessment roll; while, by the Wayne county jury law of 1893, as amended in 1895 (Pub. Acts 1893, p. 337; id. 1895, p. 69), the jury lists are made up and returned by a board of seven jury commissioners, appointed by the governor, with the consent of the senate, and the names of persons to be returned need not appear on the assessment rolls. This difference between the general law relating to jury trials and the special law relating to Wayne county, it is said, constitute a discrimination against the people of that county, and amounts to a denial to them of the equal pro-

tection of the law. This view does not commend itself to our judgment. It is fully met and shown not to be sound by the judgment in *Missouri v. Lewis* (*Bowman v. Lewis*) 101 U. S. 22, 31, 25 L. ed. 989, 992, where Mr. Justice Bradley, speaking for the court, referring to the 14th Amendment, said: 'The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory, and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by everything in the Constitution of the United States, including the amendments thereto. We might go still further and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the

> 14th Amendment be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

Another example of the length to which a State may go in varying the law in different portions of its territory is given in the case of *Mallett v. North Carolina,* 45 L.ed. 1015, 181 U. S. 589. There the statute of North Carolina gave the State the right of appeal to the Supreme Court from the Superior Court of the Eastern District, and not from the same Court of the Western District. The convicted defendants claimed that this denied them the equal protection of the law, but their contention was flatly overruled by the Supreme Court. The Court adopted the language of *Missouri v. Lewis,* above referred to, as follows:

> " 'The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of the line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same state. A uniformity which is not essential as regards different states cannot be essential as regards different parts

of a state, provided that in each and all there is no infraction of the constitutional provision.' "

While the equal protection clause of the 14th Amendment is not applicable to the federal government, it is interesting to note that eligibility of women to serve on juries in the federal courts varies from state to state. By Sections 411 and 412 of Title 28 of the United States Code, eligibility of women to serve on juries in the federal courts depends upon the law of the state in which the federal court is located. See *Glesser v. United States,* 1942, 315 U. S. 60, 86 L. Ed. 680. To have women jurors in some counties but not in others would resemble the practice from state to state in the federal courts.

For the foregoing reasons, we are of the opinion that Senate Bill No. 99, as amended, would be constitutional if enacted.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

CONSTITUTIONAL LAW—LABOR PICKETS—HOUSE BILL NO. 101 (1947 SESSION) PROHIBITING THE PICKETING OF A RESIDENCE IS VALID.

February 24, 1947.

Hon. Bernard S. Melnicove,
Chairman, Judiciary Committee,
House of Delegates.

You have asked whether House Bill No. 101 would be a constitutional enactment. The Bill provides that:

"It shall be unlawful for any person or persons to picket the home or place of residence of any

> officer or employee of any person, association or corporation in connection with any labor dispute or controversy, or to molest, in any manner, any such officer, employee or any member of their families. Nothing in this section shall be construed to impair or restrict the right of employees and their representatives to picket the plants or places of their employment for the purpose of collective bargaining."

The word "picket" in the context in which it is found obviously has the meaning commonly ascribed to the word in connection with a labor dispute. It has been defined by Teller in the work "Labor Disputes and Collective Bargaining" (1940), in Section 109 as follows:

> "Picketing is the marching to and fro before the premises of an establishment involved in a dispute generally accompanied by the carrying and display of a sign, placquard or banner bearing statements in connection with the dispute."

In the development of labor law, peaceful picketing, which was once tortious at common law, has grown to be recognized as one of the concommitants of the free speech guaranteed by the Constitution. The right of free speech, however, is relative and not absolute, and thus is subject to reasonable appropriate regulations by the State in proper cases. As Mr. Justice Holmes once put it:

> "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic . . . it is a question of proximity and degree."

That picketing the home of the employer or an employee is on the prohibitable side of the free speech line as now drawn by the law, has generally been recognized, even without statute. England prohibited such picketing by statute

in 1927, and Wisconsin did the same in 1939. Teller, in the work referred to, points out in paragraph 115 that the question has arisen in two classes of cases, the first where the residence of the employer is picketed, and second where the residence of an employee is picketed, and then says:

> "Picketing in the second class of cases though generally held illegal, has sometimes been held lawful, whereas in the first class of cases picketing has uniformly been held illegal."

The question of geographical restriction of picketing has reached the Supreme Court and been answered in the case of *Carpenters and Joiners Union v. Ritter's Cafe,* 86 L. Ed. 1143, 315 U. S. 722. In this case the owner of Ritter's Cafe was having constructed a building a mile and a half from the Cafe. The contractor became engaged in a labor dispute and a union involved began to picket the Cafe. The pickets were arrested and charged with violation of a Texas statute forbidding such practice. The court pointed out the constitutional right to communicate peaceably to the people the facts of a legitimate dispute is not lost merely because a labor dispute is involved, and also that the circumstance that a labor dispute is the occasion for exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable. The court said that whenever State action is challenged as a denial of liberty, the question always is whether the State has violated "the essential attributes of that liberty," and pointed out that while the right of free speech is embodied in the liberty guarded by the Due Process Clause, it is implicit in the Clause that the States have the authority to translate into local law policies "to promote the health, safety, morals and general welfare of its people." The court then said:

> "Texas has undertaken to localize industrial conflict by prohibiting the exertion of concerted pressure directed at the business, wholly outside the

economic context of the real dispute, of a person whose relation to the dispute arises from his business dealings with one of the disputants. The state has not attempted to outlaw whatever psychological pressure may be involved in the mere communication by an individual of the facts relating to his differences with another. . . .

"It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing."

In our view, House Bill No. 101 is within the limits which the Constitution, as the Supreme Court interprets it, grants the States in the regulation of free speech. It does no more than confine the sphere of one kind of communication in a labor dispute to an area directly related to that dispute, and it leaves open to the disputants within that sphere other modes of communication. In our opinion, the Bill, if passed would be a constitutional exercise of legislative power.

HALL HAMMOND, *Attorney General.*

CONSTITUTIONAL LAW—JUSTICES OF THE PEACE—STATUTORY PROVISIONS RELATING TO THE QUALIFICATIONS OF THE MAGISTRATE FOR JUVENILE CAUSES FOR MONTGOMERY COUNTY ARE DIRECTORY AND NOT MANDATORY.

March 24, 1947.

Hon. William Preston Lane, Jr.,
Governor of Maryland.

You have asked me whether the provisions of Chapter 1044 of the Acts of 1945 relating to the appointment of a Magistrate for Juvenile Causes is directory or mandatory in certain of its aspects.

Section 547B of Article 16 of the Code of Public Local Laws, as enacted by Chapter 1044, provides that "in addition to the Justices of the Peace already authorized by law, there shall be appointed by the Governor, by and with the advice and consent of the Senate, and if the Senate shall not be in session, by the Governor, from Montgomery County in the State of Maryland, an additional Justice of the Peace for Montgomery County to be known as the Magistrate of Juvenile Causes for Montgomery County, who shall be at least thirty years of age, a member of the bar * * * and who shall be selected from a list approved by the Board of County Commissioners of Montgomery County, Maryland, * * *."

In our opinion, the provisions as to the qualifications as to this additional Justice of the Peace must be regarded as directory and not mandatory. See *22 Opinions of the Attorney General 227*, discussing the case of *Humphrey v. Walls*, 169 Md. 292. The Opinion points out that it is the holding of the Court of Appeals that the eligibility, fitness and qualifications of Justices are, by the Constitution, left to the Governor, subject to confirmation by the Senate while the duties, jurisdiction and compensation may be fixed by the Legislature. See also *26 Opinions of the Attorney General 239*, wherein then Attorney General Walsh, in dealing with

the residence requirement as to Juvenile Magistrate in Baltimore City, said:

> "* * * I am unable to hold that the Legislature has the power to absolutely require that a Justice of the Peace for Baltimore City must be a resident of the City. Such a provision might, however, as pointed out in the *Humphreys* case and in 22 Opinions of the Attorney General, 227, be sustained as directory only, and I am accordingly of the opinion that you should consider the Charter provision as directing that the Juvenile Magistrate of Baltimore City be a resident of the City, but I am not able to definitely hold that the requirement is mandatory."

HALL HAMMOND, *Attorney General.*

CONSTITUTIONAL LAW — REFERENDUM — ACT IMPOSING A SALES TAX IS NOT REFERABLE.

May 26, 1947.

Hon. William Preston Lane, Jr.,
Governor of Maryland.

In view of statements in the press that petitions are being circulated for signature with the aim of bringing about a referendum as to Chapter 281 of the Acts of 1947, which is the Sales Tax Act, you ask us whether, assuming that the petitions are sufficient as to form and number of signatures, they would effect such a referendum.

Upon consideration of the results which could follow if a revenue bill could be submitted to the vote of the people, the almost inescapable conclusion is that the Constitution

was not intended to, nor does it, permit a referendum on such a bill. The budget expenditures for the maintenance of essential activities of State government must be projected for two fiscal years. The revenues relied on in this budget to pay for these services must be raised not by the budget, but largely by a separate revenue bill or bills. Thus upon the effectiveness of a revenue bill depends whether the State to a substantial extent does or does not function. If such effectiveness can be made to rest upon the vote of the people, which, if negative, offers no substitute source of revenue, a condition of governmental chaos would result, and all basis for orderly and sane planning made a quicksand. Particularly must this be so where often no vote could be taken until long after the fiscal year involved had begun, as in the present case where a referendum could not be held on the Sales Tax Act until the Fall of 1948, when the next State-wide election for Congress occurs.

These obvious consequences have heretofore been determined by this office and the Court of Appeals to have been in the minds of the framers of Article 16 of the Constitution and by them to have been obviated.

In 12 Opinions of the Attorney General 228, Attorney General Robinson, in a long and well-reasoned review, came to the conclusion that Chapter 118 of the Acts of 1927, which provided for the imposition and disposition of the proceeds of an additional gasoline tax could not be placed on the ballot for approval or disapproval. Mr. Robinson cited the provisions of Article 16 of the Constitution reading that:

> " * * * no law making any appropriation for maintaining the State government, or for maintaining or aiding any public institution, not exceeding the next previous appropriation for the same purpose, shall be subject to rejection or repeal under this Section. The increase in any such appropriation for maintaining or aiding any public institution shall only take effect as in the case of other laws, and such increase or any part thereof

> specified in the petition, may be referred to a vote of the people upon petition."

and came to these conclusions: (1) that Chapter 118 was a law making an appropriation for maintaining the State government; (2) that the provision with reference to appropriations in excess of the "next previous appropriation for the same purpose" does not apply to "appropriations for maintaining the State Government." He pointed out that all disbursements of State revenues are controlled by the use of either budget bills or supplemental appropriation bills. If provision for disbursement is not made by either of these methods, appropriated money cannot be withdrawn from the State Treasury. *Baltimore v. O'Conor,* 147 Md. 639. In the case of a supplemental appropriation bill, the constitutional provision is that the funds appropriated must be provided by the bill. A budget bill is merely a warrant for the disbursement of appropriated monies. It cannot stand alone. Revenues must be provided for disbursement by the budget bill by other bills, because the budget is predicated upon the estimated revenues of the State from all sources during the period it covers. On the other hand, all revenue-producing bills are equally ineffective unless the monies which they produce are disbursed by the budget bill. The budget and revenue-producing measures being thus mutually independent, the sensible and almost inescapable result is that both together must be regarded as appropriation bills, as that term is used in Article 16 of the Constitution.

That the result which Mr. Robinson reached was sound is shown by the case of *Winebrenner v. Salmon,* 155 Md. 563, wherein the Court of Appeals passed on the referability of Chapter 118 of the Acts of 1927, the Act which Mr. Robinson dealt with. The objectors to the Act argued to the Court (1) that it was not an appropriation act, (2) that if it were an appropriation act, the appropriation was not for maintaining the State government, and (3) if it constituted an appropriation for maintaining or aiding a public institution, it was referable because the tax which it laid

was an additional tax and, therefore, a tax exceeding the next previous tax appropriation for the same purpose. The Court of Appeals decided that the Act laying the additional gasoline tax and the budget act were in pari materia, and must be construed together as though they constituted one act, and that the appropriation was for maintaining the State government since the establishment, construction and maintenance of public roads is a primary function of government. In disposing of the third contention, the Court decided in effect, although it discussed other phases of the matter, that the language in the Referendum Article of the Constitution "not exceeding the next previous appropriation for the same purpose" refers to laws for maintaining or aiding any public institution, but not to laws making any appropriation for maintaining the State government.

Mr. Robinson's views on this point were likewise found sound in *Bickel v. Nice,* 173 Md. 10, wherein the Court of Appeals decided that an act providing for the issuance of a million dollar bond issue for the erection of a State office building at Annapolis was an appropriation for maintaining the State government, which exempted the Act from the provisions of the Referendum Article. The Court said that:

> "It is clear, besides, that the mere fact of an increase in an appropriation for maintaining one of the functions of government over ordinary amounts would not omit it from the excepting clause, leaving it subject to the referendum because that clause makes referable only those increases in appropriations which are for public institutions. Selection of these is tantamount to exclusion of a referendum on increases for maintaining the government. * * *
>
> While these pronouncements do not altogether solve the present problem, they do settle for us some principles leading toward the solution. Housing for state officers and employees would seem to

be as much a primary function of government as building lateral roads, and equally entitled to be classed as maintaining the government. There might be different degrees of need for the housing, or no need at all, as there might be with lateral roads. Emergencies reducing needed office space, or extension of governmental work increasing the need, might, as argued, render a building indispensable to the maintenance of government; and, on the other hand, a proposed building might be necessary. It is undoubtedly true that the actuating purpose of the excepting clause was to prevent interruptions of government. But the court is of opinion that the test intended by the excepting clause is not the need of the appropriation or the project to carry out that purpose, but the design. If the particular appropriation is one designed for maintaining the government and the project stated is of a kind that may be within that classification of maintaining the government, it is excepted."

Tested by the standards which have been held applicable by this office and the Court of Appeals, Chapter 281 of the Acts of 1947 is clearly not subject to referendum.

You will recall that in your message to the General Assembly of February 19, last, wherein you discussed additional revenue requirements, you pointed out that the immediate problem was to provide additional revenue in the amount of approximately $18,000,000 yearly for the next two years and approximately $25,000,000 for succeeding years. This message was given, of course, after the budget bill had been introduced and the discussion was concerned with appropriations to be made by the supplemental budget. You told the General Assembly that the Board of Revenue Estimates, after studying additional methods of raising the necessary revenues, had recommended a two percent retail sales tax and an increase in the rates applicable to the earned income of resident individuals. You urged the accept-

ance of the recommendations of the Board of Revenue Estimates and said in connection with the sales tax:

> "I realize that objections will be raised to this method of taxation, particularly by persons or groups with special interests to protect. In considering the problem, however, I urge you to study the need of additional State revenues from the overall point of view. It will be your task to balance the additional revenues which the State must have to finance an adequate road program, an adequate school program and to put into effect the recommendations of the Maryland Commission on the Distribution of Tax Revenues, against all arguments which will be made against the sales tax. After careful and deliberate study the Board of Revenue Estimates and the Advisory Committee, have concluded that the only adequate source of revenue which is available to meet these requirements is the sales tax. I concur in these conclusions.
>
> "Legislation which will carry this recommendation into effect will be introduced in the near future."

The legislation which was introduced emerged from the General Assembly as Chapter 281. The supplemental budget, which, together with the budget as originally introduced, became Chapter 514 of the Acts of 1947, provides at its beginning:

> "The following supplemental budget appropriations are made contingent upon the passage of legislation providing additional general funds revenue applicable to these appropriations."

The first of such contingent appropriations for general funds is approximately $10,000,000 for 1948 and $11,600,000 for 1949 for the public school system, including funds

for basic aid, for the equalization fund and the incentive fund for building. The University of Maryland and the State Board of Agriculture are given similar appropriations of approximately $1,000,000 for 1948 and $1,500,000 for 1949. The Comptroller of the Treasury is awarded $350,000 a year "for expenses of the administration of the retail sales tax act as provided for by pending legislation." To the counties and municipalities of the State are appropriated the shares due them of the State tax on admissions estimated at $225,000 a year, and there is a similar appropriation of income taxes of approximately $650,000 a year. These few illustrations suffice to show how sound is the constitutional interpretation theory that revenue bills and the budget bills constitute in substance one single legislative act, so that a revenue producing bill for maintaining the State government is clearly not one subject to referendum. They, also, point up the manifest fact that the sales tax proceeds are dedicated to maintenance of the State government.

If any doubt remained, it was dissipated by the case of *Dorsey v. Petrott,* 178 Md. 230, which involved the referability of Chapter 353 of the Acts of 1939, dealing with the conservation of fisheries of Tidewater Maryland. The Court held that fisheries constituted one of the most important, valuable natural resources of the State and that their protection, preservation, development and maintenance is an imperative duty of the government, and said:

> "So, if the Act under consideration is a law making an appropriation for the maintenance of tidewater fisheries, the Act would not be referable to the electorate. The inquiry is narrowed therefore, to whether the Act is a 'law making an appropriation' within the meaning of the Referendum Amendment, when construed in connection with other related provisions of the Constitution."

The conclusion was that the Act was a general and not an appropriation act. This seemed so clear that the detailed

analysis of the opinion in spelling out the non-referability of an appropriation act takes on particular significance.

The Court held that the determinative characteristics of an appropriation for maintaining the State government, at the time of the adoption of the Referendum Amendment in 1915, were not fundamentally affected by the budget amendment in 1916, which introduced an altered fiscal procedure. The budget amendment, said the Court, was not designed to interfere with operation of the Referendum Amendment. Its purpose was merely to require that all appropriations by the General Assembly should be by either the budget bill or a supplemental appropriation bill. The Court further held that the budget bill itself does not provide the means for the raising of the revenue requisite for the payment of the appropriations made. Thus, said the Court:

> "* * * it is clear, not only from public necessity, but also from the Budget Amendment, that the budget bill is to be implemented by the passage of such money bills or revenue measures as shall produce and supply the moneys necessary for the Treasury to meet the appropriations made by the budget bill. The enactment of such legislation gains the quality of definiteness, in the sum appropriated and the object to which it is applied, by the budget bill, of which the legislation supplying the money is an associated and necessarily component part of one fiscal system. (citations omitted).
>
> The essential unity of the revenue measure to provide the funds appropriated by the budget bill gains certainty from its public necessity. The text of the Amendment argues to the same effect. On the one hand the Budget Amendment makes it mandatory upon the executive to submit a budget which shall contain a complete plan of proposed expenditures and estimated revenues for the particular fiscal year to which it relates. Among other duties, he shall make any suggestion he conceives

expedient as to methods for the reduction or increase of the State's revenues. On the other hand, the Amendment empowers the Legislature to enact such laws as shall not be inconsistent with the Budget Amendment as may be necessary and proper to carry out its provisions. These two, as well as other provisions for which mandatory legislation is prescribed, as, for example, in the case of the payment of the principal and interest of the public debt, and the exaction of a particular tax to meet the appropriation made by a supplementary appropriation bill, irrefutably indicate that the Budget Amendment contemplates as an integral part the passage of revenue measures to raise the funds the appropriations require. It follows that revenue measures to raise the public funds to pay the appropriations of the Budget Bill are excepted from the operation of the Referendum Amendment, although the revenue thus procured is disbursed by the Treasury through the provisions of the budget without any express authorization in the money bill for its disbursement."

It is my firm conviction, free from doubt, that the Sales Tax Act is an appropriation measure for the maintenance of the State Government within the meaning of Article 16 of the Constitution of Maryland. This being so, it is a law which may not be submitted to the voters for approval or rejection and petitions which seek to place it on the ballot are a nullity, even though unimpeachable as to form, bearing the requisite number of proper signatures and duly filed within the time prescribed.

HALL HAMMOND, *Attorney General.*

CONSTITUTIONAL LAW—GENERAL ASSEMBLY—MEMBER OF LEGISLATURE NOT DISQUALIFIED BY REASON OF PASSAGE OF CHAPTER 165 OF THE ACTS OF 1947, FOR APPOINTMENT TO UPPER POTOMAC RIVER COMMISSION.

August 26, 1947.

Hon. R. E. McIntire, Chairman,
House Delegation, Garrett County.

I take it that the question in your mind as to whether a Member of the House or Senate can constitutionally accept an appointment on the Upper Potomac River Commission arises by virtue of the provisions of Section 17 of Article III of the Constitution of Maryland. This Section says that, "No Senator or Delegate * * * shall during the whole period of time for which he was elected be eligible to any office which shall have been created, or the salary or profits of which shall have been increased, during such term."

The only change made by Chapter 165 of the Acts of 1947 in Section 2 of Chapter 409 of the Acts of 1935 creating the Upper Potomac River Commission, was to eliminate the words "said District" and insert in lieu thereof, the words "Allegany and Garrett Counties." Clearly the Commission and the office it represents was created by the Acts of 1935 and not by those of 1947, so that the constitutional prohibition would not apply to those now Delegates or Senator from Garrett or Allegany Counties.

No question arises as to whether the acceptance of the office of Commissioner would violate the prohibition in the Constitution against the holding of more than one office of profit because Chapter 165 specifically provides that the members shall serve without compensation, and it has been held heretofore, not unreasonably, that one does not hold an office of profit if there is no salary attached to the office he holds.

HALL HAMMOND, *Attorney General.*

COUNTY COMMISSIONERS

COUNTY COMMISSIONERS — RENT CONTROL — THE PROVISIONS OF CHAPTER 507 OF THE ACTS OF 1947 MAY NOT BE INVOKED SO LONG AS ANY FEDERAL REGULATIONS EXIST CONCERNING RENT CONTROL.

September 2, 1947.

Mr. George M. Berry,

As counsel to the Board of County Commissioners of Baltimore County, you have requested by letter of August 25th that I render an opinion as to the powers of the County Commissioners to regulate rents and evictions under the authority of Chapter 507 of the Acts of 1947. You forwarded with your letter copy of the opinion you gave the Commissioners on July 1, 1947. I have given full consideration to your opinion and to the provisions of Chapter 507, and I concur entirely with the conclusions you reach in your opinion.

I was somewhat concerned with whether the Legislature intended by Chapter 507 that the various Counties could supplement deficiencies in Federal regulations or whether the authority granted was to be exercised only in the absence of any Federal legislation. I concluded, as did you, that the power given was made to depend upon the complete absence of Federal control. If the Legislature meant otherwise, the language employed was unfortunate.

I gave even more serious consideration to whether or not Section 2(c) of the Act could be isolated, so to speak, and considered as conferring independent authority as to evictions only even though there were Federal control as to other aspects of rent regulation. It seems to me, however, that such subdividing of the Act is unwarranted and, indeed that the provisions of Section 4, reading: "but no ordi-

nance or resolution passed or adopted *under the authority of this Article* shall become effective so long as *any* federal law or regulation is effective and in force relating to the rents of housing accommodations in that particular jurisdiction," make such a construction impossible.

It is my view, therefore, that the County Commissioners of Baltimore County have no authority by virtue of the terms of Chapter 507 to change the law as to the period of eviction existing as to Baltimore County by legislative fiat. I may say that the Deputy Attorney General and two Assistants, each considering the problem separately, reached individually the same conclusion as did you and I.

HALL HAMMOND, *Attorney General.*

CRIMINAL LAW

CRIMINAL LAW—BAIL—CORPORATE SURETY MAY BECOME SECURITY ON BAIL BOND.

May 7, 1947.

Mr. Marvin I. Anderson,
State's Attorney for Anne Arundel County.

You have asked us, in view of the provisions of Article 26, Section 42 of the Code and of our opinion contained in 26 Opinions of the Attorney General 123, if a surety company may execute a bond for the appearance of a person charged with a crime.

Article 26, Section 42 of the Code provides, among other things, that the Clerk of the Court shall accept no security without the oath or affirmation of the person offering himself as security that he or she is worth the amount of the bail in real or personal estate, exclusive of his or her right to exemption. The opinion above referred to cited the Code provision, but dealt with the propriety of accepting a husband as security when the wife did not join in the undertaking.

Section 260 of Article 66½ of the Code recognizes the eligibility of a corporate surety in cases involving infractions of the motor vehicle laws, for that Section provides that the accused ". . . shall be released from custody on giving bond or undertaking executed by a fidelity or surety company authorized to give such bonds in this State . . ."

It seems to us that the answer to your question must be determined from an examination of the applicable provisions of the statutes relating to the powers of corporate sureties. Section 137 of Article 48A of the Code provides:

> "Whenever any bond, undertaking, recognizance or other obligation is by law, or the charter, ordi-

nances, rules or regulations of any municipality, board, body, organization, court, judge or public officer, required or permitted to be made, given, tendered or filed with surety or sureties, and whenever the performance of any act, duty or obligation, or the refraining, from any act, is required or permitted to be guaranteed, such bond, undertaking, obligation, recognizance or guaranty may be executed by a surety company qualified as hereinafter provided; and such execution by such company of such bond, undertaking, obligation, recognizance or guaranty shall be in all respects a full and complete compliance with every requirement of every law, charter, ordinance, rule or regulation that such bond, undertaking, obligation, recognizance or guaranty shall be executed by one surety or by one or more sureties, or that such sureties shall be residents or householders or freeholders, or either or both, or possess any other qualifications; and all courts, judges, heads of departments, boards, bodies, municipalities and public officers of every character, shall accept and treat such bond, undertaking, obligation, recognizance or guaranty when so executed by such company as conforming to and fully and completely complying with every such requirement of every such law, charter, ordinance, rule or regulation."

This provision, we think, must be read in connection with Section 42 of Article 26 of the Code, and when so interpreted and applied, it is our view that a surety company, qualified to do business in this State under the provisions of Article 48A of the Code, may become bail for a person charged with a criminal offense.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

CRIMINAL LAW — NON-SUPPORT — JURISDICTION OF COURT WHEN ACCUSED VIOLATES PROBATION.

JUNE 18, 1947

Mr. Thomas E. Stakem,
Juvenile Court for Allegany County.

This is in reply to your letter of June 11, 1947, asking our opinion as to how you should proceed against an offender who has violated parole granted in a non-support case. We believe that your inquiry pertains to Section 89 of Article 27 of the Annotated Code of Maryland, as amended by Chapters 556 and 719 of the Acts of 1945, which Section authorizes a Court to suspend sentence in a non-support case and to release the defendant from custody on probation for the space of three years upon his entering into a recognizance in such sum as the Court shall direct, with or without sureties. This Section goes on to read:

> "If the Court be satisfied by information and due proof under oath, at any time during the three years, that the defendant has violated the terms of such order, it may forthwith proceed with the trial of the defendant under the original indictment, or sentence him under the original conviction, as the case may be. In the case of forfeiture of a recognizance and enforcement thereof by execution, the sum recovered, may in the discretion of the Court, be paid in whole or in part to the wife."

We understand that you have in mind a situation where a man has been convicted and sentenced to one year in the House of Correction and then had sentence suspended and been placed on probation upon filing a bond The man then failed to comply with the terms of the Order suspending his sentence and placing him on probation. You ask (1) whether the surety on the bond should be held responsible for the payments which the defendant was ordered to

make, and (2) whether the defendant should be allowed to stay at liberty until expiration of the bond or until no further payment can be enforced from the bond.

We believe that both of these matters are within the discretion of the Court. The Court may commit the defendant upon violation of probation or may continue to permit the defendant to remain at large, depending upon how the Court feels the case may best be handled. The liability of the surety on the bond to make the payments which the defendant should have made will depend upon the wording of the bond; however, it is pointed out that the statute provides the condition of the bond shall be such "that if the defendant shall make his personal appearance at the Court whenever ordered so to do within the three years, and shall further comply with the terms of the order, or of any subsequent modification thereof, then the recognizance shall be void, otherwise of full force and effect." We believe that it is the intent of the statute that the bond be so worded as to require the surety to make any payments which the defendant should have made. We do not believe that the defendant's violation of his probation should in any way be permitted to release the surety from its obligation. We also believe that the surety should be held liable to make all payments due or to become due the dependents during the period of the bond, unless the bond in a particular case be so worded as not to permit such an enforcement.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

CRIMINAL LAW — DISTURBANCE OF THE PEACE — PERSON ACTING IN DISORDERLY MANNER IN A TAVERN MAY BE CHARGED WITH THE OFFENSE OF DISTURBING THE PEACE.

December 4, 1947.

Mr. Edwin F. Nikirk,
State's Attorney for Frederick County.

We have your letter in which you asked if under the provisions of Sections 128 to 131, inclusive, of Article 27 of the Code, sheriffs and other law enforcement officers have the right to make arrests for disturbances in places of business holding Class B Alcoholic Beverage Licenses, where such establishments are located outside the corporate limits of Frederick City and off the public highways and the disturbances do not affect any particular neighborhood.

We think that Section 131 of Article 27, as amended by Chapter 499 of the Acts of 1945, furnishes the necessary authority for such arrests. It provides in part that:

> "Every person who shall be found drunk, or acting in a disorderly manner, to the disturbance of the public peace, upon any public street or highway, in any city, town or county, in this State, or at any place of public worship or *public resort* or amusement in any city, town, or county of this State, shall be deemed guilty of a misdemeanor..." (Italics supplied.)

The term "public resort" is defined in 50 C.J. 861 as ". . . a place resorted to by the public; a place frequented with the same freedom that men resort to a victualing house, tavern or grocery." This definition includes such establishments as those in question.

We think Section 131 is violated when the disorderly conduct is such that it disturbs that portion of the public patronizing the resort.

In our opinion, a peace officer has the power to make arrests in cases of the character mentioned. For a discussion of the authorities relating to the right of an officer to make an arrest without a warrant, see 28 Opinions of the Attorney General, 173.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

DENTAL EXAMINERS

DENTAL EXAMINERS—ALL LICENSEES REQUIRED TO REGISTER ANNUALLY, EVEN IF PRACTICING IN ANOTHER STATE.

October 27, 1947.

Dr. Kyrle W. Preis, Secretary,
Maryland State Board of Dental Examiners.

We have your letter in which you call to our attention Chapter 324 of the Acts of 1947 and you ask if, under its provisions, a dentist who holds a license issued by the Maryland State Board of Dental Examiners is required to register annually even though such dentist is practicing in another State.

We think it is clear that the law requires an affirmative answer. This Act, which adds Section 5A to Article 32 of the Code, provides, in part, that:

> "Every person licensed by the Board to practice Dentistry in Maryland shall annually, before April 1st, be required to register his name * * * on a form furnished by the Board of Dental Examiners."

We think that every person holding a license which authorizes him to practice the profession of dentistry in Maryland, whether he is so practicing or not, is subject to the requirements of this law and that his failure to conform to its requirements subjects him to the suspension of his license as provided in sub-section (b) of the Act. The State Board of Dental Examiners should, of course, prepare and furnish the necessary forms to all licensees in order to enable them to register annually.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

DEPARTMENT OF PUBLIC WELFARE

DEPARTMENT OF PUBLIC WELFARE—OLD AGE ASSISTANCE—CLAIMS AGAINST ESTATE—CLAIMS FOR ASSISTANCE NOT BARRED BY THREE YEAR STATUTE OF LIMITATIONS.

July 21, 1947.

Mr. Carlton V. West,
Register of Wills for Caroline County.

Your letter of June 12, 1947, states that the Caroline County Welfare Board for Old Age Assistance has presented a claim against the estate of a decedent to recover funds paid in accordance with Article 70A of the Annotated Code of Maryland. You further state that old age assistance was paid to the decedent continuously from February 1, 1939 to October 10, 1946, and that the decedent died a few days after the later date. A contention that the three year limitations period bars full recovery of the claim has prompted you to seek our advice.

Gratuities paid to assist the aged are financed by the federal, state and local governments. The statutory scheme upon which such payments are made embraces the concept that public funds should be paid only to those in need. Accordingly, provision is made for the recovery of assistance previously paid if the recipient has come into possession of property or income. Section 16 of Article 70A of the Annotated Code of Maryland (1943 Supplement), as amended. If the recipient is dead, a similar recovery is authorized to be made from his estate by Section 17 of Article 70A, *supra*. This Section is as follows:

> "On the death of any recipient, the total amount of assistance paid under this Article shall be allowed as a claim against the estate. The net amount

realized from all such claims shall be divided among the State, the county, and the Federal Government in proportion to the amount of the assistance paid by each respectively; provided, that no such claim shall be enforced against any real estate of a recipient while it is occupied by the recipient's surviving spouse or dependents."

Limitation of actions is a statutory concept. In this State, the period is three years with respect to actions on simple contracts or claims—Section 1 of Article 57 of the Annotated Code of Maryland (1939 Edition), but is twelve years with respect to actions on specialties—Section 3 of Article 57, *supra*, as amended by Chapter 467 of the Acts of 1945. There is no specific statute foreclosing suits for recovery from the estate of a recipient of old age assistance. It must follow, therefore, that such an action would be barred by the three year period only if it could be characterized as a simple claim within the ambit of Section 1 of Article 57, *supra*.

In our opinion, an action brought under Section 17 of Article 70A, *supra*, is not a simple claim upon which suit must be brought within three years from its maturity. Such actions, have in the past, been characterized as *statutory* claims—23 Opinions of the Attorney General 236, or *statutory* debts—25 Opinions of the Attorney General 195. This being true, the claim is at least a specialty and suit for its collection would not be barred within twelve years from the time the cause of action arose.

In *Baltimore v. Webb*, Baltimore City Court, Daily Record, November 15, 1939, the question was whether a claim against the estate of an indigent hospital patient was barred by limitations. In reaching his conclusion, Judge Dickerson pointed out that the suit was brought under Section 63 of Article 43 of the Annotated Code of Maryland (1939 Edition) and that as a result the right of action was based on a specialty upon which the period of limitations

was twelve years and not three. This decision was subsequently affirmed. *Webb v. Baltimore,* 179 Md. 407 (1941).

A similar result was reached in *Baltimore v. Main,* Superior Court of Baltimore City, Daily Record, March 4, 1943. There, suit was brought by the City of Baltimore to recover from the estate of a deceased lunatic the reasonable and necessary costs of her maintenance in the Springfield State Hospital. The action was instituted under Section 4 of Article 59 of the Annotated Code of Maryland (1939 Edition), which reads, in part, as follows:

> "Upon the death of any person committed to any of the said institutions as aforesaid, the County Commissioners or the Department of Welfare of Baltimore City, as the case may be, shall be entitled to make claim against the estate of any such person for his or her maintenance and support while in such institution, or for the balance due therefor if part has been paid. Such claim shall constitute a preferred claim against the estate of any such person, and all claims arising hereunder against the relatives and other persons legally chargeable with the maintenance and support of such inmates, shall constitute preferred claims."

Against the contention that the suit was barred by the three year statute of limitations, Judge Smith ruled that the action was on a specialty and that the applicable period of limitations was twelve years.

In reaching the conclusion that the claim of the Caroline County Welfare Board for Old Age Assistance is not barred in this case, we are not unmindful of the doctrine that general statutes of limitations are inapplicable to a State when suing in its sovereign capacity. 34 Am. Jur., *Limitation of Actions,* Section 393. Moreover, it may well be that such claims could not be barred in any event by reason of the fact that they do not mature until the death of the recipi-

ent. We find it unnecessary to pass upon these questions, however, since in the instant case suit may be maintained on the theory that the action is brought upon a specialty.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

EDUCATION

EDUCATION—TEACHERS COLLEGES—SALARIES OF FACULTY MEMBERS OF TEACHERS COLLEGES NOT SUBJECT TO CONTROL OF STATE EMPLOYEES STANDARD SALARY BOARD.

January 3, 1947.

Hon. William Preston Lane, Jr.,
Governor of Maryland.

In reply to your letter of December 27, 1946, requesting my opinion on whether the State Board of Education has the authority to determine or set the salaries for the professional staff at the State Teachers colleges, I find that the State Board of Education and the State Superintendent of Schools, acting in conjunction as a board of Trustees, do have authority to fix the salaries of the instructional personnel at the State Teachers Colleges, and that the salaries of such personnel were expressly exempted from the jurisdiction of the State Employees Standard Salary Board by Chapter 930 of the Acts of 1945, which amended Section 16 of Article 64A of the Annotated Code.

Section 16 was also amended by Chapter 781 of the Acts of 1945 by the insertion of a special provision pertaining to employees of County Welfare Boards. Chapter 781 did not contain the exemption as to the instructional personnel at the State Teachers Colleges. However, the two Acts do not conflict and may be read together so as to give effect to the special provisions inserted by each in Section 16. Since it is possible to do so, both Acts should be given effect, and if there should be found to be a conflict, Chapter 930, containing the provision applicable to State Teachers Colleges, would prevail, it being the later enactment.

HALL HAMMOND, *Attorney General.*

EDUCATION—CHARLES COUNTY—PRINCE GEORGE'S COUNTY —CONDITIONS UPON WHICH PAROCHIAL SCHOOL STUDENTS MAY RIDE ON PUBLIC SCHOOL BUSES.

September 16, 1947.

Dr. T. G. Pullen, Jr.,
State Superintendent of Schools.

You have asked our opinion as to the extent to which the Board of Education of Charles County and the County Commissioners of said County are authorized by Chapter 918 of the Acts of 1947 to establish new bus routes in order to transport to and from school children attending parochial schools not receiving State aid.

Section 241A of Article 9 of the Code of Public Local Laws, as enacted by said Chapter 918 of the Acts of 1947, provides that said children "who reside on or along or near to the public highways of Charles County, on which there is now or hereafter operated a public school bus or conveyance provided by the Board of Education of Charles County for transporting children to and from the public schools of Charles County, shall be entitled to transportation on the said buses or conveyances, subject to the conditions hereinafter set forth, from a point on the said public highway nearest or most accessible to their respective homes to a point on the said public highways nearest or most accessible to their respective schools without changing the routes of said buses". Section 241B of said Article 9 authorized the County Commissioners to appropriate funds to defray any costs incurred in carrying into effect the provisions of Section 241A and "to establish new bus routes, in the discretion of the Board of Education of Charles County, for the transportation to and from school of children attending schools not receiving State aid."

We are of the opinion that the above quoted language from Section 241A indicates clearly that any new bus

routes which are established must be primarily for the purpose of transporting children to and from public schools and that new routes may not be established solely for the transportation of children to and from parochial schools. Section 241A specifies the conditions under which parochial school students may enjoy public transportation, and we do not believe that the special privilege thereby conferred upon parochial school students was intended to be enlarged in any way by Section 241B.

On July 15, 1947, we advised you, in connection with Prince George's County, that the Board of Education of that County might establish new public school routes and purchase additional equipment if the existing bus routes should become overcrowded because parochial school students are being transported. That opinion is equally applicable to Charles County, but the law provides that any new routes which are established must be primarily for the transportation of public school students and parochial school students are entitled to ride thereon only from a point on the public highway nearest or most accessible to their homes to a point on said public highway nearest or most accessible to their schools.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

ELECTIONS

ELECTIONS—PRIMARIES—CANDIDATES FOR NOMINATION FOR JUDGE OF THE ORPHANS' COURT MAY NOT SEEK THE NOMINATION OF A PARTY WITH WHICH THEY ARE NOT AFFILIATED.

April 24, 1946.

Mr. James L. Hennegan, President,
Board of Supervisors of Elections.

In your recent letter you asked if a person seeking nomination for the office of Judge of the Orphans' Court is entitled to file a certificate of candidacy for nomination in both the Democratic and Republican Primaries.

As early as 1896 the right of a person to seek a nomination by two or more parties was recognized, because by Section 50 of Chapter 202 of the Acts of that year, it was provided, in part that: "If a candidate is named for the same office on two or more certificates of nomination, his name shall be placed in each of the several appropriate groups."

The above quoted portion of the law was changed by Chapter 2 of the Acts of 1901, and as a result of the amendment, it read: "If a candidate is named for the same office on two or more certificates of nomination, his name shall be printed on the ballot but once, and to the right of the name of said candidate shall be added the names of each of the parties or principles which the candidate represents." The law continued in this form until Chapter 124 of the Acts of 1912 enacted the provision which is substantially in the form it is today, namely, that if a person is nominated for the same office by two or more parties, his name shall be printed on the ballot but once, and to the right of the candidate's name shall be added the name of one of the parties which he represents as appearing in his certificate of nomination, and the Board of Supervisors of Elections

shall cause to be printed beside his name whatever one of said party names the candidate shall designate in writing. This provision is now contained in Section 58 of Article 33 of the Code, as enacted by Chapter 934 of the Acts of 1945.

In *German v. Sauter,* 136 Md. 52, the Court of Appeals affirmed an Order of the Circuit Court for Baltimore County directing that a writ of mandamus be issued to require the Board of Supervisors of Elections for that County to place upon the Primary Election ballots the name of the appellee as a candidate for the Republican State Central Committee, the appellee being affiliated on the registration books as a Democrat. The Court said that in order to entitle the appellee to have his name placed upon the ballot, he was required to do only those things provided for by the statute, and when he had complied with it, it was the duty of the Supervisors to place his name upon the ballot, that it was not essential to his qualifications that he be affiliated with the Republican Party.

In view of the statutory provision above referred to relative to a person obtaining the nomination for the same office on two or more certificates of nomination, and the decision of the Court of Appeals in *German v. Sauter,* supra, that a person need not be affiliated with the party on whose ticket he is a candidate, there would seem to be no reason why a person may not, in the absence of statutory prohibition, seek the nomination of two political parties. Former Attorney General Walsh, in an opinion dated May 9, 1942, and reported in 27 Opinions of the Attorney General, 126, ruled that the Judge of the Court of Appeals from Baltimore City and certain Judges of the Supreme Bench were entitled to file certificates of candidacy for the nomination for their respective offices by both the Democratic and Republican Parties. However, prior to that ruling, the General Assembly had enacted the first of three provisions touching upon this subject.

By Chapter 703 of the Acts of 1941, it was provided that the names of all candidates for Judge of the Circuit Courts for the several Counties, or of the Supreme Bench of Balti-

more City, or for the Court of Appeals, should be placed on the ballots or voting machines without any party label or other distinguishing mark or location which might directly or indirectly indicate the party affiliation of any such candidate. This provision is now a part of Section 58 of the Election Laws, as re-enacted in 1945. It was followed in 1943 by Chapter 334, now Section 49, of the Election Laws. Under its provisions, no certificate of candidacy for nomination filed or offered for filing by any person seeking a nomination for office, other than for the office of Judge, shall be accepted or acted upon by the Board of Supervisors of Elections or by the Secretary of State, as the case may be, unless such person is affiliated on the registration records of his County or Baltimore City with the political party whose nomination he seeks.

By Chapter 754 of the Acts of 1943, Section 229, now Section 45, was amended by the addition of the provision that: "No person, other than as candidate for Judge, shall be a candidate for the nomination by more than one political party for any public office in Maryland, or for the House of Representatives of the Federal Congress, United States Senate or President of the United States."

It will be observed that the Act of 1941 did not use merely the word "Judge", but it designated with particularity the Judges who were brought within the scope of that legislation, namely, the Judges of the Circuit Courts, the Judges of the Supreme Bench, and the Judges of the Court of Appeals. After eliminating by this Act the pre-existing requirement that the name of the political party be printed on the ballot to the right of the name of the candidate for Judge of one of the courts mentioned, the General Assembly felt the need for further legislation on the subject, and by the two Acts passed in 1943 it denied a candidate for office, other than that of Judge, the right to seek the nomination of a party except that with which he was affiliated.

These three provisions, we think, must be considered together. We have no doubt that in enacting Chapters 334 and 754 of the Acts of 1943, the Legislature intended the

word "Judge" to apply to those Judges who were referred to in Chapter 703 of the Acts of 1941. There could be no possible reason in our opinion, for the Legislature to create a situation that would result in there being three classes of candidates, namely, candidates for Judge of the Supreme Bench, the Circuit Courts and the Court of Appeals, filing in both Primaries and running without party designation; candidates for Judge of the Orphans' Courts seeking the nomination of both parties, but yet subject to the provision requiring a party designation to be printed to the right of their names on the ballot, and still a third class of all other candidates who may seek only one nomination, namely, that of the party with which they are affiliated, and the party designation likewise to be printed on the ballots to the right of their names. It is a familiar rule of statutory construction that it is not judicial legislation for the courts to construe Acts of Assembly according to their obvious intent and meaning, considering the purpose of their enactment. Real intent must prevail over literal intent. *State v. Petrushansky*, 183 Md. 67, 71. The real intent of the Legislature in the enactment of these provisions is, we think, quite obvious. It was to permit candidates for the office of Judge of the Court of Appeals, of the Circuit Courts, and of the Supreme Bench, to file with two or more parties and to run without party designation, and to require candidates for all other offices to seek the nomination of the party of their affiliation, and if nominated, to run under the label of that party at the General Election.

It is our opinion, therefore, that candidates for nomination for Judge of the Orphans' Court are not permitted to seek the nomination of a party except the one with which they are affiliated.

WM. CURRAN, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

This opinion, which appears in Volume 31 of the Report and Official Opinions of the Attorney General, page 100, is reprinted because of the erroneous omission of a portion of the opinion in the original report.

ELECTIONS AND REGISTRATION—SPECIAL ELECTIONS—BOARD OF SUPERVISORS OF ELECTIONS OF BALTIMORE CITY SHOULD CLOSE REGISTRATION RECORDS OF ENTIRE CITY FOR THIRTY DAYS PRECEDING AND TEN DAYS FOLLOWING A SPECIAL CONGRESSIONAL ELECTION.

June 11, 1947.

Board of Supervisors of Elections
of Baltimore City.

We have your letter of June 10th asking our opinion concerning the provisions of Section 23 of Article 33 of the Code, as enacted by Chapter 934 of the Acts of 1945, relating to the registration of voters. A special election is to be held in the Third Congressional District, all of which lies within Baltimore City, on July 15, 1947, and you are uncertain whether the cessation of registration for 30 days preceding the special election should apply only in those precincts which are within the Third Congressional District or whether the registration records for the entire city should be closed.

Section 23, above referred to, provides in part that:

> "In the said city . . . persons qualified to register, transfer, affiliate or change their party affiliation may register, transfer or affiliate at the office of the Board of Supervisors of Elections at any time such office is open, except in Baltimore City 30 days preceding and 10 days following a special or primary election . . ."

We do not know of any court decision interpreting this statute, and we find no ruling of this Department relating thereto. The question is not entirely free from doubt. Under the provisions of the election laws, the registration of voters is no longer conducted in the precincts as was formerly the practice in Baltimore City and as is the practice in most of the Counties of the State. Rather, all per-

sons eligible to register as voters, regardless of the ward and precinct in which they reside, appear at the office of the Board where the requisite information is obtained, and the applicant is registered if he is found to be qualified. We find nothing in Section 23 which indicates an intention upon the part of the Legislature that your Board may conduct at its office a registration of persons living in certain wards or precincts of Baltimore City and at the same time refuse registration to persons living in other wards or precincts of the city. It seems to us, too, that as a matter of policy such a practice may well lead to confusion, and that this, together with the likelihood of errors, is sufficient to justify that construction which will promote a more accurate administration of the election laws. We think it is quite reasonable and consistent with the obvious purpose and intent of the law for us to conclude, therefore, that for 30 days preceding and 10 days following a special election involving some but less than all of the wards and precincts of Baltimore City, the registration books of the entire city should be closed.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

ELECTIONS AND REGISTRATION—REGISTRATION LIST NEED NOT BE PREPARED FOR SPECIAL ELECTION.

June 12, 1947.

Board of Supervisors of Elections
of Baltimore City.

We have your letter of June 11th in which you ask if it is neecssary for you to cause to be prepared from the registration cards a complete and official registration list for each precinct, containing the names, party affiliations

and addresses of all qualified and duly registered voters, as required by Section 26 (a) of Article 33 of the Code, as enacted by Chapter 934 of the Acts of 1945, before the special election to be held in the Third Congressional District of Maryland on July 15, 1947. The statute requires preparation of such a list by your Board "at least twenty-nine days before every general election". The question, therefore, is whether the election to be held on July 15th next is a general election within the meaning of this provision.

The term "general election" is not defined in the Election Laws but the word "election" is defined in Section 196 "to include elections had within any county or city for the purpose of enabling voters to choose some public officer or officers under the laws of this State or of the United States, or to pass upon any amendment, law or other public act or proposition submitted to vote by law and unless otherwise stated shall also be construed to include primary as well as general and special elections." It is apparent from the above definition that the word "election", unmodified and standing alone as it does in Section 196, is broad in scope. On the other hand, Section 26 does not require the preparation of the registration lists prior to every election, but before general elections only.

In *Mackin v. State*, 62 Md. 244, the appellant was indicted for violating the local option law of Harford County, which local option law apparently was approved by the people of that County at the election held on the Tuesday after the first Monday in November, 1882. One of the objections raised by the appellant was that the election held on that day was not a general election. In overruling that contention, the Court of Appeals said:

> "It may not have been a 'general election' in the sense in which the Constitution uses those words with reference to the election of members of the House of Delegates; but it was a general election in the sense of being general throughout the State,

> for both members of Congress and Judges. It was that election which was meant, for the time for it is specially designated, so that objection cannot be sustained."

Later in *Downs v. State,* 78 Md. 128, it was objected that the Grand Jury which found the indictment was illegally drawn because, among other reasons, their names were selected from the duplicate registry of voters instead of from the poll books filed in the Clerk's Office after the General Election held in 1892. The question before the Court, therefore, in connection with that objection was whether the election held in November, 1892 was a general election. The Court said:

> "It is true it was not a general election for members of the General Assembly, and State officers generally, but it was a general election for representatives of the State in the Congress of the United States, as provided by Art. 33, sec. 118 of our Code, and for election of President and Vice-President of the United States. Art. 33, sec. 109. It would seem therefore, that the tax list filed on the 1st of February, 1893, was, as provided by Art. 51, sec. 6, filed not less than twenty days before the beginning of the second regular term of said court after the general election of November 1892.
>
> "The second assignment of error does not appear to present any serious difficulty, for while the Code, Art. 51, sec. 6, provides that the names to be used by the judge in the selection of juries shall be taken from the tax list *and* the poll books, it will be seen that under the registration law as now in force, the registries of voters and the poll books, so far as the names are concerned are identical, the former showing who are the qualified voters, and the latter, while con-

taining all the names on the former, indicate also who have actually voted. Code, Art. 33, sec. 7.

"The list of names on the registry and poll books being substantially the same, the selection of the names from either would be a sufficient compliance with this provision of the law."

A regular or general election is defined in 18 Am. Jur. 181 as "one which recurs at stated intervals as fixed by law; it is one which occurs at stated intervals without any superinducing cause other than the efflux of time." The same authority defines a special election as "one that arises from some exigency or special need outside the usual routine, such as to fill a vacancy in office, or to submit to the electors a measure or proposition for adoption or rejection." This distinction between a general election and a special election appears to have practically universal recognition. See 18 Words and Phrases 205, 39 Words and Phrases 614.

The distinction has been observed by the General Assembly because Section 23 of Article 33 of the Code, as enacted by Chapter 934 of the Acts of 1945 provides for the registration of persons at the office of the Board of Supervisors of Elections in Baltimore City at any time said office is open, except 30 days preceding and 10 days following a primary or special election, and 45 days preceding and 15 days following a general election. A comparison of these two sections, we think, makes it even more evident that the term "general election", as used in Section 26, was not intended by the General Assembly to include special elections, because, under the provisions of Section 23, persons entitled to register as qualified voters may appear at your office for that purpose except 30 days preceding and 10 days following a special or primary election, while Section 26 requires the preparation of the registration lists for each precinct 29 days before every general election. It is hardly to be supposed that the General Assembly would im-

pose a duty without at the same time affording sufficient time for its mandate to be carried out. In this instance your Board would have only one day in which to prepare the registration lists if Section 26 requires their preparation prior to the special election on July 15th.

For the reasons above stated, it is our opinion that the term "general election", as used in Section 26 of Article 33 of the Code, does not include a special election, and that your Board is under no statutory duty to prepare the registration lists mentioned therein.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

ELECTIONS AND REGISTRATION — SPECIAL ELECTIONS — NOTICE TO SHERIFF.

June 13, 1947.

Mr. Joseph C. Deegan,
Sheriff of Baltimore City.

We have your letter of June 11th enclosing a copy of a letter addressed to you by the Board of Supervisors of Elections of Baltimore City, concerning the special election to be held in the Third Congressional District on July 15th next, and a copy of the Governor's Proclamation. You have asked us to advise you concerning your duties in connection therewith.

We find no provision in the election laws imposing upon you any special duties in connection with this election. Section 115 of Article 33 of the Code provides that the Proclamation issued by the Governor shall require at least 20 days' notice of such special election be given by the Supervisors of Elections to the Sheriffs of the Counties compris-

ing the Congressional District in which the vacancy exists. Section 10 of Article 33 of the Code requires the Board of Supervisors of Elections of each County to give ten days' notice of the time and place of all elections, and under Section 196 of that Article the word "election" is required to be construed to include primary as well as general and special elections, unless otherwise stated. There was apparently a time when notices of election were given by the Sheriff, because Section 14 of Article 33, as it appeared in the Code of 1904, in dealing with the notice to be given by the Supervisors, provides, among other things, that the Sheriff of Baltimore City and of each County shall no longer publish such notices of election.

It is to be observed too that Section 162 of Article 33 of the Annotated Code of 1939 provided that the Sheriffs of the several Counties be allowed $12.00 for each election held in their County, and that when two or more elections were held on the same day, the Sheriff should not be allowed any additional amount, except in Baltimore City. In the revision of Article 33 by Chapter 934 of the Acts of 1945, Section 162 became Section 8, and it makes no reference whatever to any compensation for the Sheriffs. We think it is quite likely, therefore, that the requirement of Section 115 that notice of a special Congressional Election be given to the Sheriffs, without imposing some positive duties upon those officers, is the result of oversight, rather than an intention that the Sheriff undertake the performance of some unspecified duty in connection therewith.

Of course, it may well be the practice in some of the Counties for Deputy Sheriffs to be assigned to the polling places to preserve the peace, and that may be the reason for the provision. We understand that in Baltimore City the Police Commissioner assigns a member of his department to each polling place and that you do not undertake to duplicate his work.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

ELECTIONS—CANCELLATION OF REGISTRATION OF PERSONS FAILING TO VOTE FOR FIVE YEARS—BOARD MAY NOT DECLINE TO CANCEL—AT REQUEST OF REGISTRANT, CANCELLATION MAY BE MADE.

December 11, 1947.

The Board of Supervisors of Elections,

We have your two letters of November 25, 1947, in one of which you asked whether the Board has the authority to continue in effect the registration of a person who has not voted for five years, when the person in question requests such continuance, in which event you would enter on your records in the column headed "Remarks" a notation that such request had been made by the voter.

Section 29(b) of Article 33 of the Code, as enacted by Chapter 934 of the Acts of 1945, provides:

> "If a registered voter in any county or in Baltimore City has not voted at least once at a primary, general or special election within the five preceding calendar years, it shall be the duty of the Board of Election Supervisors of each county or city, or of the Board of Permanent Registry in counties having a system of permanent registration, to cause the registration of such voter to be cancelled by erasing his name from the registry as provided in Section 17 of this Article, or, in counties having a system of permanent registration and in Baltimore City, by removing the registration cards or forms of said voter from the original and duplicate files and placing the same in a transfer file; a notice of such action and the reason therefor shall be sent to the last known address of such voter: provided, however, that the registration of no person shall be so cancelled during his service in the Armed Forces of the United States."

In view of our former rulings that the provisions of this Section are mandatory (31 Opinions of the Attorney General 104 and 107), it is our conclusion that the Board must cancel the registrations of all persons who have not voted at least once within the five preceding calendar years, and you may not, therefore, decline to cancel a registration for the mere reason that a voter requests such non-action on your part.

The question raised in your second letter, as supplemented by your telephone conversation, is whether a registered voter who has not voted within the five preceding calendar years, may call at your office and request that his registration be cancelled forthwith, and that immediately thereafter he be permitted to re-register as a qualified voter.

If the voter's registration is subject to cancellation under Section 29(b) at the time he makes his request, we know of no reason why such cancellation may not be made in the manner herein set forth. The law requires that a notice of cancellation or erasure under this Section shall be sent to the last known address of the voter and, of course, that provision should be complied with, even where the voter calls at the office and requests cancellation. Likewise, if the person whose registration is so cancelled is eligible to register as a qualified voter, we think his immediate re-registration is permitted.

Whether the Board wishes to undertake the cancellation of registrations under this Act in a piecemeal fashion is a matter of policy for the Board to determine, rather than a matter of law upon which we should express an opinion.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

ENGINEERS

ENGINEERS — BOARD OF EXAMINING ENGINEERS — ENGINEERS WHO OPERATE STEAM HEATING PLANTS SUBJECT TO BOARD'S JURISDICTION—ENGINEERS SUBJECT TO JURISDICTION OF BOARD REGARDLESS OF HORSEPOWER OF PLANT.

February 3, 1947.

State Board of Examining Engineers,

I have your letter of January 6, 1947, asking (1) whether engineers who operate machinery for heating purposes are within your licensing jurisdiction, and (2) whether engineers who operate boilers of less than fifteen pounds' pressure are within your licensing jurisdiction.

It is my opinion that a heating plant operated by steam is a plant of machinery within the meaning of Section 517 of the Charter and Code of Public Local Laws of Baltimore City (1938 Edition), and that stationary engineers who operate such plants are within the general supervision of the Board of Examining Engineers and must procure licenses from said Board.

There is no provision in the law pertaining to the Board of Examining Engineers which excepts stationary engineers who operate boilers of less than fifteen pounds' pressure. I am of the opinion that stationary engineers are within the general supervision of the Board and must procure licenses from the Board regardless of the pressure of the plants of machinery operated by them. The fact that a boiler of less than fifteen pounds' pressure is exempt from the jurisdiction of the Maryland Board of Boiler Rules does not affect the jurisdiction of the State Board of Examining Engineers.

HALL HAMMOND, *Attorney General.*

PHILIP T. MCCUSKER, *Asst. Attorney General.*

FINES AND FORFEITURES

FINES AND FORFEITURES—FINES FOR CONTEMPT IMPOSED BY CRIMINAL COURTS ARE PAYABLE TO THE STATE.

December 17, 1947.

Mr. Daniel L. Clayland, 3d,
State Auditor.

This is in reply to your letter in which you asked our opinion as to the proper disposition of contempt fines imposed by criminal courts.

The disposition of contempt fines imposed by the several courts in this State sitting in equity has been decided by this office on previous occasions. See 19 Opinions of the Attorney General 290, 20 Opinions of the Attorney General 352 and 22 Opinions of the Attorney General 521. In these cases, Judge Henderson, then Assistant Attorney General, consistently ruled that under the provisions of Section 194 of Article 16 of the Code (1939 Edition) the fines should be paid to the Treasurer of the State.

The question now to be determined is whether contempt fines imposed by criminal courts or fines for criminal contempt should be disposed of in the same manner in view of the provisions of Section 5 of Article 38 of the Code (1943 Supp.), as amended by Chapter 1064 of the Acts of 1945, which law provides that one-half of the fines imposed and recognizances forfeited to the Circuit Courts shall be paid to the Clerks to establish a library in said courts, with some exceptions.

As was said by Judge Henderson in 19 Opinions of the Attorney General 290:

> "A proceeding for contempt is quite different in character than the ordinary criminal pro-

ceeding. It is an exercise of an inherent judicial power of the court, * * *".

Section 1 of Article 26 of the Code, (1939 Edition) provides as follows:

> "The judges of the several courts of law and of equity may make such rules and orders from time to time for the well-governing and regulating their respective courts and the officers and suitors thereof and under such fines and forfeitures as they shall think fit," * * * *all of which fines shall go to the State*".

The history of this Section dates back to the earliest annals of Maryland law. It was enacted by Chapter 41 of the Acts of 1715, and it was an Act titled for the better administration of justice in the Courts and providing for a fine for violating the rules of a provincial court in the penalty of 1,000 pounds of tobacco and for a penalty of 500 pounds of tobacco for violating the rules of a county court. The Act then provided that the penalty was to go to His Majesty, his heirs and successors. The wording of this Section was subsequently changed to its present terminology and was codified in the Code of 1888, which Code was adopted by a specific Act of the Legislature.

The statute providing for the allocation of one-half of the fines to the court libraries was first enacted by Chapter 407 of the Acts of 1898. Prior to this enactment, all fines, penalties and forfeitures were "paid to the county or city where the same may be imposed *unless directed to be paid otherwise by the law imposing them*", under the provisions of Section 2 of Article 38 of the Code of 1888. This Act dates back to Chapter 6 of the Acts of 1777 and was codified with the language above underlined in the Code of 1888, which, as stated, was adopted by an Act of the Legislature.

In reading Chapter 407 of the Acts of 1898, (the Library Act), there is nothing to imply that the Legislature

understood or intended to change the practice in the disposition of contempt fines that had existed for 183 years. If it had been the purpose to effect that result, it could easily have been done—*Baltimore v. Deegan,* 163 Md. 234—and a study of the subsequent amendments to this Act reveals no such intent or purpose. It is noted that this Act was last amended by Chapter 573 of the Acts of 1943 to provide for the payment of fines, penalties and forfeitures to the county or city in which the offense occurred, but this amendment retained the original clause, *"unless directed to be paid otherwise by law imposing them".*

Thus, it seems that the Legislature recognized that contempt fines were quite different in character from ordinary criminal fines and the history of the legislative amendments discussed above indicates it intended to deal with contempt fines on a different basis from fines imposed in other criminal cases, and it is possible to harmonize the two statutes upon this basis.

We are of the opinion, therefore, that contempt fines imposed by criminal courts, as well as contempt fines imposed by civil or equity courts, should be paid to the Treasurer of the State of Maryland.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

FINES AND PENALTIES

FINES AND PENALTIES—ALL FINES AND PENALTIES IMPOSED FOR VIOLATION OF ARTICLE 95A OF THE CODE (UNEMPLOYMENT COMPENSATION) TO BE REMITTED TO STATE TREASURER FOR CERTAIN PURPOSES.

November 18, 1947.

Mr. A. Sydney Gadd, Jr., Clerk,
Circuit Court for Queen Anne's County.

Under date of November 7th, you ask that we furnish an opinion as to the proper disposition of fines and penalties collected for violations of Article 95A of the Code (the Unemployment Compensation Article).

This office has held on at least two occasions (see 25 Opinions of the Attorney General 331 and 26 Opinions of the Attorney General 165) that in view of the fact that Section 9 of Article 95A provides that the Unemployment Compensation Fund shall consist of, among other things, "all fines and penalties collected pursuant to the provisions of this Article". Article 95A was amended by Chapter 768 and Chapter 270 of the Acts of 1945. Chapter 768 eliminated the provision above referred to. However, Chapter 270, Section 13(c) provides, in part, as follows:

> "There is hereby created in the State Treasury a special fund to be known as the Special Administrative Expense Fund. All interests, fines and penalties collected under the provisions of this Act together with any voluntary contributions tendered as a contribution to this fund shall be paid into this fund."

In view of the express provisions in the two 1945 Acts referred to above, it is our opinion that all fines and penal-

ties imposed for violation of Article 95A should be remitted to the State Treasurer to be credited to the Special Administrative Expense Fund.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

GOVERNOR

GOVERNOR—FINES AND FORFEITURES—GOVERNOR MAY, IN HIS DISCRETION, REMIT ANY FINES OF FORFEITURES FOR OFFENSES AGAINST THE STATE.

April 22, 1947.

Hon. William Preston Lane, Jr.,
Governor of Maryland.

I have your letter of April 15th, together with enclosures, concerning the request which has been made that you refund fines imposed by a Trial Magistrate on certain residents of Queen Anne's County, for alleged violations of the oyster laws. It appears that the persons in question were tonging oysters in the waters of Talbot County. You quote a portion of Section 5, sub-section (i) of Chapter 929 of the Acts of 1945, that tongers of Queen Anne's and Talbot Counties may use the South Branch of the Wye River and the mouth thereof in common.

The request for the remission of the fines appears to arise from some uncertainty respecting the boundaries between the two Counties, and the lack of a specific definition of what is the mouth of the Wye River. Section 1 of Article 72 of the 1939 Code, repealed by Chapter 929 of the Acts of 1945, after making provision for the granting of licenses for the catching of oysters and limiting the right of the licensee to take oysters in the waters of the County where the license was issued, states that the provisions of that Section shall not be construed to prevent "the citizens of Queen Anne's and Talbot Counties from using the waters of the Wye River and the mouth thereof in common * * *." This exception appeared in the law for the first time in Chapter 181 of the Acts of 1874, and has been continued in the law down to the enactment of Chapter 929 of 1945, when it was limited to the South Branch of the Wye River and the mouth thereof.

While there may be uncertainty as to the boundary line between Queen Anne's and Talbot Counties, this exception has been in the law for seventy-three years, and it seems hardly reasonable that a lack of knowledge of County boundaries should appear at this late date to confuse the tongers.

Chapter 487 of the Acts of 1908, codified as Sections 161, 162 and 163 of Article 75 of the Code, provides that the jurisdiction of every County bounded at any point by navigable waters shall extend from the shore to the inside of the channel, except where said waters adjoin neighboring States, in which case the jurisdiction of said County shall extend to the ultimate limits of the State. That Act provided further that the center of the waters shall be deemed as represented on the county maps issued under the authority of Chapter 51 of the Acts of 1896 and Chapter 129 of the Acts of 1898, and certified copies of county maps were directed to be filed with the Clerks of the Circuit Courts for the several Counties and with the various Boards of County Commissioners. We presume that copies of these maps are on file in all the Counties, and that a reference to them would have furnished any inquiring parties with the means whereby the boundary lines of the Counties could have been ascertained.

It is contended that, in view of these uncertainties, it is impossible to state that the tongers have actually violated the law. However, an adverse ruling on that contention is implicit in view of the convictions. That was a question for the determination of the Trial Magistrate before whom the cases were tried and, of course, is reviewable on appeal to the Circuit Court.

But apart from these considerations, Article 2, Section 20 of the Constitution and Section 48 of Article 41 of the Code, as amended by Chapter 53 of the Acts of 1945, confer authority upon you to remit the whole or any part of any fines or forfeitures for offenses against the State. There is no limitation upon the exercise of your discretion in these matters, and the unequivocal language of the constitutional provision is not restricted and is, of

course, the highest authority in our State on the subject.—20 Opinions of the Attorney General 365. If, therefore, in view of the contentions which have been advanced in behalf of the tongers, you feel that equity and justice require the remission of the fines, you have the undoubted authority to order such remission.

You have asked about the procedure to be followed in the event you determine to remit the fines in question. Section 15 of Chapter 929 of the Acts of 1945 provides that all monies received by the Comptroller of the Treasury under the provisions of this Article from licenses, fees, taxes, fines, penalties, forfeitures or any other source shall be credited by the Comptroller to the oyster fund. It will be sufficient in our opinion for you to give your written direction to the Comptroller of the Treasury to remit such fines as you determine should be remitted.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

HEALTH

HEALTH—FUNDS APPROPRIATED TO THE STATE BOARD OF HEALTH MAY BE MADE AVAILABLE TO IT FOR THE PURPOSES CONTEMPLATED BY THE ACT OF CONGRESS, KNOWN AS PUBLIC LAW NO. 725.

August 25, 1947.

Board of Public Works,

You ask me the situation with reference to the responsibility of the Board of Public Works in connection with Public Law No. 725 of the 79th Congress, relating to Federal aid for hospital surveys and construction. Public Law No. 725 was an act to amend the public health service, to authorize grants to the States in surveying their hospital and public health centers, and planning health and additional facilities, and to authorize grants to assist in such construction. Under its provisions, to be approved, a State's application for funds for survey purposes must designate a single State agency for the carrying out of such purposes, and provide for a State agency for the carrying out of such purposes, and provide for a State Advisory Council.

By Chapter 810 of the Acts of 1947, the State Board of Health was designated as the sole agency required by Public Law No. 725, and an Advisory Council was created.

By Chapter 779 of the Acts of 1945, the State Board of Health was authorized to receive and expend grants in aid by the Federal Government, or any other federal funds made available to it, for use in the carrying out of the powers and duties confided to it by law, and to expend the same in accordance with the laws of the United States and any rules and regulations adopted pursuant to such laws.

In Item 41 of the Supplemental Budget, found on page 143 of the printed budget, there is allocated to the State

Department of Health, contingent upon Federal legislation providing Federal aid for hospital construction in Maryland, and contingent also upon passage of House Bill No. 663 of the Maryland Legislature, designating the State Board of Health as the Administrative Agency for the Administration of Federal Aid for Hospital Construction; for salaries and expenses, to be spent under the direction of the Board of Public Works $42,100 for the fiscal year 1948 and $42,100 for the fiscal year 1949. (House Bill 663 became Chapter 810 of the Acts of 1947.)

Public Law No. 725 allocated to States which have State plans approved by June 30, 1948 the total of $75,000,000. The legal effect of this is that hospital or health center projects may be approved for Federal aid up to the amount of the allotment of the particular State which, in the case of Maryland, I understand is $870,000. The Act provides that when the Surgeon General has approved the project under the Hospital Survey and Construction Act, the Federal share of the cost of construction of such project becomes a contractual obligation upon the Federal Government. This means a definite commitment on the part of Congress to appropriate funds to meet this obligation. This same technique has been used in the administration of the Federal Highways Act, and Congress has never failed to meet a commitment. Under the procedure contemplated, project applications will be submitted to the Surgeon General through the State Board of Health and, when approved, will create the contractual obligation described above. The Surgeon General will report such applications promptly to Congress so they may form the basis for appropriations. It is expected that appropriations will be available early next winter in an amount ample to carry the program through to the end of the fiscal year. Thereafter it is anticipated that annual appropriations for succeeding fiscal years will be sufficient to meet the needs for construction grants in full.

Under the applicable laws and the facts as they have been presented to me, it would seem entirely in order for

the Board of Public Works to approve the request of the State Board of Health for the funds set up in Item 41 of the current budget, so that the Board of Health may, pursuant to Section 601A of Public Law No. 725, make an inventory of existing hospitals in the State and a survey of the need for the construction of additional facilities, and thus develop a program for the construction of public and other non-profit hospitals as will, in conjunction with existing facilities, afford the necessary physical facilities for furnishing adequate hospital, clinic and similar services to all the people of the State.

HALL HAMMOND, *Attorney General.*

INSURANCE

INSURANCE — HOSPITAL AND MEDICAL INSURANCE — ONLY DOMESTIC CORPORATIONS MAY QUALIFY UNDER SPECIAL LAW APPLICABLE THERETO.

February 3, 1947.

Mr. Hazelton A. Joyce,
Deputy Insurance Commissioner.

We have your letter of January 23rd, 1947, asking whether a foreign corporation offering a non-profit health service plan may qualify as such or must meet the requirements imposed by Maryland law upon mutual health and accident insurance companies.

It has long been established in this State that a plan to indemnify or insure against the payment of hospital or medical bills constitutes insurance and must conform with the laws governing insurance—19 Opinions of the Attorney General 298. It was for this reason that the Legislature, in 1937, adopted a special law governing non-profit hospital service plans and exempted such plans from other laws relating to insurance.

By the express terms of Section 235 of Article 48A, the exemption from the laws relating to insurance extends only to any corporation, without capital stock, organized under the provisions of Article 23 of the Code of Public General Laws of this State. Foreign corporations not organized under the laws of this State are, therefore, not entitled to qualify under the special law applicable to non-profit hospital service plans, but must meet the requirements imposed by other laws relating to insurance.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

INSURANCE—EXEMPTIONS—BALTIMORE CITY POLICE BENEFICIAL ASSOCIATION EXEMPT FROM INSURANCE LAWS.

February 20, 1947.

Mr. Lawrence E. Ensor,
State Insurance Commissioner.

In your letter of February 7, 1947, you ask our opinion as to whether the Police Beneficial Association, operated by members of the Baltimore Police Department, is exempt from laws relating to insurance companies. We understand that membership in the Association is limited to active or retired members of the Police Department and their wives and that the maximum insurance obtainable is $1500.00 on the life of a member and $500.00 on the life of a wife of a member.

It is our opinion that the Police Beneficial Association is exempt from the insurance laws by sub-section (1) (b) of Section 214 of Article 48A of the Code of Public General Laws, which sub-section reads as follows:

> "(1) Nothing contained in this Article shall be construed to affect or apply to * * *;
>
> (b) orders, societies or associations which admit to membership only persons engaged in one or more crafts or hazardous occupations, in the same or similar lines of business, and women's societies or women's auxiliaries operating in conjunction with such orders, societies or associations;"

As authority for this opinion, we cite an opinion of a former Attorney General in which he ruled that a similar association whose membership was limited to persons engaged in the occupation of paperhanging was exempt from the insurance laws.—20 Opinions of the Attorney General 392.

You will note that the statutory provision exempts associations which admit to membership only persons engaged in the same or similar line of business and women's auxiliaries. We presume that retired members of the Police Department are admitted to membership only while on active duty and not after their retirement when they are no longer engaged in the same line of business. We think that insurance on the wife of a member is entitled to be included under the exemption of a women's auxiliary operated in conjunction with the association.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

INSURANCE — TAXATION — PREMIUM TAX — MEMBERSHIP FEES ARE PART OF GROSS DIRECT PREMIUMS SUBJECT TO TAX.

August 18, 1947.

Mr. Hazelton A. Joyce,
Deputy Insurance Commissioner.

This is in reply to your letter of August 8th inquiring about whether membership fees of the Farm Bureau Mutual Automobile Insurance Company should be included as part of the premiums subject to tax by Sections 101 to 103 of Article 81 of the Code. We understand that it is the practice of the Farm Bureau Company to charge a membership fee in return for the right to secure insurance from the Company. This fee is charged only on first becoming a member, and there is no annual membership fee. A member is charged an annual premium for his policy.

We are of the opinion that the membership fee constitutes a part of the consideration for the policy and, therefore, is a part of the "gross direct premiums" taxed by Sec-

tions 101 to 103 of Article 81. Section 101 (2) defines the term premiums to include "the consideration for surety, guaranty and annuity contracts". Section 102 (a) taxes gross direct premiums without deduction for any cause whatever except as herein provided. Section 102 (b) authorizes three deductions: (1) returned premiums; (2) dividends paid or credited to policy-holders, and (3) returns or refunds made or credited to policy-holders because of retrospective ratings or safe drivers rewards. A member of the Farm Bureau Company cannot obtain insurance without first paying the membership fee. This fee, therefore, is part of the gross consideration for the policy and since it is not authorized to be deducted by Section 102 (b), it must be included in the gross premiums subjected to the tax.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

INSURANCE—TITLE INSURANCE—MARYLAND COMPANY MAY DO TITLE INSURANCE BUSINESS OUTSIDE OF STATE.

September 22, 1947.

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

This is in reply to your letter of September 4, 1947, asking our opinion as to whether the Title Guarantee and Trust Company, of Baltimore, Maryland, is authorized by the law of this State to engage in the title insurance business in other States. The question arises because the Title Guarantee and Trust Company is granted in its Charter "all the powers given to Trust companies under Article 11 of the Annotated Code of Maryland" and because a trust company of this State may not engage in business as a trust company in other States.

We are of the opinion that the Title Guarantee and Trust Company is not prevented by the law of Maryland from engaging in title insurance business in other States. We note that while the Company is authorized to do a trust business it is primarily engaged in the title insurance business. Its report for the year 1946 to the Insurance Commissioner shows a total income of $400,123.46, of which $6,617.85 represents rental from safe deposit boxes. The only banking business that the Company does in addition to rental of safe deposit boxes is the maintenance of deposits from the Treasurers of the State of Maryland and the City of Baltimore and from fifty to fifty-five corporations and individuals. These deposits are listed in said Report as $475,047.03. The Company does not propose to accept deposits or rent safe deposit boxes or otherwise to engage in a trust or banking business outside of Maryland. The business to be conducted in other States will be limited to its title insurance business.

It is well accepted that ordinary corporations and insurance companies incorporated in this State may engage in business outside of this State. In fact, Section 8 (4) of Article 23 of the Annotated Code expressly authorizes every corporation incorporated under the general law to transact its business and carry on its operations within or without this State.

We, therefore, see no reason why the Title Guarantee and Trust Company may not avail itself of the same right to carry on its insurance business outside of the State as is extended to other insurance companies.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

JUSTICES OF THE PEACE

JUSTICE OF THE PEACE FOR BALTIMORE CITY — BONDS SHOULD BE FOR $500.00 UNLESS THE JUSTICE IS DESIGNATED TO SIT IN A STATION HOUSE IN WHICH CASE BOND REQUIRED IS $3,000.

May 8, 1947.

Mr. Samuel H. Feldstein,
Justice of the Peace at Large
for the City of Baltimore.

In your letter of May 5th you state the Governor has appointed you as Justice of the Peace at Large for the City of Baltimore, but that you were not selected as a Justice of the Peace to sit in any station house in the City of Baltimore as provided by Chapter 1052 of the Acts of 1945. You state that you presented a surety bond in the amount of $500 to the Clerk of the Superior Court of Baltimore City, and said Clerk refused to accept the bond, contending that it should be in the amount of $3,000, and cited as his authority Chapter 1052 of the Laws of Maryland of 1945. Chapter 1052 states in part, as follows:

> "It shall be the duty of the governor, after the appointment of the Justices of the Peace provided for in Section 712 of this said Article 4, to select from the Justices of the Peace so appointed a Justice of the Peace to sit at each station-house in the City of Baltimore, and in addition, two justices, or such other number of justices as may be by law hereafter provided for, of peace, to act at such times and places as is hereinafter provided for . . . The attendance at any such station-house of an additional Justice of the Peace shall be regulated and controlled by the Police Commissioner

> for the City of Baltimore; *but the Police Commissioner in regulating the attendance of an additional Justice of the Peace at a station-house shall not assign any Justice of the Peace to said station-house, under this section or Section 737 of this said Article 4, other than a Justice of the Peace selected by the Governor to sit at a station-house in said City,* as long as one of the said Justices of the Peace so assigned by the Governor shall be available for said purpose." (Emphasis supplied.)

Section 737 referred to above provided that if any Justice of the Peace selected to sit in a station house was unable, because of illness or otherwise, to attend said station house, the Police Commissioner was required to appoint another Justice of the Peace to perform said duties. However, Section 737 was amended by Chapter 975 of the Acts of 1945, which provides that if any Justice of the Peace selected as aforesaid to sit in any station house in the City of Baltimore is unable to attend to his duties, then it shall be the duty of the *Governor* to require another Justice of the Peace to perform the duties in such station house.

It is further provided in Chapter 1052 of the Acts of 1945, as follows:

> "Each of the *said* Justices of the Peace before entering upon the duty of his office shall give to the State of Maryland good and sufficient bond, with a surety or sureties to be approved by the Judge of the Superior Court of Baltimore City, in the penalty of $3,000. . . ." (Emphasis supplied.)

Section 1 of Article 52 of the 1939 Code provides that every Justice of the Peace shall file with the Clerk of the Court receiving said commission a bond in the amount of $500. The amount of this bond as to Justices of the Peace, appointed by the Governor, assigned to sit in the station houses in Baltimore City, of course, was increased to $3,000 by Chapter 1052 of the Acts of 1945, quoted above.

> provides that the Governor, by and with the advice and consent of the Senate, shall appoint 'such number of Justices of the Peace . . . for the several Election Districts of the counties . . . as are now or may hereafter be prescribed by

To hold that each of the many Justices of the Peace in Baltimore City should give bond in the amount of $3,000 merely because there is a remote possibility under the provisions of said Chapter 1052 that the Police Commissioner may call upon them for duty in the station houses would be imposing a financial obligation that is not intended and

> Law,' the act deprives the Governor of that power by limiting him to the appointment of one justice of the peace for three election districts. While the case of *Levin v. Hewes, supra,* (118 Md. 624, 86 A. 233) held that the Legislature could authorize the appointment of justices of the peace at large, in addition to those appointed for the wards of Baltimore City, it nowhere held that it could take from him the power or discharge him from the duty of appointing such justice for the 'several wards' of Baltimore City. If it could validly limit his power to the appointment of one justice for an aggregate of three districts, it could limit the power to the appointment of one justice for an aggregate of three districts, it could limit the power to one justice for the entire county or abolish the office altogether by failing to provide for the appointment of a justice for any election district in the county. Any such construction would destroy the vitality of the constitutional provision, and in our opinion is unsound. In *Levin v. Hewes, supra,* in overruling an objection to the validity of an act allowing the appointment of justices at large, it was said, 'every requirement of the fundamental law is gratified when the act expressly enjoins that a justice shall be appointed from each ward.' It is difficult to attribute to that language any meaning other than that the fundamental law does require the appointment of a justice for each ward or each election district, and this is the interpretation given the constitutional provision in *Day v. Sheriff etc.,* 162 Md. 221, 226, 159 A. 602. If it does not mean that, it interprets 'several' as meaning 'each,' and since the act deprives the Governor of the power to appoint justices of the peace for at least two election districts in Wicomico County, it is to that extent invalid."

Of course, the case of *Humphreys v. Walls,* supra, was decided prior to the enactment by Chapter 720 of the Acts of 1939 of the Trial Magistrates Act, by Section 91 of which it was provided that:

> "The Governor, by and with the advice and consent of the Senate, shall appoint for every county of the state one Justice of the Peace for each of the election districts thereof, and such number of Justices of the Peace at large in the several counties, to be designated 'Trial Magistrates', as is hereinafter specified in Section 98."

This provision became Section 93 of Article 52 of the Annotated Code (1939 Ed.). Chapter 834 of the Acts of 1941 amended this Section by adding the requirement that the Governor appoint one more Justice of the Peace for the 4th, 7th and 13th Election Districts of Montgomery County. Chapter 921 of the Acts of 1943 added a provision for additional Justices of the Peace in Prince George's County. This Section was materially changed by Chapter 777 of the Acts of 1945 by the enactment of which Section 93 was amended to read:

> "The Governor, by and with the advice and consent of the Senate, shall appoint for each county in the State one or more Justices of the Peace to be known as 'Committing Magistrates,' and such number of Justices of the Peace at large in the several counties, to be designated 'T r i a l Magistrates', as is hereinafter specified in Section 100."

Chapter 402 of the Acts of 1947 added to the Act of 1945 a direction for appointment of several Justices of the Peace at large in Prince George's County. That Act was passed as an emergency measure to take effect upon the date of its passage, and it was approved by you on April 10, 1947. Thus it will be observed that the statu-

tory provision relating to the appointment of Justices of the Peace, who are not designated as Trial Magistrates, does not fix the number to be appointed but leaves that to your discretion. Under the interpretation which the Court of Appeals has placed upon Section 42 of Article 4 of the Constitution, we think the General Assembly may not validly fix the number of Justices so as to deprive you of the power of appointing at least one for each of the Election Districts in the Counties.

Article 2, Section 10 of the Constitution provides that you shall nominate, and by and with the advice and consent of the Senate, appoint all civil and military officers whose appointment or election is not otherwise provided for in the Constitution, unless a different mode of appointment is prescribed by the law creating the office. Section 11 of that Article authorizes you to fill any vacancy during the recess of the Senate by the appointment of a suitable person whose commission shall continue until the end of the next session of the Legislature or until some other person is appointed to the same office. whichever shall first occur, and the nomination of the person thus appointed during the recess shall be made to the Senate within 30 days after the next meeting of the Legislature. Section 12 of that Article forbids the nomination of a person for the same office at the same session after being rejected by the Senate, except at the request of the Senate, or the appointment of such person to the same office during the recess of the Legislature. Section 13 of that Article, previously referred to, provides that all civil officers appointed by the Governor and Senate shall be nominated to the Senate within 50 days from the commencement of each regular session of the Legislature, and their term of office, except in cases otherwise provided for in the Constitution, shall commence on the first Monday in May next ensuing their appointment and continue for two years and until their successors qualify according to law, but the term of the office of Inspectors of Tobacco shall commence on the first Monday of March next ensuing their appointment.

In *Smoot v. Somerville,* 59 Md. 84, the question before the Court related to the Governor's power to appoint a Tobacco Inspector. It appeared that in January, 1880 the Appellee was nominated to that office and was confirmed by the Senate. In February, 1882 the Governor nominated Jones for that office and the nomination was rejected by the Senate. Subsequently the Governor nominated the Appellant but the Senate adjourned sine die on the day the nomination was made and took no action thereon. The Governor then proceeded to make a recess appointment of the Appellant and issued a commission to him. In holding that the Governor was not authorized to make a recess appointment because no vacancy existed, the Court said:

> "No vacancy . . . existed from the first Monday in March, on which day the Constitution provides that the term of office of inspectors of tobacco shall commence, down to the time of adjournment of the Legislature, nor did its final adjournment without any action by the Senate, on the nomination of the appellant cause a vacancy, which had not occurred before. There was no vacancy in the office, which the Governor was authorized by the Constitution to fill during the recess of the Senate, and, consequently the appointment of the appellant is void and of no effect, and the appellee is entitled to hold the office until his successor shall have been appointed and qualified in accordance with the directions of the Constitution, Art. 2, sec. 13."

In the later case of *Claude v. Wayson,* 118 Md. 477, the question before the Court concerned the Governor's power to appoint Justices of the Peace. In 1910 the Governor appointed Wells and Davis to be Justices of the Peace for the 6th Election District of Anne Arundel County. They were confirmed by the Senate and undertook the performance of their duties. On February 14, 1912, the Governor nominated the appellant and one Feldmeyer as Justices of

the Peace to succeed Wells and Davis but the Senate adjourned without acting upon these nominations, and after final adjournment the Governor made recess appointments of Claude and Feldmeyer and issued commissions to them. They attempted to qualify but the County Commissioners of Anne Arundel County refused to approve their bonds and consequently the Clerk of the Circuit Court declined to administer to them the oath of office. The appointees filed a petition for a writ of mandamus to compel the County Commissioners to approve their bonds and to require the Clerk of Court to administer the oath. The Court of Appeals concluded that the terms of Wells and Davis expired two years from the first Monday in May, 1910, and that there was, therefore, a vacancy which the Governor was authorized to fill for the remainder of the term. The Court said:

> "Section 13 of Article 2 of the present Constitution, under which the question here presented arises, as we have said, provides that the term of the offices therein mentioned, to which the same is applicable, shall commence at the time therein stated and continue 'for two years (unless removed from office), and until their successors, respectively, qualify according to law,' *except in cases otherwise provided for in the Constitution.* Therefore, to make this section, in respect to the extent of the term of office, applicable to justices of the peace, or in fact to any other office, it must be shown that no provision has been made elsewhere in the Constitution for such term of office. This cannot be said of the term of office of justice of the peace, when by section 42 of Article 4 it is expressly provided that justices of the peace shall hold their office for *two years.*
>
> "The term of office of justice of the peace is for two years, and not two years and until their successors are appointed and qualify, as it would be if the language found in section 13 'until their

successors, respectively qualify according to law' were made applicable thereto.

"If the term fixed by section 42 of Article 4 had been for four years, for example, instead of two, it could not be pretended that section 13 of Article 2 would apply, as it would have been in direct conflict with section 42 which made special provision for these offices. How then, can it be said that it can change the 'two years' to 'two years and until their successors qualify,' simply because the term named in section 42 happens to be two years? It does not say that all civil officers appointed for two years shall continue for two years and until their successors qualify, as the Constitution nowhere says that all officers appointed or elected for a definite term shall continue until their successors are elected and qualified . . . .

"Taking this view of the case, the extent of the term of office of justice of the peace is dependent solely upon section 42 of Article 4 which fixes the term for *two years*."

Shortly after the *Claude v. Wayson* case, the Court of Appeals was again called upon, in *Levin v. Hewes*, 118 Md. 624, to examine the constitutional provisions relating to the appointment of Justices of the Peace, this time when Chapter 823 of the Acts of 1912, establishing a People's Court in Baltimore City, was challenged as invalid. One of the contentions advanced was that even if the Act were valid there were no vacancies under the Constitution which the Governor had power to fill. In disposing of that contention the Court said:

"It has been strongly urged upon the Court that even if the act be not void because obnoxious to the Constitution, nevertheless it did not present the case of a vacancy, which under the Constitu-

tion, the Governor had any power to fill, until the meeting of the General Assembly in 1914. What constitutes a vacancy is not a question of any serious difficulty, there is no technical or peculiar meaning to the word 'vacancy' as applied to an office. It is to be understood in its ordinary signification of unoccupied. If the act had in fact created a new office, then there was a vacancy from the time it took effect until it was filled by appointment by the Governor, *Cline v. Greenwood,* 10 Or. 230. The requirement of the Constitution that nominations of appointees for civil offices shall be made within fifty days from the commencement of each regular session of the legislature applies only to appointments under laws in force at the beginning of the session, not to appointments made by the Governor under laws passed during the session. *Merrill v. School Commrs.,* 70 Md. 269; *County Commrs. v. Hellen,* 72 Md. 603.

"But in our view there were no new offices created by the Act of 1912 to be filled by the Governor, or if there were, they were the offices of five additional justices of the peace. The most important duty imposed on the Governor by the act was that of designating from among the justices appointed and confirmed, which of them were to perform their duties required by the act of justices of the People's Court."

Finally, in the recent case of *Johnson v. Duke,* 180 Md. 434, the Court of Appeals again had occasion to consider the various constitutional provisions relating to the appointment of Justices of the Peace. Duke and West were given recess appointments as Justices of the Peace after the Trial Magistrates Act took effect on June 1, 1939. At the regular session of the General Assembly which convened in January 1941, the Governor included the names of those appointees among the recess appointments required to be submitted to the Senate under the provisions

of Article 2, Section 11 of the Constitution. The Senate disapproved both appointees and in February following the Governor submitted the appointments of two other persons, one of whom was rejected by the Senate and the other confirmed. Following the adjournment of the General Assembly the person whose appointment had been confirmed declined the appointment, whereupon the Governor designated Duke and West to fill the vacancies. The Court reviewed the provisions of Article 2 and Article 4 of the Constitution to which we have referred and held that the Governor was authorized to make the recess appointments. In reaching that conclusion, the Court said:

> "While our present Constitution confers upon the Governor the power to fill a vacancy 'in any office which the Governor has power to fill,' the person so appointed is not entitled to hold the office beyond the close of the next session of the Legislature, and the Governor is required to inform the Senate of the appointment within thirty days after the commencement of that session. *Smoot v. Somerville,* 59 Md. 84, 89; *Sappington v. Slade,* 91 Md. 640, 48 A. 64. But in the event of a vacancy in the office of justice of the peace, the Governor is empowered to appoint a person to serve 'for the residue of the term.' Since the terms of all civil officers, except in cases otherwise provided for in the Constitution, commence on the first Monday of May next ensuing their appointment and continue for two years, a person appointed to fill a vacancy in the office of justice of the peace during recess of the Legislature is entitled to serve until the first Monday of May following the next session of the Legislature. Thus, by mandate of the Constitution, the tenure of office of a person holding a recess appointment as justice of the peace is different from that of other recess appointees. Chief Judge Bartol observed in 1882 that there were some constitutional

> officers whose appointments could lawfully be made by the Governor 'without the cooperation of the Senate . . . merely for the purpose of filling vacancies.' *Herman v. Harwood,* 58 Md. 1, 11, 12. In 1884 Chief Judge Alvey defined the Governor's appointive power more definitely in the following language: 'Section 11 of Article 2 has reference exclusively to the power and manner of filling vacancies in the offices therein referred to; and the appointment by the Governor and the subsequent nomination to and confirmation by the Senate, must have reference alone to the limitation of the right to hold as designated in that section, and not to any other or different term of office.' *Kroh v. Smoot,* 62 Md. 172, 176. We conclude that the members of the Constitutional Convention did not intend to require the Governor to submit recess appointments of justices of the peace to the State Senate, since that body has no concurrent authority over such appointments."

Upon these authorities, it is clear, we think, that the General Assembly may not provide by law for the appointment of fewer justices of the peace than one for each of the election districts in the Counties. Section 93 of Article 52 of the Code, as amended by Chapter 402 of the Acts of 1947, does not attempt to fix a definite number of justices; it provides merely for one or more for each County, in addition to the Trial Magistrates. Inasmuch as the term of office of a justice of the peace is not governed by Section 13 of Article 2 of the Constitution, but rather by Section 42 of Article 4 of that instrument, such vacancies as exist in that office may be filled by you at this time by recess appointments, which will be for the residue of the term. There is no requirement that these recess appointments be submitted to the Senate for confirmation at the next session of the General Assembly.

It is to be understood that the views which we have expressed are applicable to the Counties and that your in-

quiry does not concern justices of the peace in Baltimore City.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

JUSTICE OF THE PEACE—VACATIONS—ANNUAL SICK LEAVE INDEPENDENT OF ANNUAL LEAVE.

October 3, 1947.

Hon. James R. Cadden,
Central Police Station.

You have asked our opinion on whether sick leave taken by magistrates in the City of Baltimore during the course of a year must be applied against the annual leave granted to such magistrates by Section 738 of Article 4 of the Code of Public Local Laws, as amended.

Section 738 of Article 4, *supra,* as amended by Chapter 601 of the Acts of 1941, provides that the police justices of Baltimore City shall be granted a leave of absence, with pay, for thirty days during each and every year. Section 737 of Article 4, *supra,* as amended by Chapter 975 of the Acts of 1945, provides that if any justice of the peace is unable to sit at any station house in the City of Baltimore to which he has been assigned, it shall be the duty of the Governor to require another justice of the peace to perform the duties of the absentee. In such cass, Section 737, *supra,* further provides that:

> " * * * the Justice of the Peace so required to perform said duties at said station-house by the Governor, shall receive ten dollars per day for every day he shall actually serve at such station-house; which pay shall be deducted from the pay

provided to be paid to the Justice selected to sit at such station-house and failing to attend; provided, that said pay of the said Justice who may sit in the absence of the Justice so selected to sit at any station-house, shall not be deducted from the pay of the said last-named Justice, if the Governor shall certify that such absence was by reason of his necessary attendance upon any court or Justice of the Peace of said State, under its process, nor when such absence shall not exceed thirty days in the course of any one year, and when the Governor shall certify that such last-named absence, not exceeding thirty days, as aforesaid, was occasioned by sickness or other unavoidable cause."

Section 738 of Article 4, *supra,* which grants an annual leave to police magistrates is entirely separate, apart and independent of Section 737 of Article 4, *supra,* which deals with the sick leaves of magistrates. Because of this fact, we are of the opinion that the sick leave provided for by Section 737 *supra,* is independent of the annual leave as specified in Section 738, *supra,* and that the use of the former in no way limits the extent of the latter.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

LAWS

LAWS—RACING COMMISSION—TWO ACTS AMENDING SAME SECTION WILL BE GIVEN EFFECT WHEN THEY ARE NOT REPUGNANT.

July 10, 1947.

Mr. Joseph O'C. McCusker,
Chief Deputy Comptroller.

You ask us the proper method of distribution of racing receipts under the legislation passed by the 1947 Session of the General Assembly.

Senate Bill 101, which became Chapter 502 of the Acts of 1947, was introduced on January 7th and passed the House on March 27th. Its effective date is June 1st. By its provisions Section 15A of Article 78B of the Code, as said Section was enacted by Chapter 3 of the Acts of the Special Session of 1946, was renumbered to become Section 17 of said Article and was repealed and a new Section enacted in lieu thereof. The new Section provided that the general funds of the State receive one-half of all revenues from mile track licensees, fair licensees and harness racing licensees. One-half of all revenues from mile track licensees is allocated to be paid to the several Counties and to Baltimore City, upon the basis of population according to the latest available federal census. One-quarter of the revenues from fair licensees is likewise so allocated, as is one-half of the harness racing revenues. One-quarter of all revenues from fair licensees is allocated and paid to the Maryland State Fair Board. The Legislature then provided as follows:

> "From the funds allocated to each County under the provisions of this Section, the County Commissioners of the County shall allocate and pay to

each incorporated town in the County a share of such funds in the ratio which the population of each such town (figured on the best and most reliable figures available in the opinion of the County Commissioners) bears to the total population of the County, provided, however, that such distribution shall be made if and only if the two following conditions are met: (a) only if such funds are used for the construction or maintenance of streets, or sewerage facilities or water systems, or garbage collections and disposal within the town; and (b) only if such town shall raise by taxation and apply for the same purpose as is the distributed funds an amount equal to any funds so distributed. The share which any incorporated town failing to comply with the provisions of this Section would have received upon such compliance shall be retained by the County.

"Any funds allocated and paid to any County of the State under the provisions of this Section, which shall not be distributed to incorporated towns in the County as hereinabove provided, shall be used by the County only for the construction and maintenance of capital assets, including roads, schools, water systems, electric light and power systems, gas systems, bridges and grade-crossing eliminations."

House Bill 800 was introduced on March 18th and passed the Senate March 29th, and became Chapter 856 of the Acts of 1947. It amended Section 15A of Article 78B, as that Section was amended by Chapter 3 of the Acts of the Special Session of 1946, to provide the same scheme of allocation which was provided in Senate Bill 101, and which has been set forth above, except that there is no provision for the allocation of revenues from harness racing, and except that the allocation of funds, other than the general funds of the State, is "to the counties, incorporated towns and Baltimore City on the basis of

population according to the latest available Federal census. . . . In determining the population of each county for the purposes of this section, the population of all incorporated towns in such county shall be excluded."

The provisions of Section 15A, as amended by House Bill 800, are identical with those enacted by Chapter 3 of the Acts of the Special Session of 1946, except that there has been added, after the words "and shall be distributed", in the third line, the following: "except as otherwise provided."

It becomes necessary, because of the differences in Section 15A, or 17, as it is now numbered, under the terms of Senate Bill 101 and those of House Bill 800, to decide which provision is effective. It is, of course, a cardinal rule of statutory construction that repeals by implication, particularly as to measures passed by the same Legislature, are never favored. If the subsequent Act can be made by any reasonable construction to stand with the previous legislation, that construction will always be adopted. It is only when there is a plain, inevitable and irreconcilable repugnancy between the two Acts that the latter is said to repeal the former by implication. See *Baltimore v German Insurance Co.*, 132 Md. 380 at 385, wherein two Acts of the Legislature of 1914 repealed and re-enacted with amendments Section 159 of Article 81 of the Code. The Court of Appeals held that both amendments should stand and must be read together.

We put to one side two preliminary questions: First, Section 15A was not repealed and re-enacted by Senate Bill 101. The Section was repealed altogether and a new Section enacted in lieu thereof. It can be argued, therefore, that there was no Section 15A, as enacted by Chapter 3 of the Acts of the Special Session of 1946, at the time House Bill 800 became law, and that, therefore, any attempt to repeal and re-enact that Section by that bill was a nullity. We do not decide whether this contention is correct.

Again, it can very plausibly be argued that the amendment of Section 15A by House Bill 800 is ineffective and

invalid because the title of that Act states that it deals only with "the disposition and amount of breakage on one-half mile tracks." The allocation of racing revenues does not involve breakage, and it may well be that the title is too limited to permit the amendment of Section 15A under it. Again we do not decide this point.

It is clear to us that the law which governs the allocation of racing revenues is that set forth in Senate Bill 101, which we have quoted at length in the earlier part of this opinion. We have noted that the only change in Section 15A made by House Bill 800 was to add the words "except as otherwise provided." An entirely logical explanation for this change is that Senate Bill 101 had not passed the Legislature at the time of the introduction of House Bill 800, and at that time was the subject of acrimonious contention on the part of those who favored and those who opposed the bill. The draftsmen of House Bill 800 in the Legislature must be presumed to have known of the status of Senate Bill 101, and it is reasonable to say that the intent in adding the words "except as otherwise provided", was to insure a method of allocation if Senate Bill 101 did not become law. Since Senate Bill 101 did become Chapter 502 there is another method of allocation provided and, under the plain terms of House Bill 800 and the reasoning in the *German Insurance case,* the method there provided is ineffective and is put to one side, leaving Senate Bill 101 in full force and effect.

HALL HAMMOND, *Attorney General.*

LIBRARIES

LIBRARIES—DEPARTMENT OF EDUCATION—EMPLOYEES MUST JOIN THE STATE TEACHERS' RETIREMENT SYSTEM.

September 4, 1947.

Miss Jeanne B. Lloyd,
The Board of Trustees,
Harford County Library.

This is in reply to your recent letter inquiring about whether professional and clerical employees of libraries established by the State Department of Education under Chapter 980 of the Acts of 1945 must enter the Teachers Retirement System. This is to advise you that it is mandatory upon such library employees to belong to the Teachers Retirement System, and that membership in such System is a condition of employment.

Section 174 of Article 77 of the Code of Public General Laws, as enacted by Chapter 980 of the Acts of 1945, reads as follows:

> "The professional and clerical employees of any library established or operating under the provisions of this sub-title shall be included in the definition of 'Teacher' and 'Member', as said terms are defined respectively in sub-sections (3) and (4) of Section 95 of this Article, and all such professional and clerical employees shall be entitled to all the rights and privileges and subject to all of the obligations of the Teachers Retirement System, as established and maintained under Sections 95 to 110, inclusive, of this Article."

You will note that under the above Section library employees are included in the definition of "Teacher", as con-

tained in Section 95 (3) of Article 77. Section 97 (1) of Article 77 provides that all persons who become teachers after the effective date of the Retirement System "shall become members of the Retirement System as a condition of their employment". There is an exception in Section 97 (3) in the case of teachers who are members of a retirement system of a city or county, but this exception is not applicable to new teachers and would, therefore, not be applicable to newly employed librarians. In view of these provisions of the law and the fact that Section 174 of Article 77 provides that library employees "shall be entitled to all the rights and privileges and subject to all of the obligations of the Teachers Retirement System", we are of the opinion that membership in the System is mandatory as in the case of teachers.

This opinion may be burdensome to some librarians who come into the State service already carrying annuity insurance up to the level of their ability to pay; nevertheless we are required to advise you that membership in the Teachers Retirement System is a mandatory condition of employment.

RICHARD W. EMORY, *Deputy Attorney General.*

LICENSES

LICENSES — SODA FOUNTAINS — STATE LICENSE MUST BE PROCURED FOR SODA FOUNTAIN IN CITY MARKET— LICENSES—RESTAURANT—STATE LICENSES MUST BE PROCURED FOR RESTAURANT IN CITY MARKET.

June 9, 1947.

Mr. M. A. Powers,
Chief Inspector State Licenses.

This is in reply to your letter of June 4th inquiring about whether restaurant and soda fountain licenses are required in City Markets. It is my opinion that such licenses are required in City Markets because Sections 282 and 289 of Article 56 of the Code, which require soda fountain and restaurant licenses, contain no exception which would justify exempting such businesses from the requirement of a license on the ground that they are conducted in a City Market. Attorney General Armstrong, in 1921, ruled that a license must be procured for restaurants or eating places in the City Market. 6 Opinions of the Attorney General, 342.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

LICENSES—PIN BALL MACHINES—COMPTROLLER TO SUPERVISE ISSUANCE AND ENFORCEMENT OF LICENSES FOR PIN BALL MACHINES IN CAROLINE COUNTY.

July 9, 1947.

Miss Rachel Collison, Clerk,
County Commissioners of Caroline County.

We have your letter of June 7, 1947, in which you raise several questions in regard to Chapter 921 of the Acts of 1947.

Under the provisions of Chapter 921, *supra,* it is unlawful to operate a free play pinball or console machine without first having obtained a State license. The law further provides that all license fees collected "shall be paid to the County Clerk for deposit in the County Fund" and shall be disbursed from that Fund "in the manner and for the purposes prescribed by the County Commissioners". The specific questions asked by you may be summarized as follows:

(1) Should the license fees in question be paid to the Clerk to the County Commissioners or the Clerk of the Circuit Court?

(2) What State agency or official is charged with the responsibility of enforcing the provisions of Chapter 921, *supra?*

(3) What State Agency or official is required to furnish the issuing clerk with the necessary licenses and certificates?

Under the express provisions of the Act, a license to operate a free play pinball or console machine must be obtained from the Clerk of the Circuit Court in the County in which the machine is to be operated or maintained. The license fees thus collected must be paid by the issuing Clerk to the "County Clerk" for deposit in the "County Fund". Although the term "County Clerk" is not defined in the Act

with particularity, we believe that in the case of Caroline County, this term should be construed to mean the Clerk to the County Commissioners.

The answer to the second and third questions outlined above is to be found in Section 8 of Article 56 of the Annotated Code of Maryland (1939 Edition). By the terms of this Section, the State Comptroller is authorized and empowered to superintend the issuance of all licenses by the Clerks of the several Courts of this State. Moreover, Section 8, *supra*, provides for the appointment of a chief inspector of licenses and his assistants and requires the State Comptroller, through these inspectors, to investigate the adequacy of all licenses issued by the Clerks of Court.

It follows, therefore, that the State Comptroller has been delegated the power to supervise the issuance of all licenses by the Clerks of the several Courts and it is his office which is empowered to and will supervise the issuance and the enforcement of the licenses specified in Chapter 921 of the Acts of 1947.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

LICENSES — TRADERS — HAWKERS AND PEDDLERS — OPERATIONS CONDUCTED IN MORE THAN ONE COUNTY—PEDDLERS' LICENSE REQUIRED FOR PERSONS ENGAGED IN BUSINESS OF SELLING GASOLINE TO OYSTER BOATS.

September 24, 1947.

Mr. Joseph W. T. Smith, Clerk,
Circuit Court for Wicomico County.

Your letter of August 12, 1947, states that a resident of Wicomico County plans to purchase a small oil tanker for the purpose of selling fuel to owners of gasoline powered

oyster boats operating in the Wicomico and Nanticoke Rivers. We further understand that the vendor plans to sell gasoline to the oyster boats either at their harbor or at the oyster beds; that the vendor will neither operate on fixed routes nor pursuant to orders previously received; and that the vendor will have no fixed place of business. You ask for our opinion on the type of State license required for this operation.

Section 24 of Article 56 of the Annotated Code of Maryland (1939 Edition) provides that no hawker or peddler shall buy for sale out of the State or buy to trade, barter or sell or offer to trade, barter or sell within the State any goods, wares or merchandise until he shall have first taken out a license for that purpose. Section 25 of Article 56, *supra*, fixes the license rates for the various classes of hawkers and peddler's; Section 26 of Article 56, *supra*, provides that no peddler's license shall be granted in the name of a partnership or company; and Sections 27 through 33 of Article 56, *supra*, make it unlawful for any peddler to operate without a license and establishes the penalties for any unlawful operation.

Section 40, *et seq.*, of Article 56 of the Annotated Code of Maryland (1939 Edition) imposes the trader's license. In substance, these Sections provide that no person or corporation other than a grower, maker or manufacturer shall barter or sell or otherwise dispose of or shall offer for sale any goods, chattels, wares or merchandise within the State of Maryland without first obtaining a license. These Sections also declare that when any person shall propose to sell or barter or dispose of or offer for sale certain enumerated articles, he shall apply to the Clerk of the Circuit Court of the County in which he proposes to carry on such selling (or the Clerk of the Court of Common Pleas in Baltimore City) for the issuance of a license which shall be good and sufficient as a license to offer for sale in every part of the State. The Sections also state that a trader's license shall not authorize the holder thereof to open or operate any store or fixed place of business for selling or

offering for sale merchandise in any place other than the place of business designated in the license.

The law applicable to trader's licenses contemplates a fixed place of business located within the County in which the license is issued.—*State v. Amick,* 171 Md. 536 (1936). The applicant for such a license is required to state on oath the location of his place of business and the license fee is graduated in amount according to the stock in trade owned or held by the licensee. As a result, an individual selling gasoline on a commission basis from a fixed place of business would be required to secure a trader's license—16 Opinions of the Attorney General 223; and if in connection with that place of business the individual conducted a peddler's business, that activity would call for the impost provided for by Section 24 of Article 56, *supra,—Brown v. State,* 177 Md. 321, (1939); 25 Opinions of the Attorney General 351. In the present case, however, a fixed place of business is not established by the facts. We hold, therefore, that the individual in question is not required to secure a trader's license.

No unbending rule regarding the application of the hawker's and peddler's statute may be cast for all cases. *State v. Amick,* 171 Md. 536 (1939). We have held however, that a peddler's license is required if articles are sold and delivered by persons who travel from place to place—18 Opinions of the Attorney General 328; on no fixed route—15 Opinions of the Attorney General 210, cf. 23 Opinions of the Attorney General 313; and selling without orders previously secured—20 Opinions of the Attorney General 466. We have also held with respect to the necessity of obtaining a peddler's license that there was no difference between selling gasoline and any other commodity—24 Opinions of the Attorney General 485; and that where trucks, filled with gasoline, were sent into various Counties for the purpose of making sales wherever possible to new customers such a license was required—18 Opinions of the Attorney General 330.

We are convinced that the operation described in your

letter and outlined above is essentially that of a hawker or peddler. This being so, it would be unlawful for the citizen in question to buy, barter or sell gasoline until he "shall have first taken out a license for that purpose"—Section 24 of Article 56, *supra.*

Although it is clear that a hawker's and peddler's license is required in this case and that it would be unlawful to sell gasoline in the manner proposed without such a license, the exact amount of the license which should be paid is obscured in the antiquity of Section 25 of Article 56, *supra.* So far as is here material, this Section, which sets the license rates, is as follows:

> "For every license to travel on foot, the sum of one hundred dollars; to travel with a horse or other beast of burden and wagon or other vehicle, the sum of one hundred and fifty dollars; with two horses or other beast of burden and wagon or other vehicle, the sum of two hundred dollars; and with a motor truck or motor vehicle of any description whatsoever, the sum of three hundred dollars."

Obviously, the applicant in this case will not conduct his business on foot or with horse and wagon. The statute provides, however, that the license rate shall be three hundred dollars for the licensing of persons operating "from any motor vehicle *of any description whatsoever*". A momentary reflection will reveal the dilemma occasioned by this phrase. To hold that the gasoline tanker is not a motor vehicle "of any description whatsoever" would result in the denial of a license which the law requires; to hold that the tanker is a motor vehicle "of any description whatsoever" would do partial violence to the ordinary lay concept of the term "motor vehicle" and, perhaps, even to judicial authority.—*Duckwald v. Albany,* 25 Ind. 286.

Statutory authority for licensing hawkers and peddlers first appeared in Maryland as Chapter 341 of the Acts of

1856, and for all practical purposes has remained unchanged from that time to the present. To hold that no license could be issued in this case by restricting the meaning of the phrase "motor vehicle of any description whatsoever" would be tantamount to ignoring change in social and economic conditions within the past ninety years. The Court of Appeals has refused to narrow the impact of the law. Thus the Court said in *State v. Amick*, 171 Md. 545, (1936), at page 545:

> "It is our opinion, however, that its provisions should be construed in the light of many changes which have followed its enactment during the past eighty years, and in view of modern social conditions, and especially the improved methods of transportation and commerce * * *."

In our opinion, a liberal construction should be given to the phrase "motor vehicles of any description whatsoever". We hold that for the purpose of the hawker's and peddler's law that phrase should include a gasoline tanker.

One question remains. As stated above, the applicant in the instant case intends to sell gasoline to oyster boats operating in the waters of the Wicomico and Nanticoke Rivers. We hold that this activity involves an operation in three Counties and that as a result three separate licenses are required.

The boundary line separating Worcester, Wicomico and Dorchester Counties is the channel of the Wicomico River and the Nanticoke River. In this connection, Section 2 of Article 13 of the Constitution of Maryland, which defines the boundaries in question, provides, in part, as follows:

> "Beginning at the point where Mason and Dixon's line crosses the channel of Pocomoke river, thence following said line to the channel of the Nanticoke river; thence with the channel of said river to Tangier Sound, or the intersection of

Nanticoke and Wicomico rivers; thence up the channel of the Wicomico River to the mouth of Wicomico creek; * * *."

Section 26 of Article 56, *supra,* provides that no hawker's or peddler's license shall extend beyond the County in which it may be issued. When the activities of a peddler have extended beyond one County, we have held that a license should be obtained for each County in which the operation is conducted.—14 Opinions of the Attorney General 173. That opinion is controlling here, and as a result, the applicant in question should secure a peddler's license to operate in Worchester, Wicomico and Dorchester Counties.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

LICENSES—CONSTRUCTION LICENSES—LIMITATIONS—PENALTIES—LAW INTERPRETED.

November 19, 1947.

Hon. James J. Lacy,
State Comptroller.

You have asked our opinion on various questions concerning the deficiencies in the payment of the license taxes levied by Section 291 of Article 56 of the Annotated Code of Maryland of many persons, firms or corporations carrying on the business of construction, as defined in that section, which was first enacted by Chapter 704 of the Acts of 1916 and was repealed and re-enacted with amendments by Chapter 53 of the Acts of 1941.

Your first question is as to what period of limitations there may be as to a taxpayer who has failed to pay the tax for a number of years.

It is our opinion that the four year period of limitations provided by Section 160 of Article 81 of the Code applies to license taxes including those on persons carrying on the business of construction. Section 160 reads in part, as follows:

> "All State, county or city taxes of every kind for which no other period of limitations is prescribed by this Article shall be collected within four years after they shall have become due, or else shall be utterly barred; and no such taxes shall be collected after said period. . . ."

The Court of Appeals in the case of *Theatrical Corp. v. Brennan,* 180 Md. 377, said at page 380:

> "There is no doubt that the Legislature, or a municipality duly authorized by the Legislature, may impose license taxes upon businesses, occupations or amusements, either for regulatory purposes, under the police power, or for revenue purposes, under the taxing power. Cases in which this court has upheld *such taxes* are, among others:"

citing cases including those on billiard tables, oyster packers, wheeled vehicles, commission men, junk dealers and auctioneers. See also *Meushaw v. State,* 109 Md. 84, in which a charge for the City of Baltimore for the privilege of selling in the wholesale produce market was held by the Court of Appeals to be a tax.

Inasmuch as license charges upon businesses or occupations are clearly taxes, there is no reasonable doubt that the language of Section 160 as to all taxes "of every kind" comprehends such license charges. This interpretation of the statute is buttressed by its history. The Tax Revision Commission of 1928, which originally drew Section 160 as

the Legislature passed it in 1929 by Chapter 226 of that year, said this:

> "We have accordingly provided that *all taxes without exception* must be collected within four years from the time they fall due, except of course in case of fraud."

This spells out the fact that the language in Section 160, which was re-enacted in 1941 by Chapter 701 of the Acts of that year pursuant to the recommendations of the 1939 Tax Revision Commission, namely "All State, county or city taxes of every kind" is another way of saying all taxes without exception.

Although the language of the refund provisions contained in Sections 162A to 162E of Article 81, which were also enacted by Chapter 701 of the Acts of 1941, is on its face broader than that in Section 160, it is worthy of note that in 27 Opinions of the Attorney General 252, we held that the refund provisions applied to traders' license fees or taxes.

Since Section 160 of Article 81 provides that taxes must be collected within four years from the time they become due, and since the contractors' tax required by Section 291 of Article 56 is payable on June 1st of each year at the latest, under Sections 1 and 7 of Article 56, it follows that you cannot now enforce collection of such taxes due, except for the years 1944, 1945, 1946 and 1947.

Your next question is as to your discretion and authority to make adjustments with delinquents as to back taxes, penalties and fines. Section 6 of Article 56 provides that any person doing business without a license shall, upon conviction, be fined not more than $100; and Section 7 of Article 56 provides that any person who shall not procure a license within the time prescribed by law shall pay in addition to the license fee an additional fee equal to 10% of said license fee for each and every month thereafter that

the fee shall remain unpaid, with the provision that no licensee shall be deemed to be in default until thirty days from the date upon which he is required to obtain the license. Read literally without consideration of all the facts involved, this would seem to mean that the penalty of 10% must be added for each month for which one liable to take out a license has continued in default. In other words, this would seem to mean that Contractor A, who did not take out a license by June 1, 1944, would be liable for the license fee of $15.00 plus a penalty of 110% for the balance of that license year, plus a penalty of 120% for each of the succeeding years. However, it is our considered view that such a literal construction is unsound and untenable. We take the true intent of the statute to be, as far as the license under consideration is concerned, that the penalty continues only for the year for which the license would be valid. It seems obvious and compelling that after the expiration of a particular license year, it would not be possible for a contractor to secure a license for that year, and the exaction which the State requires for the privilege of doing business for a particular length of time should be related to the length of time involved. A rough analogy, but one that seems to have persuasive force, is found in the case of *ex parte Maulsby*, 13 Md. 625. Maulsby was committed for contempt until he appeared before the Grand Jury and gave certain information. He was discharged on habeas corpus on the ground that the Grand Jury had ended its term and therefore it would be impossible for him to comply with the terms of the writ. In our view of the case, therefore, the maximum tax which could be collected for any license year would be the original tax of $15.00 plus eleven months' penalty at the rate of $1.50 a month, or $16.50, making a total of $31.50.

Section 35 of Article 19 of the Code provides, as follows:

> "The Comptroller is authorized and empowered to adjust and settle the claims of the State . . . against corporations and individuals who may be

> indebted and in arrears to the State for two years . . . and for the purpose of closing all such cases the Comptroller is fully authorized to compromise the same by abating the interest that has accrued, or any portion thereof, or any part of the principal debt, in his discretion, so as best to subserve the interest of the State. . . ."

This comforting prospect of being able to adjust the many cases of delinquency in the enforcement of the tax is dissipated considerably by the language which follows in the same Section that:

> "the Comptroller shall be satisfied after thorough examination into the claims that the same could not be collected by the State by legal process and further, that the Governor and Treasurer for the time being shall each approve in writing any such statement before the same shall be effective. . . ."

Under Section 8 of Article 56, you are given full power and supervision over the license laws of the State and the issuance of all licenses by the Clerks of the several Courts of the State. In view of the provisions of that Section and of Section 35 of Article 19, it would seem that you must enforce collection of all delinquent taxes and penalties, except in specific cases where you are satisfied that collection could not be enforced by legal process, and the Board of Public Works acquiesces.

It has been suggested that as a practical matter the provisions of Section 291 of Article 56 cannot be enforced because the taxes imposed apply only where the gross business is over $5,000 a year, and Attorney General Armstrong ruled in 7 Opinions of the Attorney General, 272, that the Chief Inspector of State Licenses does not have the authority to demand the production of inventories or other books or papers of licensees or prospective licensees. This opinion was rendered in 1922 when, happily, we were

not subject to the payment of State income taxes. Since the passage of Chapter 11 of the Acts of the Special Session of 1937, there was available to the Chief Inspector of State Licenses, as there now is, the gross income reported by each income taxpayer. Section 225 of Article 81, as enacted by Chapter 11 of the Acts of the Special Session of 1937, now Section 240 of Article 81, contains a provision that income tax returns are a secret and must be kept so "except to an officer of the State having a right thereto in his official capacity". This exception would permit you to make available to the Chief Inspector of State Licenses the gross income reported by those who apparently should pay the tax required by Section 291 of Article 56.

The final question which we have been asked to answer is to whom would be payable the taxes collected under the authority of Section 291, the State or the City.

Prior to the adoption by the Legislature of the recommendations of the Sherbow Commission, revenue received by the State from licenses issued by Clerks of the Court were not shared with local subdivisions. The Commission, in its report, recommended that construction firm licenses, along with many others, should be considered local in scope, and that the revenue received from such licenses should be allocated to the incorporated town or city in which the licensed activity is carried on. The statute which effected this recommendation is Chapter 487 of the Acts of 1947, which added a new Section known as Section 1B, to Article 56 of the Code. It provided that receipts from licenses for construction firms, together with many others, should be subject to a deduction by the Clerk issuing the same of the fees presently authorized and an additional fee of 3% to be paid into the General Fund of the State for the expenses of the State License Bureau. All net proceeds from said licenses are to be paid by the Clerks to the incorporated town or city in which the licensed business is located or, if not in a town or city, to the County. This Act specifically provides that the provisions of this Section shall be construed to apply only to licenses issued after June 30, 1947.

It is apparent that the legislative intent was not to disturb the fiscal estimates and arrangements of the State prior to the fiscal year beginning July 1, 1948, and that all license fees for the year beginning May 1, 1947, should go to the State and not to the City, even though the licenses actually are issued after July 1, 1947. The time when the licenses should have been issued, and not the time when they are actually issued controls. Therefore all license fees, taxes and penalties which are now collectible by the Clerks of Court under your supervision, by the authority of Section 291 of Article 56, are payable to the State rather than to local subdivisions.

HALL HAMMOND, *Attorney General.*

LICENSES—APPLICABILITY AND EFFECT OF VARIOUS SECTIONS OF ARTICLE 56 OF THE ANNOTATED CODE.

December 9, 1947.

Hon. James J. Lacy,
State Comptroller.

You have asked us to decide a number of questions which have arisen in connection with the applicability and effect of the various Sections of Article 56 of the Annotated Code which impose license fees. We shall answer your questions one by one:

First, you wish to know whether undertakers are required to obtain traders' licenses. In our opinion, they are not. It is significant that Sections 40 to 73 of Article 56 have never been construed to include within their scope those engaged in the business of undertakers. This long continued administrative interpretation of the law is most persuasive. See *Arnreich v. State,* 150 Md. 92. Further, we are convinced that this long practice is correct. A trader's license is required for the sale or offering for sale of goods,

chattels, wares and merchandise. It is not as such imposed upon those who primarily render service. The connotation of trading or traders clearly denotes, and has come to mean, one whose business is to buy and sell merchandise for a profit. The general acceptance of an undertaker is one who furnishes service and, while there may be included in the overall service the sale of tangible personal property, nevertheless the function of the undertaker in the transaction is merely to display that property as an agent showing a sample and not as a merchant making a sale. This distinction has been recognized in an earlier opinion of this office. See 23 Opinions of the Attorney General, 310 wherein the facts were that a partnership was engaged in the rug and furniture business at one location for which it held a trader's license. At a separate though communicating location, the partnership engaged in the undertaking business. The question was whether the chain store law was applicable. It was pointed out that the chain store law was an integral part of the trader's license law, and that it has been ruled that no one has been required to comply with the chain store law unless he is also required to obtain a trader's license. See *Reed v. Claypoole,* 165 Md. 250, 255. Assistant Attorney General Henderson, now Judge Henderson, ruled that, "It follows that since the parties in the case under consideration are only operating one *trading* establishment, the chain store law is not applicable."

Further support is given to the position that undertakers do not require traders' licenses by the fact that it has been ruled under the Sales Tax Law that they are essentially engaged in furnishing services and must, as the consumers of the commodities which they purchase in carrying on their business, pay the Sales Tax to their suppliers.

Next you wish to know whether plumbers are required to hold traders' licenses. This question seems to be answered clearly by the language of Section 290 of Article 56, which says that "Each person, firm or corporation, not holding a trader's license, operating or conducting the business of a plumber or gas fitter" shall take out a license. The legis-

lative intent would appear to be that a plumber who sells to other plumbers, or the public, substantial amounts of plumbing materials should operate under a trader's license, while plumbers who primarily render service only should take out plumbers' licenses. Obviously under the language quoted only one type of license is required.

You next ask whether plumbers, electricians and painters are required to obtain construction licenses under the provisions of Section 291 of Article 56 of the Annotated Code (1943 Supp.). The question arises because plumbers and electricians are required under other statutes to have licenses as a pre-requisite for the carrying on of their business. The argument is made that the Legislature did not intend that more than one license should be necessary. This argument overlooks the fact that the licenses relied on to relieve the necessity of obtaining construction licenses are those imposed for the purpose of the public health and safety in insuring that no one not qualified shall engage in the business of an electrician or a plumber. In other words, they are regulatory licenses and not those imposed for the obtaining of revenue. The license required by Section 291 is imposed for revenue. The point at issue has been decided by a previous opinion of this office. See 14 Opinions of the Attorney General, 160. There, Attorney General Robinson, on March 14, 1929, reversed a ruling he had given on May 29, 1928. His original opinion was based on the understanding that administrative practice had always been not to require construction licenses of electricians licensed under Chapter 244 of the Acts of 1906, which was entitled "An Act to regulate in Baltimore City the licensing of persons conducting or managing a business or installing any wires or electrical apparatus to convey electric current." In his overruling opinion, Attorney General Robinson says that the Chief Inspector of the State License Bureau informed him "that it has always been the view of his Department that electrical contractors are required to obtain the license and pay the fee imposed by the Act of 1916 (Section 291 of Article 56) that this interpretation

has been recognized by the electrical contractors generally as being correct, and that practically all of such contractors have voluntarily obtained these licenses." He goes on to say:

> "It is quite apparent from an analysis of the Act of 1916 and the Act of 1906, by which the State Board of Electrical Examiners and Supervisors was created, that the two Acts are not in conflict, the object of the Act of 1906 was to require a certificate of qualification before any person, firm or corporation could carry on the business of a master electrician as therein defined. The Act of 1916 on the other hand has no connection with the qualifications of electrical contractors, but is in the nature of a trader's license.
>
> "It seems clear, therefore, that aside from any custom on the subject, it was intended by the Legislature to require electrical contractors to obtain a license under each of these Acts."

The reasoning of this opinion makes it clear to us that electricians are required to comply with the provisions of Section 291 of Article 56.

In the case of painters no question of another license is involved. Section 291 provides in terms that: "Any person, firm or corporation accepting orders or contracts for doing any work on or in any building or structure requiring the use of *paint*, stone, brick . . . iron or steel, sheet iron, galvanized iron, tin, lead, electric wiring or other metal or any other building material . . ." The use of the word "paint" makes it explicit that a painter or painting contractor whose annual gross business equals or exceeds $5,000, as the Act requires, must take out a construction license.

In the case of plumbers, they are subject to taxation as such under the provisions of Section 290 of Article 56, and by that Section are required to have either a trader's or

a plumber's license. This immediately poses the question of whether, in addition, they are required to have a contractor's license. The fact that the Legislature took the trouble in Section 290 to specifically say that they should not be required to have both a trader's and a plumber's license, seems to us to negative the thought that the possession of either of those licenses by a plumber exempted him from a contractor's license if he did as much as $5,000 a year of the type of work listed in Section 291. See *State v. Cahen,* 35 Md. 236. It is true that the administrative practice has been not to collect both a plumber's and a contractor's license from the same individual. We are not convinced, however, that this is conclusive in the present case, because the language seems entirely unambiguous and plain.

You also ask whether filling stations are required to take out traders' licenses. There seems no doubt that they are. See 16 Opinions of the Attorney General, 223 and 14 Opinions of the Attorney General, 165.

Your final question is as to whether or not night clubs and other establishments holding liquor licenses, which are permitted to provide amusement for their patrons in the form of singers, dancers and floor shows, are required to obtain show licenses under the provisions of Sections 103 to 111 of Article 56. We take the answer to be that the license is imposed not upon the theatre or exhibitor as such, but upon the performer or company of players. This was held by Attorney General Ritchie in several opinions found in 2 Opinions of the Attorney General, 263 and 4 Opinions of the Attorney General, 115. In the latter opinion he held that the theatre proprietor could not take out one annual license and exhibit different companies of stage players under that license throughout the year. He said: "The license in question is not imposed upon the theatre but upon the company, and each company must either have a fifty dollar annual license, or two dollar license for each exhibition." The language of the statute certainly supports Attorney General Ritchie's conclusion. We conclude, therefore, that any entertainer in a night club in Baltimore City must

take out the license imposed by Section 106, and any in the counties, that imposed by Section 103. The fees imposed in Baltimore City are $200.00 a year, or $5.00 for each night of performance, and in the counties $50.00 a year or $2.00 for each exhibition, and those fees, as we have said, are payable by the performer. This is made plain by the provisions of Section 108 that every stage player, ventriloquist, slight-of-hand performer, rope dancer, etc. "who shall perform or exhibit in any County in this State or the city of Baltimore without having paid the tax herein directed shall forfeit sixty dollars to be collected by the Sheriff.", and the language of Section 109 that "It shall be the duty of the persons enumerated in the preceding Section to exhibit their licenses to any Justice or Constable who demands a view thereof." The itemization of the entertainers who are liable for the tax is couched in somewhat antique language, but the interpretation has been consistent that any entertainment commonly associated with or connoted by the term "show" must pay the required fees. Section 111 gives an indication that this is a correct interpretation. It says: "Every entertainment, exhibition or performance given for charitable objects shall be exempt from taxation or license", and the implication is clear that those not given for charity are taxable.

HALL HAMMOND, *Attorney General.*

MARRIAGES

MARRIAGES—LICENSES—WAIVER OF 48 HOUR REQUIREMENT IN THE CASE OF MEMBERS OF ARMED FORCES AUTHORIZED UNTIL PRESIDENT DECLARES WAR AT END AND SIX MONTHS THEREAFTER.

February 19, 1947.

Mr. D. Ralph Horsey, Clerk,
Circuit Court for Caroline County.

We have your request for an opinion as to whether it is still proper to issue marriage licenses to persons in the military service without the forty-eight hour interval between the application and the issuance of the license.

Section 5A of Article 62 of the Annotated Code of Maryland, as amended by Chapter 249 of the Acts of 1945, authorizes Clerks of any of the Courts to waive the forty-eight hour requirement "for the duration of the present war and six months after the termination thereof".

We are of the opinion that the duration of the present war obtains until such time as the President of the United States declares the war to be at an end. The President has not yet done so; and it is, therefore, proper to continue to waive the forty-eight hour requirement as to persons on active duty in the armed forces or in the merchant marine of the United States.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

MARRIAGES—LICENSE MAY BE GRANTED UNDER CERTAIN CIRCUMSTANCES FOR MARRIAGE OF A PREGNANT GIRL WHO IS SEVENTEEN YEARS OF AGE.

December 23, 1947.

Mr. Erman A. Shoemaker, Clerk,
Circuit Court for Carroll County.

We have your letter in which you state that application has been made to you for a marriage license to permit a boy fifteen years of age to marry a girl seventeen years of age. You state that the girl is pregnant and that fact is attested by the certificate of a physician. You ask if you are authorized to issue a license under the circumstances.

Section 7 of Article 62 of the Code, as amended by Chapter 105 of the Acts of 1947, provides that it shall be unlawful for any female below the age of sixteen years or any male below the age of eighteen years to marry, or for the parent or guardian to permit any such person to marry, or for any female between the ages of sixteen and eighteen years, or any male under the age of twenty-one to marry, unless the parent or guardian shall assent thereto, and in the case of a female, swear or affirm that she is over sixteen years of age and in the case of a male, swear or affirm that he is over eighteen years of age. This Section then provides:

> "* * * that on the certificate of a licensed physician, presented with the application for a marriage license, to the effect that the girl is pregnant or has given birth to a child, a marriage license may be issued without the consent of her parent or guardian, and if the putative father of the child or prospective child of a girl under eighteen years of age is over sixteen years of age, a marriage license may be issued without the consent of his parents or guardian."

It is our opinion that, under the quoted provision of this statute, you may issue the marriage license if the parents or guardian of the male consent thereto. The consent of the parents or guardian of the woman is unnecessary under the circumstances here stated; however, the consent of the parents or guardian of the male is required unless he is over sixteen years of age.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MARYLAND TRAINING SCHOOL FOR BOYS

MARYLAND TRAINING SCHOOL FOR BOYS—STATE IS NOT LIABLE FOR ACTS DONE BY BOYS WHO HAVE ESCAPED.

January 29, 1947.

Mr. Louis J. O'Donnell,
Assistant to the Governor.

Attorney General Hammond has requested me to reply to your letter of January 24th in connection with the alleged killing of a cow by a boy, who had escaped from the Maryland Training School for Boys. Mrs. Clara Popp, the owner of the cow, has written to Governor Lane with a view of seeking indemnity from the State.

I know of no statute which imposes liability upon the State in a case of this kind. On June 18, 1920, former Attorney General Armstrong gave an official opinion concerning the liability of the State for property stolen by boys who had escaped from the above institution. In the course of that opinion, General Armstrong observed that, as a general rule, a parent is not liable in damages for torts committed by a minor child, even though the child lives with the parent and is under his control, unless, of course, the acts were done by his authority, or with his knowledge or consent, or were ratified by him or were done for his benefit, or in connection with his business, or by reason of negligence on his part, which made it possible for the child to cause the injury complained of. He concluded, therefore, that unless such circumstances existed in that case as would bring it within one of the mentioned exceptions, the institution was not liable in the premises. This opinion is reported in 5 Opinions of the Attorney General, 512.

It is our view that, under the circumstances set forth in the correspondence which you forwarded to us, and which

is returned herewith, no liability on the part of the State, or the institution, exists in the instant case, because there is no claim or assertion that the act was other than an independent and voluntary act on the part of the boy who had escaped from the institution, and is not within the exceptions mentioned in General Armstrong's opinion.

J. EDGAR HARVEY, *Assistant Attorney General.*

MEDICAL EXAMINERS

MEDICAL EXAMINERS — PHYSICIANS AND SURGEONS — THE WORD "PHYSICIAN" MAY NOT BE APPLIED TO A PERSON WHO IS NOT QUALIFIED TO PRACTICE MEDICINE.

May 23, 1947.

Dr. E. H. Kloman, Secretary,
Board of Medical Examiners.

We have your letter calling our attention to a listing in the classified section of the current telephone directory under the heading "Naturopathic Physicians". You ask if the use of the word "physician" is legally permissible in this connection.

In 25 Opinions of the Attorney General 457, we observed that naturopathy was not recognized by the laws of this State, and that persons attempting to practice it in the treatment of the sick were apparently doing so in violation of the law.

In 16 Opinions of the Attorney General 73, it was said that: "The term 'physician' as used in our statutes means one who is authorized to practice medicine and surgery." It was consequently held that a chiropractor was not a physician, and in 24 Opinions of the Attorney General 172, it was held that a chiropractor may not use the term "chiropractic physician".

Section 139 of Article 43 of the Code provides that:

> "Any person shall be regarded as practicing medicine within the meaning of this sub-title who shall append to his or her name the words or letters 'Dr.', 'Doctor', 'M.D.', or any other title in connection with his name, with the intent thereby to imply that he or she is engaged in the art or

science of healing, or in the practice of medicine in any of its branches . . ."

We think that use of the word "physician", as employed here, is condemned by statute, and accordingly, it is our opinion that the word may not properly be adopted by persons who are not qualified to practice medicine under the laws of Maryland.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MERIT SYSTEM

MERIT SYSTEM—ACCUMULATED SICK LEAVE IS NOT ALLOWABLE FOR PREGNANCY.

January 31, 1947.

Mr. W. D. Owens,
State Employment Commissioner.

We have your recent letter in which you advise us that it has been the practice of your Department to grant leaves of absence without pay for a period not to exceed one year for maternity purposes, and that you do not permit accumulated sick leave with pay in cases of that nature. You state that that practice is now being challenged, and you have asked our opinion in the premises.

Section 22 of Article 64A of the Code (1943 Supp.), after providing for vacation leave states that "any employee shall be entitled to sick leave with pay for not in excess of thirty days in any calendar year; provided, however, that if any employee in any calendar year uses less than the full amount of sick leave allowable, such unused leave shall be accumulated up to 100 working days and shall be available to such employee for sick leave at any time." Paragraph (b) of Section 22 authorizes you to provide by rule for granting leaves of absence for longer periods with pay, or with part pay to employees "who may be disabled either through injury or illness as a result of, or arising from their respective employment; . . ." You inform us that, pursuant to the authority contained in the last quoted portion of the law, Rule 50 has been promulgated, but in the view we take of the question you present, we think both the Rule and the statute under which it was made are inapplicable.

The question in our opinion turns upon the meaning to be attributed to the word "sick", and if pregnancy is not a condition of sickness, then it necessarily follows, in our

opinion, that the practice which you have been following is sound. In *Lee v. Metropolitan Life Insurance Co.,* 180 S. C. 475, 186 S. E. 376, the Appellant brought suit under an insurance policy which provided benefits for disability resulting from bodily injury or disease. The Court said that the evidence left but one reasonable deduction, which was that Mrs. Lee's condition was due entirely to her condition of pregnancy. The Court quoted, with approval, from *Rasicot v. Royal Neighbors of America,* 18 Idaho 85, 108 P. 1048, 1053, 29 L.R.A. (N.S.) 433, 138 Am. St. Rep. 180, as follows:

> ". . . It is also contended that the insured was not in 'sound health' at the time of delivery because of pregnancy. Pregnancy is not per se a condition of 'unsound' health, nor is it a 'disease' or 'ailment' within the meaning of those terms used in this application and policy. . . . Childbirth is a physiological fact which occurs in the regular course of nature, and neither signifies nor entails disease or ailment in the usual and ordinary use of those terms."

In the later case of *Carter v. Howard,* 160 Ore. 507, 86 P.2d 451, the Court, in discussing this question, said:

> "It is conceded that when she engaged defendant to care for her, she was pregnant; and while pregnancy is not a disease nor an injury, but a natural condition for a married woman, the attendance of an accouching physician at childbirth is always desirable and usually imperative."

In the light of these authorities, it is our opinion that pregnancy is not within the terms of Section 22 of Article 64A of the Code providing for sick leave, and that the practice which you have been following is not contrary to law.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MERIT SYSTEM—STANDARD SALARY BOARD—SALARY SCALES FIXED BY STANDARD SALARY BOARD ARE NOT RETROACTIVE.

May 8, 1947.

Mr. Walter N. Kirkman, Director,
Department of Budget and Procurement.

You have asked us whether the Standard Salary Board has the authority to make salary scales retroactive.

It is a fundamental rule of statutory construction that statutes are to be considered as prospective only in their operation unless there is manifest a clear legislative intent to the contrary. We have carefully examined the statutes controlling the Standard Salary Board and not only do we find no legislative intent that the scales established by the Board may be made retroactive, but there are numerous indications that they are to be effective only as to the future.

Section 16 of Article 64A of the Code, as amended by Chapter 781 and 930 of the Acts of 1945, provides, in speaking of salary scales, that:

> "Such pay plan shall take effect and shall have the force and effect of law when approved by the Governor. * * * Each employe * * * *shall be* paid at one of the rates set forth in the pay plan for the grade or class of positions in which he is employed. The pay plan *shall be* used by the Governor in the preparation and submission of his budget."

Chapter 287 of the Acts of 1947, which amended Section 17 of Article 64A of the Code, likewise gives definite indications that its operation is to be in the future and not

as to the past. The Board is given power to increase or decrease rates of pay, and it is then provided:

> "and said increased or decreased rates of pay *shall* after approval by the Governor, apply to all employees * * *."

It can hardly be supposed that the Legislature intended any decrease in pay to apply retroactively, and there is no greater reason to infer from the language used by the Legislature that any increase is to be retroactive.

Our conviction that there is nothing in the legislative language applying to the subject matter which would give any clear indication that pay scales are to apply retroactively is strengthened by the Maryland constitutional provision found in Article III, Section 35, which reads:

> "No extra compensation shall be granted or allowed by the General Assembly to any public officer, agent, servant or contractor after the service shall have been rendered or the contract entered into; nor shall the salary or compensation of any public officer be increased or diminished during his term of office."

HALL HAMMOND, *Attorney General.*

MERIT SYSTEM — RETIREMENT ACT — MANDATORY RETIREMENT PROVISION NOT APPLICABLE TO DEPUTY CLERKS OF COURTS AND DEPUTY REGISTERS OF WILLS.

May 23, 1947.

Mr. Thomas I. Hays, Secretary,
State Employees' Retirement System.

I am in receipt from you of a number of letters asking whether certain individuals who are members of the State

Employees' Retirement System, and who have reached or will shortly reach the age of seventy, must be retired, under the provisions of Chapter 696 of the Acts of 1947, which repeals and re-enacts with amendments, among others, subsection (1) (a) of Section 7 of Article 73B of the Annotated Code (1943 Supp.), to provide that:

> "Any member in service who is not an elected or appointed official of the State and who attains the age of seventy (70) years on or before July 1, 1947, must retire by that date."

The question at issue in each case is whether or not the individual concerned is "an elected or appointed official of the State".

Most of the individuals involved work in the office of a Court Clerk or a Register of Wills. Little doubt can remain that both Deputy Clerks and Deputy Registers of Wills are public officers. Deputy Clerks have been held to be officers in 13 Opinions of the Attorney General 209 and 26 Opinions of the Attorney General 337. The latter opinion dealt with the precise question as to which you are now inquiring, and it was held that deputies in the office of the Clerk are to be classed as public officers, due to the various constitutional and statutory provisions applicable to them. Reference was made to the case of *State v. Turner,* 101 Md. 584, where the Court of Appeals said of deputies in the Clerk's office that they "are not mere servants or agents of the Clerk; they are agents and officers of the Court * * * ". With this opinion on file, the Legislature has twice reenacted the language exempting "an elected or appointed official of the State" from compulsory retirement.

The same holding has been made by this office in regard to deputies of the Registers of Wills. See 15 Opinions of the Attorney General 235, 16 Opinions of the Attorney General 268 and 7 Opinions of the Attorney General 464. See Section 291 of Article 93 of the Code, which refers to the number and compensation of "assistant clerks or depu-

ties" to be employed by the Registers, and says: "Such Registers of Wills are hereby authorized to appoint such assistant clerks and deputies, and when duly qualified as such, said assistant clerks and deputies shall have the power and authority to act in the place and stead of the Register of Wills; and all such acts heretofore performed by any such assistant clerk or deputy are hereby expressly ratified and confirmed as if they had been performed by the Register of Wills in person."

In view of the quoted language, it would be difficult to reach any conclusion other than that assistant clerks and deputies of the Register are public officers.

It is clear then that Deputy Clerks and Deputy Registers of Wills and assistant clerks in the office of the Register of Wills are appointed officials and need not retire at the age of seventy unless they so desire. The more difficult question is to determine what other assistants to the Clerks and Registers are properly to be classified as public officials. For example, in the office of the Clerk of the Superior Court of Baltimore City, particularly in the Record Office, are approximately 125 employees classified as recorders, chattel clerks, counter clerks and extractors, none of whom take an oath of office and many of whom are not approved by the Supreme Bench of Baltimore City as Deputies or assistant clerks of the Clerk himself. The duties performed by these employees are purely ministerial and they do not in their own right exercise any part of the sovereign power of the State. In our opinion they are not public officers and those of them who by July 1, 1947, have reached the age of seventy must retire. On the other hand, in the office of the Clerk of the Circuit Court and Circuit Court No. 2 of Baltimore City, all assistants to the Clerk have taken the oath of office as Deputy Clerks and are classified as such, although they may be designated for the purpose of convenience as docket clerks or utility clerks. Any one of them at any time may perform the functions and duties customarily assigned to another. All of these employees, therefore, who are actually Deputy Clerks are public officials and need not

retire at the age of seventy. This situation also prevails generally in the office of the Clerk of the Court of Common Pleas and the Baltimore City Court, as well as in the Circuit Courts for the Counties. In the case of the offices of the Registers of Wills, you are faced with the problem that many of the employees obviously exercise no part of the sovereign functions or power of the State. In the office of the Register of Wills of Baltimore City are stenographers and recorders whose work is merely that of copying for the permanent records documents which are filed with the Register. There are also on the payroll watchmen and messengers. None of these can be properly classified as appointed officials. Acknowledgment of this fact is found in the holding of Attorney General Robinson in 12 Opinions of the Attorney General 202, wherein he determined that the appraisers of the Orphans' Court of Baltimore City were not officials.

You have also inquired whether a Deputy Sheriff in the office of the Sheriff of Baltimore City is an appointed official. In our opinion he is not. This office has so held on two occasions. See 7 Opinions of the Attorney General 469 and 27 Opinions of the Attorney General 287. In the first opinion, Attorney General Armstrong, relying on *Turner v. Holtzman,* 54 Md. 148, came to the conclusion that a deputy sheriff is not an officer holding an office created by the Constitution or laws of the State, but was merely an agent of the sheriff and as such a common law officer not required to take any oath as a prerequisite qualification.

HALL HAMMOND, *Attorney General.*

MERIT SYSTEM—CLASSIFICATION—PROCEDURE OF EMPLOYMENT COMMISSIONER FOR CLASSIFYING EMPLOYEES OF EMPLOYMENT SERVICE DIVISION ON THEIR TRANSFER FROM FEDERAL GOVERNMENT TO STATE.

July 21, 1947.

Mr. Walter D. Owens,
State Employment Commissioner.

You have asked our opinion as to whether a certain employe of the Employment Service Division of the Employment Security Board (formerly Unemployment Compensation Board) is presently entitled to hold the position of Supervisor I or whether said employee is now a Supervisor II and not entitled to the position of Supervisor I until after passing a competitive examination and selection for promotion. We understand the employee makes two claims to the position of Supervisor I. Her first contention which relates to events prior to her entering the classified service in 1939 is as follows:

The employee entered the State service on May 1, 1937, either as a "Section Supervisor" or "Division Manager" (the exact title of her position at that time not being clear) in the office of the Maryland State Employment Service (now the Employment Service Division). If her initial appointment was as "Section Supervisor", she entered the State service as the equivalent of a Supervisor II; if her initial appointment was as a "Division Manager", she entered the State service as the equivalent of a Supervisor I. In any event, the employee, on June 25, 1937, passed an examination for "Division Manager" (Supervisor I). On October 1, 1937, the employee was certified as having passed the June examination and as being entitled to the position of Manager. At the time she was in charge of a unit of nine employees and was called a Division Manager. As of January 1, 1939, the office of the Employment Service Division was reorganized and the title of the position which said employee had held since 1937 was changed to "Section Supervisor".

The initial employment of the employee in question was made by the then Unemployment Compensation Board, pursuant to Section 12 (a) of Article 95A of the Code of Public General Laws, as enacted by Chapter 1 of the Acts of the Extraordinary Session of 1939. Said employee's appointment was not under the Merit System, and the employees of the Employment Service Division were not placed under the Merit System until June 1, 1939. Chapter 584 of the Acts of 1939 required all appointments in the Employment Service Division made after June 1, 1939, to be in accordance with the Merit System. The same Act provided for present employees to be blanketed into the Merit System as follows:

> "All of the employees of the Maryland State Employment Service on January 1, 1939, shall remain employees of the Maryland State Employment Service, subject to reclassification under said Article 64A of the Annotated Code of Maryland."

This Act placed said employee and her fellow employees of the Employment Service Division in the Merit System "subject only to the right of the State Employment Commissioner to reclassify them under the provisions of the Maryland Merit System Law". 24 Opinions of the Attorney General 531, 534. The Employment Commissioner made a classification study in which the position held by the employees in question was designated the equivalent of Supervisor II. This classification study was declared effective January 16, 1940, and all employees of the Employment Service Division were declared in the State service under the Merit System law in accordance with the classifications therein specified.

Said employee now contends that she was improperly classified a Supervisor II in 1940 and that she should have been placed in the Merit System as a Supervisor I. This claim is based on the fact that in June, 1937, she passed an examination for "Division Manager" and from some time in 1937 to January 1, 1939, held a position with that

title. We are not able to find any merit in this claim. Said employee along with all other employees of the Employment Service Division was blanketed into the Merit System by Chapter 584 of the Acts of 1939, subject to reclassification by the Employment Commissioner. It is improbable that said employee ever had a right to set aside that reclassification or to require that she be given a classification of Supervisor I. In any event, we cannot entertain such an objection at this late date after said employee has served for several years under the State Merit System as a Supervisor II.

The employee's second claim that she is presently entitled to the position of Supervisor I is based upon the following chain of events:

As of December 31, 1941, the Employment Service Division was transferred to the Federal Government under Executive Order Number 8990 issued by the President of the United States. Paragraph 3 of this Executive Order stated:

> "With the concurrence of the Civil Service Commission and for such period of time as the Commission may deem necessary, vacancies occurring after December 31, 1941, in the Public Employment Office facilities and services operated by the Social Security Board may be filled by the Federal Security Agency from eligible lists prepared under the rules of the State Merit System previously approved by the Social Security Board pursuant to the provisions of the Social Security Act."

As previously noted in this opinion, at the time the Employment Service Division was transferred to the Federal Government, said employee held the permanent position of Supervisor II in the Classified Service of the State Merit System. During the period that the Employment Service Division was under the United States Employment Service, said employee passed a State examination for Supervisor

I and was placed on an eligible list as of February 13, 1943. On June 1, 1945, the Federal Security Agency appointed said employee to the position of Supervisor I, and she held this position until November 16, 1946, when the Employment Service Division was transferred from the Federal Government back to the State.

The transfer of the Employment Service Division from the Federal Government to the State was directed by the "Labor-Federal Security Appropriation Act, 1947". This Act, after directing the Secretary of Labor to transfer to each State the operation of State and local employment office facilities and properties which were transferred by such State to the Federal Government in 1942, provides in part, as follows:

> "The Secretary of Labor may withhold or deny certification of funds for a State system of public employment offices unless he finds that the state -
>
> "(1) (a) has made provisions for the transfer to and retention in the State-wide system of public employment offices of employees of the Federal Government who (on the effective date of this Act) were employed in State or local employment service functions in such State, in the positions occupied by them under the Federal Service or in reasonably comparable positions, except that individuals so transferred may be separated or terminated for good cause as determined in individual cases under the applicable State merit system, or separated or terminated under the applicable State merit system by reason of reductions in force found necessary in the interests of efficient operation. . . ."

In explanation of this provision by which Congress sought to require the States to accept the transfer of Federal employees at the peril of losing Federal funds, the Senate and House Conferees on the bill inserted the fol-

lowing statement in the Congressional Record for July 11, 1946:

> "The interpretation of the conferees of the language used in the amendment providing for the transfer of the United States Employment Service to the States is that all persons employed in the Service on the date of the passage of this act will be transferred pending their permanent appointment or release under the provisions of the State merit system, it being understood that preference rights of returning war veterans will be recognized in a manner similar to that accorded by Federal statute.
>
> "This statement was agreed to and initialed by both the Senate and House conferees. It simply means that all persons on the roll the date this bill becomes a law shall be returned and have equal opportunity to be retained under the State merit system, and I assume they will be if they qualify and are certified. The bill provides that all shall be returned as of November 15, 1946."

This Act of Congress transferring the Employment Service Division to the State presented you as the State Employment Commissioner with the difficult problem of how to classify federal employees in the State Merit System. For reasons of policy and fairness you desired to comply with the request of Congress (we call it a request and not a mandate because it was by no means binding upon the States) that Federal employees be classified in the State Merit System "in reasonably comparable positions" to those held by them in the Federal service prior to November 16, 1946. As Employment Commissioner you decided upon the following procedure:

(1) an employee who held a permanent appointment under the State Merit System and who was serving in that position was reinstated in the State Merit System without further examination;

(2) an employee who held a permanent appointment under the State Merit System and who had been transferred or promoted to a higher position during Federal service was reinstated in the State Merit System at the higher classification without further examination, provided said employee (a) during Federal service passed an appropriate State examination for the higher position, and (b) was appointed to the higher position from an eligible list. Any appointment by Federal authorities made within two years of the employee having passed the examination was considered as made from an eligible list. The two year period was selected because that is the longest period of time that you as Employment Commissioner have ever allowed an eligible list to remain open under Section 12 of Article 64A of the Code of Public General Laws.

(3) an employe who met the requirements of (2) but who was not appointed to the higher position from an eligible list was classified in the higher position, provided such employee passed a promotional examination for the higher position after return to State service. The next promotional examination after November 16, 1946, was declared open to such employees.

The employee in question came under paragraph (3) above, since she passed a State examination for Supervisor I on February 13, 1943, but did not receive her appointment from an eligible list within two years. Under Section 12 of Article 64A of the Code of Public General Laws, "eligible lists shall continue in force for one year from the date of posting and may be extended by the Commissioner by action taken before the expiration of such year". Thus it is the declared policy of the legislature that eligible lists shall not remain open indefinitely and that unless the period is extended, a person must be selected for promotion within a year of having qualified. The longest extension that you as Commissioner have ever granted is one year, and the longest period that you have ever permitted an eligible list to continue in force is two years. As previously noted, in order to determine whether a Federal promotion was

made from an eligible list, you treated all appointments made within two years as from an eligible list. This procedure was adopted in order to give employees being transferred from the Federal government to the State every benefit of the doubt. The employee in question did not meet this standard since she was not appointed by Federal authorities to the position of Supervisor I until June 1, 1945, two years and three and one-half months after being placed on an eligible list.

Thus, under the procedure laid down by you as Employment Commissioner for transferring the Federal employees into the State Merit System, the employee in question should have taken a promotional examination in order to receive a permanent classification of Supervisor I. She refused to take this examination; so you propose to classify her as Supervisor II.

We are of the opinion that the procedure which you as Employment Commissioner established for the classification of Federal employees in the State Merit System was entirely reasonable and proper. We believe you are justified in classifying said employee as Supervisor II in view of her failing to meet the requirements for classification as Supervisor I without examination and her refusal to take a promotional examination as required.

We understand that said employee refused even to take a promotional examination under protest and that she cannot now be given such an examination without prejudicing the rights of others who are qualified and desirous of being promoted to the position of Supervisor I. We therefore advise you that you should classify said employee as Supervisor II and require her to take a competitive examination and be selected for promotion in order to receive a classification of Supervisor I under the Merit System.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

MERIT SYSTEM—COMPUTATION OF TIME FOR UNUSED VACATIONS OF STATE EMPLOYEES.

August 4, 1947.

Mr. Joseph O'C. McCusker, Secretary,
Board of Public Works.

Some time ago, at the request of the Board of Public Works, you forwarded to us file as to vacation allowance upon resignation of State employees, and asked us to advise you as to the proper course in the matter.

The Department of State Employment has a rule that the resignation shall be dated as of the last day of actual service and that the final check should include allowance for any vacation earned and not used. The Commissioner wrote the State Roads Commission an explanation of the meaning of this Rule, as follows:

> "If any leave is due upon resignation it means the total number of days of accumulated leave due over a denominator of 30, and *not an additional number* of *working* days over a denominator of 30, in addition to the total number of days worked for final payment."

Several complaints have been received that this interpretation is incorrect. The basis for the complaint is that the vacation allowance should be on a working day basis, that is to say, if a man resigns on March 15th having ten days accrued vacation leave, he should receive not 10/30ths of a month's pay as vacation pay, but rather 16/30th, in an example where there were 3 Sundays, 2 Saturdays and one holiday in a period from March 15th through March 31st.

It is our opinion that the interpretation of the complainants is correct. Section 22 of Article 64A of the Code provides that, "Every classified employee shall receive as vacation in each calendar year a leave of absence with pay for fifteen *working* days. . . ." Thus it is clear that the statute

contemplates, and we are advised that the practice has been, that an employee is entitled to fifteen working days exclusive of Saturdays, Sundays and holidays. Obviously the granting of an unused vacation allowance upon resignation should be based upon the same theory if it is to be given at all. We see no reason to make "flesh" of an employee who gets vacation allowance while working, and "fowl" of one who works until the time of resignation, particularly when the strict rule could be easily evaded by the employee taking his vacation and then resigning.

HALL HAMMOND, *Attorney General.*

MERIT SYSTEM—VETERANS—PREFERENCE APPLICABLE TO POSITIONS NOT FILLED BY COMPETITIVE EXAMINATION.

November 28, 1947.

Mr. W. D. Owens,
State Employment Commissioner.

This is in reply to your letter of October 29th asking our opinion as to whether and how veterans should be preferred under your labor registry plan for certain positions in the classified service which you propose to exempt from competitive examination.

We understand that pursuant to Section 10 of Article 64A you propose to exempt from competitive examinations certain positions to be filled by unskilled manual laborers. Naturally, when these positions are exempt from examination, it will be impossible for you to provide a credit of five points for non-disabled veterans and ten points for disabled veterans as is required for positions filled by examination rating. We, therefore, advise you that in your labor registry plan you may disregard the special credit required to

be given to any veteran who takes a merit system examination.

We call your attention, however, to Section 9 of Article 64A, which provides, in part:

> "Whenever a vacancy in any position in the classified service is to be filled, the appointing authority shall make requisition upon the Commissioner for eligibles * * * that an appointed officer who passes over a veteran eligible as provided in Section 10 of this Article and selects a non-veteran shall file with the State Employment Commissioner a substantial reason for so doing * * *."

We are of the opinion that this provision which requires that a veteran be selected for employment unless sufficient reasons for not doing so are shown is applicable to the labor registry plan which you propose for certain positions to be filled by unskilled manual laborers without examination.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

MONTGOMERY COUNTY JUNIOR COLLEGE

MONTGOMERY COUNTY JUNIOR COLLEGE—MAY CHARGE RESIDENT VETERANS THE NON-RESIDENT TUITION FEE.

December 11, 1947.

The Montgomery County Junior College.

In your letter of November 21st you ask the following question: Is it illegal or in conflict with any law for the Montgomery County Junior College to charge the Veteran Administration the non-resident fee for tuition of veterans who are residents of Maryland? You state the tuition fee for resident students is $200 per school year, whereas the fee for non-residents is $350.

Part VIII, Section 5 of the Veterans Regulation No. 1 (a) promulgated pursuant to the Servicemen's Readjustment Act of 1944 (Chapter 268, Public Law 346, 78th Congress) reads in part, as follows:

> ". . . and provided further, that if any institution has no established tuition fee, or its established tuition fee shall be found by the Administrator to be inadequate compensation to such institution for furnishing such education or training as authorized to provide for the payment, with respect to any such person, of such fair and reasonable compensation as will not exceed $500 for an ordinary school year."

Subsequent to this Regulation, it was urged upon the Administrator of the Veterans Administration that educational institutions which derive part of their revenue from State funds should be allowed to charge resident veterans more than the customary resident tuition fees. The reason for this contention was that the education of resi-

dent students in such institutions is partially paid for by local and State governments, and that the cost of educating such students is much less than the actual cost of the training rendered. It was contended by the educators that the Federal Government, rather than State and local governments, should pay the full cost of education rendered veterans under provisions of the Servicemen's Readjustment Act.

To carry out the provisions of the Act and Regulations, and in accordance with the suggestions of the educators, General Hines, then Administrator of the Veterans Administration, issued certain instructions in September 1944 and March 1945, wherein institutions were permitted to charge resident veterans the fees normally charged their non-resident students. Under date of April 17, 1945, the Veterans Administration Instruction No. 6 was issued, which, in part, provides as follows:

> "Institutions which have non-resident tuition may, if they so desire, charge for each veteran enrolled under Part VIII such customary tuition and incidental fees as are applicable to all non-resident students, provided that the charges are not in conflict with the existing laws or other legal requirements. Managers will secure evidence from the institutions or proper officials that such charges are legal."

The Montgomery County Junior College was created by the Board of Education for Montgomery County by resolution duly passed under date of May 14, 1946, pursuant to Chapter 558 of the Acts of the General Assembly of Maryland of 1945. This Act gave the County Board of Education, subject to the approval of the State Superintendent of Schools the right to establish certain schools within the Counties and provided for the establishment of "any other combination of grades . . . with the approval of the State Superintendent of Schools according to the rules and regulations of the State Board of Education . . ."

Subsequent to the Resolution, referred to above, the Board of Education of Montgomery County allotted a certain sum to be used to help defray the expenses of said School for the school year beginning September, 1946, and the State Board of Education did likewise. The Legislature of Maryland, by Chapter 514 (the Budget Bill) in 1947, recognized the Junior Colleges in Maryland by providing the sum of $40,000 for the fiscal year 1948, and $40,000 for the fiscal year 1949 toward their support. The above referred to provision is found on page 1161 of the Laws of Maryland of 1947.

The Montgomery County Junior College provides for two years of standard college work or two years of terminal (technical) training, and the courses offered are often referred to as the 13th and 14th grades. The College is now in its second year of operation and its enrollment is about 400 students.

The Board of Education for Montgomery County provided the sum of $10,000 in its budget as an appropriation toward the support of the Montgomery County Junior College for the fiscal year 1947-1948. This budget was approved by the Board of County Commissioners for Montgomery County, which is the legislative body of that County. We have carefully examined the statutes relating to public education and schools of the State of Maryland and have reviewed the Resolutions of the Board of Education and the Board of County Commissioners for Montgomery County and find no provision which would forbid the Junior College from assessing charges for resident veteran students at the non-resident student rate.

The Veterans Administration has made provision for payments at the non-resident rate in accordance with the special authority of the particular Act of Congress and the last named regulation quoted above makes it discretionary with the officials of the Institution as to which rate should be charged. Therefore, in our opinion, there is no objection to charging bona fide residents of this State, who are vet-

eran students at the Montgomery County Junior College the tuition customarily charged non-resident students.

The same conclusion was reached by this office when the question was asked by the University of Maryland. See 30 Opinions of the Attorney General, 43.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

MOTOR VEHICLES

MOTOR VEHICLES—TITLING TAX—TITLING TAX IS PAYABLE ON THE FAIR MARKET VALUE OF A MOTOR VEHICLE WHICH IS WON IN A CONTEST.

February 6, 1947.

Mr. Joseph O'C. McCusker,
Chief Deputy Comptroller.

We have your letter of January 30th, enclosing photostatic copies of two letters from Mr. W. Wharton Weddell, in which he requested that you obtain an opinion from us concerning the requirement that he pay an excise tax of two percent upon the fair market value of a motor vehicle which he won at a convention, and for which he has procured a certificate of title from the Department of Motor Vehicles.

The law, which is codified as Section 25A of Article 66½ of the Code, provides that in addition to the other charges prescribed by that Article, there is imposed an excise tax of two percent of the fair market value of every motor vehicle for the issuance of "every original certificate of title for motor vehicles in this State * * *." The only exemption contained in the law is that found in Chapter 47 of the Acts of 1945. By that Act, certificates of title for motor vehicles owned by the State of Maryland or its political sub-divisions and certificates of title for fire engines and similar apparatus may be issued without the prior payment of tax. Before the passage of the Act of 1945, we ruled that motor vehicles owned by the State of Maryland could be operated without the issuance of certificates of title by the Department of Motor Vehicles, but that if the State applied for certificates of title for its motor vehicles, it was necessary for the excise tax to be paid (28 Opinions of the Attorney General 898). We made similar rulings in con-

nection with vehicles owned by the United States (27 Opinions of the Attorney General 432; 21 Opinions of the Attorney General 706). We held, too, that consular agents of foreign countries were required to pay this excise tax before procuring certificates of title for motor vehicles owned by them (20 Opinions of the Attorney General 875).

It is a familiar rule of statutory construction that laws providing exemptions from taxation are to be strictly construed. *State Tax Commission v. Standard Oil Company*, 181 Md. 637. With this principle to guide us, as well as our former rulings on other aspects of the statute in question, we are unable to concur in Mr. Weddell's contention that the excise tax is inapplicable in his situation. There is nothing in the law which confines its application to those instances in which motor vehicles are the subjects of sales, rather than gifts, and indeed it is possible that the General Assembly may have foreseen this question and met it by providing that the tax should be two percent of "the fair market value" of the vehicle rather than a percentage of the purchase price. Thus, the purchase price is not the controlling factor in determining either the application or the amount of the tax.

For these reasons, we entertain no doubt about the propriety of the collection of the tax.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES—REGISTRATION—FEDERAL SOLDIERS AND SAILORS CIVIL RELIEF ACT IS IN FULL FORCE AND EFFECT AND UNDER ITS PROVISIONS, PERSONS IN MILITARY SERVICE AS THEREIN DEFINED, MAY NOT BE REQUIRED TO REGISTER THEIR MOTOR VEHICLES IN THIS STATE, PROVIDED THEY COMPLY WITH THE LAWS OF THE STATES IN WHICH THEY ARE DOMICILED.

March 6, 1947.

Mr. W. Lee Elgin,
Commissioner of Motor Vehicles.

We have your letter referring to the provisions of the Soldiers and Sailors Civil Relief Act, and asking our opinion concerning its effect in so far as it concerns the registration of motor vehicles.

Title 50 Appendix Section 574 U.S.C.A. provides as follows:

> "(1) For the purpose of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District

of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district: *Provided,* That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

"(2) When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: *Provided,* That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid."

Section 584 of the Act provides that it shall remain in force until May 15, 1945, provided that, should the United States be then engaged in a war, it shall remain in force until such war is terminated by a Treaty of Peace proclaimed by the President and for six months thereafter. While it is true that our armed forces are not now actually engaged in combat with those of any foreign powers, a war does not terminate with the cessation of actual fighting. In *Stewart v. Kahan,* 11 Wall. 493, 20 L Ed. 176, the

Supreme Court of the United States held that the war power "is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress."

In the later case of *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 64 L Ed. 194, 40 S. Ct. 106, the Supreme Court said that:

> "In the absence of specific provisions to the contrary the period of war has been held to extend to the ratification of the Treaty of Peace or the proclamation of peace."

By its very terms, the Soldiers and Sailors Civil Relief Act provides that it shall remain in force until May 15, 1945, and, if the United States is then at war, until such war is terminated by a Treaty of Peace proclaimed by the President and for six months thereafter. Even though on December 31, 1946 the President issued a proclamation declaring the cessation of hostilities of World War II, there has been no Treaty of Peace proclaimed by the President, and it is clear that the Act is still in effect. See also our opinion to Mr. Ralph D. Horsey, Clerk of the Circuit Court for Caroline County, Daily Record, February 27, 1947.

It is our opinion, therefore, that persons in the military service, which term is defined in Section 511 of the Act as all members of the army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the public health service detailed by proper authority for duty either with the army or the navy, are entitled to the benefits of that Act, and that the State of Maryland may not exact from them licenses, fees or excises imposed in respect to motor vehicles, provided such license, fee or excise required by the State, Territory, Possession or District of Columbia of which they are residents, has been paid.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES—STREET CARS AND TRACKLESS TROLLEYS REQUIRED TO OBEY TRAFFIC CONTROL SIGNS PLACED IN ACCORDANCE WITH THE LAW.

March 6, 1947.

Mr. Hamilton R. Atkinson,
Police Commissioner.

We have your letter in which you ask for our opinion concerning the application to street cars and trackless trolleys of highway signs bearing the legends: "Through Highway—Stop", and "Stop—Intersection".

Section 2 (65) of Article 66½ of the Code defines "Vehicles", as "Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices used exclusively upon stationary rails or tracks or propelled by electric power obtained from overhead trolley wires, but not operated upon rails or tracks."

It is clear from this definition that street cars and trackless trolleys are not "Vehicles" as that term is used in the motor vehicle law, and if they are subjected by any of the provisions of Article 66½ to signs of the type to which you refer, it must be by specific reference to them, or by the use of appropriate terms which would not exclude them.

Section 138 of that Article directs the State Roads Commission to place and maintain upon all highways under its jurisdiction such traffic control devices conforming to its manual and specifications as it shall deem necessary to indicate and carry out the provisions of that Article, or to regulate, warn or guide traffic, and prohibits local authorities from placing or maintaining any traffic control device upon any highway under the jurisdiction of the Commission except with the latter's permission and in accordance with its direction.

Section 139 requires "local authorities", defined by Section 2 (22) of the Article as "Every county, municipal, and

other local board or body having authority to adopt local police regulations under the Constitution and laws of this State.", in their respective jurisdictions to place and maintain such traffic control devices upon highways under their jurisdiction as they shall deem necessary, to indicate and carry out the provisions of that Article or local traffic ordinances, or to regulate, warn or guide traffic. That Section requires further that all such traffic control devices hereafter erected by such local authorities shall conform to the State Manual and specifications.

Section 140 of Article 66½ of the Code provides in sub-section (a) that:

> "No driver of a vehicle or operator of a street car or trackless trolley shall disobey the instructions of any official traffic-control device placed in accordance with the provisions of this Article, unless at the time otherwise directed by a peace officer."

Sub-section (b) of that Section provides that whenever any street car tracks enter upon or cross highway at a point where a traffic control device directs vehicles to stop, then the State Roads Commission or local authorities under whose authority the traffic control device was erected shall erect and maintain an official traffic control signal to be operated at such hours as may be deemed necessary by the proper authority having jurisdiction over traffic on such highway, provided that the company operating over said street car tracks shall, upon demand prior to installation, agree to pay one-half the cost of such traffic control signal and one-half of the cost of erecting same, and if said company fails so to agree, then such traffic control signal need not be installed.

Section 141 likewise provides that street cars and trackless trolleys shall obey the type of traffic signals which are referred to in that Section. It seems to us that there can be little doubt that if the traffic control devices to which your

letter refers conform to the State Manual and specifications and have been erected in accordance with the provisions of Section 138 or Section 139, as the case may be, observance of their requirements is mandatory under Section 140 not only by the operators of motor vehicles, but by the operators of street cars and trackless trolleys as well. See 22 Opinions of the Attorney General 458.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES—FINANCIAL RESPONSIBILITY ACT OF 1945. EFFECT OF RELEASE FROM LIABILITY, IN PRIOR FORM ON ITS FACE, IS NOT DESTROYED FOR THE PURPOSES OF THE ACT BY REASON OF THE ASSIGNMENT OF THE CAUSE OF ACTION TO THE COLLISION INSURANCE CARRIER.

May 16, 1947.

Mr. W. Lee Elgin,
Commissioner of Motor Vehicles.

We have your letter in which you inform us that the attorney for an insurance company has taken up with you a case in which two motor vehicles were involved in a collision. The owner of one of the vehicles held a collision insurance policy and his claim was settled in due course by the insurer. At the time of settlement, various papers were signed by the insured whereby the company became subrogated to his rights against the other party. Thereafter the owner who had obtained settlement under his collision policy executed a release of liability to the owner of the other vehicle with the result that the license and registration certificate of the released owner are not now under suspension. The attorney for the insurance company contends that this places his client in an unfair and unjust position and that a release of liability under the circum-

stances should be executed not by the insured owner but by the insurance carrier. You inform us that your Department has no means of ascertaining whether a claim is settled under a collision policy or otherwise, and that Chapter 456 of the Acts of 1945 is silent with respect to collision insurance. You have asked for our advice in the premises.

Chapter 456 of the Acts of 1945 added several Sections to the then existing financial responsibility law, and was designed to expedite the removal from the highways, under certain conditions, of uninsured and financially irresponsible operators and owners of motor vehicles. The Act requires a report of an accident to be made and within 60 days after its receipt, the Department is directed to suspend the license of each operator and all registrations of each owner of a motor vehicle in any way involved in such accident, unless there is a compliance with other provisions of the Act.

Section 110D provides in part that the suspension shall remain in effect until evidence satisfactory to the Department has been filed of a release from liability.

It is our opinion that the controversy which has arisen in this case is one of which you may not take cognizance. We assume that the instrument is in proper form and that it constitutes satisfactory evidence of a release from liability. As you have observed, this Act is silent respecting collision insurance and while we do not mean to approve a practice which may result in the destruction of the insurer's right of subrogation by the deliberate act of the insured, the Act authorizes you to rescind the suspension when you have obtained satisfactory evidence of a release from liability, but it does not authorize you to go beyond that point and construe written instruments and determine rights and liabilities resulting therefrom. Under the circumstances we cannot say that you exceeded your authority in the instant case by accepting the release at its face value.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES — FINANCIAL RESPONSIBILITY — DEPARTMENT OF MOTOR VEHICLES MAY SUSPEND LICENSE UNDER CHAPTER 456 OF THE ACTS OF 1945 IF THERE IS NO INSURANCE, BUT IT MAY NOT DECIDE IN A GIVEN CASE WHETHER THE INSURANCE CARRIER IS LIABLE UNDER THE POLICY.

May 23, 1947.

Mr. W. Lee Elgin,
Commissioner of Motor Vehicles.

You have informed us that reports of an automobile accident were filed with your Department pursuant to Chapter 456 of the Acts of 1945, which enacted Sections 110-110H, of Article 66½ of the Code, relating to financial responsibility. It appears that a company engaged in the business of renting automobiles to the general public had rented a vehicle to one of its customers, and that the customer's employee, whose duty it was to operate the vehicle, drove it to his place of residence when he finished work on Saturday, rather than taking the vehicle to the garage where it was customarily stored. On the following Sunday morning the employee was proceeding to the garage with the vehicle when a collision occurred. The insurance carrier duly filed the necessary papers showing the existence of an insurance policy but subsequently its investigation disclosed that the collision occurred under the circumstances above set forth, and it wishes to withdraw the certificate because the employee, it contends, "was not operating under any authority specific or implied."

While Section 110C of the law exempts from the requirements concerning the deposit of security the owner of a motor vehicle which was being operated without his express or implied permission, it is our view that the question here more properly is whether the alleged deviation by the employee in driving the vehicle to his residence, rather than to the garage, is sufficient to exonerate his employer from liability. That is a question which frequently presents perplexing complications.

In *McDowell v. Magazine Service,* 164 Md. 170, where a similar question was presented, and the employer was held liable, the Court of Appeals said:

> "There is no uniformity of decisions on the subject of this appeal. If an owner were responsible for whatever might happen during the hours of his agent's employment, the solution of such cases as this would be easy, and some of the cases go to almost this length. . . . The decisions are in such hopeless confusion that it is useless to attempt a review of them with any idea that they can be reconciled. They all start out with the idea that the questions of agency and scope of employment are ordinarily questions of fact for a jury, and that from ownership of the vehicle liability is presumed, though rebuttable. The differences arise from the application of these general rules to the facts. It is plain, therefore, that each case depends largely upon its own facts and the construction to be adopted with reference to them."

In the later case of *Abell v. Sopher,* 179 Md. 687, the Court of Appeals held that the undisputed facts showed that the employee was not acting within the scope of his employment, and that the employer was not liable.

Whether the employer in the instant case is liable or not is a question which we cannot determine from the meagre facts which have been submitted to us, but even though that difficulty should be overcome, we have found nothing in Chapter 456 of the Acts of 1945 which discloses a legislative intent that either the Department of Motor Vehicles or this Department shall pass upon the legal responsibility of an employer or insurance carrier in cases involving accidents. The legislative intent as disclosed by the Act is, in our opinion, entirely contrary to the notion that the matter of fixing responsibility is other than a judicial function, because the mandate of the law is that "The operator of every motor vehicle which is in any man-

ner involved in an accident . . ." in which any person is killed or injured or damage to property in excess of $50.00 is sustained, shall make a report to the Department, and thereafter the various steps required by the law must be pursued. The Department of Motor Vehicles is not permitted to determine which of the parties involved in an accident has been guilty of negligence, and to apply the requirements of the Act to him alone, and to permit the other parties to ignore the statute. For your Department to conclude that the employee in the present case was not engaged in the performance of his master's business would, in our opinion, be the assumption by you of a judicial function, and certainly your determination would not be binding upon anyone.

The courts have frequently been called upon to decide whether an insured owner of a car failed to cooperate with the insurance carrier to such an extent that the latter, under its policy, was not liable for the payment of a judgment which had been entered against the insured. It could hardly be supposed in a case of that kind that your Department would be acting within the scope of the law if the existence of insurance were admitted, nevertheless, upon the complaint of the insurer, you proceeded to suspend the license of the insured owner upon the mere complaint that he had violated the terms of the policy.

It follows, therefore, in our opinion, that if the papers filed with your Department disclose the existence of an automobile liability policy with respect to the vehicle involved, as set forth in Section 110B 1, or a policy or bond with respect to the operation of a vehicle by a person who was not the owner thereof, as set forth in sub-section 2 of Section 110B, the requirement of the law is satisfied, and that you may not undertake to determine whether in a given case the servant was acting within the scope of his employment.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES—FINANCIAL RESPONSIBILITY—FINANCIAL RESPONSIBILITY ACT OF 1945 IS NOT APPLICABLE TO ACCIDENTS OCCURRING WITHIN RESERVATION OF UNITED STATES NAVAL ACADEMY.

May 23, 1947.

Mr. W. Lee Elgin,
Commissioner of Motor Vehicles.

You have asked our opinion concerning the application of Chapter 456 of the Acts of 1945, known as the Financial Responsibility Act, and codified as Sections 110A to 110H, of Article 66½, to cases of accidents occurring upon the grounds of the United States Naval Academy at Annapolis.

By the first Section of the Act, the operator of every motor vehicle involved in an accident "within this State" in which any person is killed or injured, or in which property damage in excess of $50.00 is sustained is required to make a report thereof to the Department of Motor Vehicles. The question, therefore, is whether the Federal Reservation above mentioned is comprehended in the term "within this State".

The land upon which the Naval Academy is located was ceded to the United States by Chapter 158 of the Acts of 1847, Chapter 185 of the Acts of 1853, Chapter 68 of the Acts of 1866 and Chapter 294 of the Acts of 1867. 25 Opinions of the Attorney General 697. Each of the first three Acts above mentioned contained a provision that the State of Maryland retained concurrent jurisdiction with the United States in and over said lands and ceded territory as to all civil and such criminal process against any person or persons charged with crimes as though the cession and consent had not been made and granted, except so far as such process may affect the real and personal property of the

United States within said ceded territory. The Act of 1867 recited:

> "That all the provisions of the Act of the January session, eighteen sixty-six, chapter sixty eight, relating to the cession of concurrent jurisdiction to the United States over the lands in the city of Annapolis therein described, whenever the same should be conveyed to the United States, by deed duly executed, and exempting from taxation property therein described, shall extend and apply to any lands within the said city, or Anne Arundel county, duly conveyed by deed or condemned to the United States by virtue of provisions of this Act."

In 8 Opinions of the Attorney General 304, the question presented was whether certain employees of the Naval Academy were within the scope of the Workmen's Compensation Law of Maryland. While the inquiry in that case did not disclose whether the work performed by these employees was within or without the Naval Academy Reservation, it was observed that: ". . . if any of these enterprises are conducted within the area owned by the United States Government, I do not think that the Maryland Commission would have any jurisdiction."

Subsequently a citizen of Maryland was convicted of reckless driving and failure to have his license while operating a motor vehicle on Conduit Road, which is within the geographical limits of the State of Maryland, but is under federal jurisdiction. Following his trial before a United States Commissioner, the questions arose whether the fines imposed should be remitted to the Department of Motor Vehicles, and whether the Department was authorized to suspend or revoke his operator's license. It was held that the fines were not payable to the Department of Motor Vehicles, and that the provisions of the then existing law which authorized the suspension or re-

vocation of an operator's license for a conviction of a violation of the motor vehicle law did not authorize such action in this instance. It was pointed out, however, that action against the driver's license was permissible under the statutory provision authorizing a suspension or revocation for any cause which the Commissioner may deem sufficient. 22 Opinions of the Attorney General 451.

In *Lowe v. Lowe,* 150 Md. 592, the question presented to the Court of Appeals related to the jurisdiction of a court of equity to grant a divorce to a person residing at Perry Point, which the Court pointed out was a tract of land of about 500 acres in Cecil County and owned by the United States. After referring to various sections of Article 96 of the Code whereby exclusive jurisdiction in and over lands acquired by the United States was ceded to it for all purposes except the service of civil and criminal process, the Court quoted, with approval, from *United States v. Cornell,* 2 Mason 60, dealing with the effect of a reservation as to a service of process. It was there said:

> " 'It provides only that civil and criminal process issued under the authority of the state, which must, of course, be for acts done within and cognizable by the state, may be executed within the ceded lands, notwithstanding the cession. Not a word is said from which we can infer that it was intended that the state should have a right to punish for acts done within the ceded lands. . . . The whole apparent object is answered by considering the clause as meant to prevent these lands from becoming a sanctuary for fugitives from justice for acts done within the acknowledged jurisdiction of the state. Now, there is nothing incompatible with exclusive sovereignty or jurisdiction of one state that it should permit another state in such cases to execute its process within its limits. And a cession of exclusive jurisdiction may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to

the cession, and as an agreement of the new sovereign to permit its free exercise, as *quod hoc* his own process. * * * And we have not the least hesitation in declaring that the true interpretation of the present proviso leaves the sole and exclusive jurisdiction of Fort Adams in the United States.' . . ."

And the Court said further:

"The question of the right of a resident on a United States reservation to sue for a divorce in the state court seems not to have been decided in any one of the many cases on the relations of such residents to the state government. We are of the opinion that in view of the Maryland statute in reference to residence in the state as being a prerequisite to filing a bill for divorce, the question depends upon whether or not the government reservation at Perry Point was, at the time of the bill filed, Maryland territory. The record does not disclose that either of the parties to this divorce proceeding were ever residents of the State of Maryland before the filing of the bill, unless residence on the government reservation also makes them residents of Maryland for the purpose of invoking the aid of the state courts in obtaining a divorce. The federal constitutional provision speaks only of the power in Congress to exercise exclusive legislation over the land, but the courts have, with practical unanimity, held that the power of exclusive legislation carries with it exclusive jurisdiction, and in many cases have treated the cession as accomplishing a thorough separation of the land and its inhabitants from the state. It has been stated generally that the states cannot take cognizance of any acts done in the ceded places after the cession; the inhabitants of those places cease to be inhabitants of the state and can no longer exercise any civil or political rights under the laws of the state."

There is nothing in this Act which confines its application to residents of the State of Maryland. In fact, its provisions extend to non-residents as well because by Section 110B it is expressly provided that:

> ". . . if such operator is a non-resident the privilege of operating a motor vehicle within this State,"

shall be suspended. On the other hand, the provisions of the Act are not, in our opinion, enforcible against a Maryland resident who is involved in a collision in a foreign State, and upon the aforegoing authorities, we think that the Reservation occupied by the United States Naval Academy, while within the geographical limits of the State of Maryland, is no more subject to the jurisdiction or control of this State, except in the very limited manner above mentioned, than is territory which is far removed beyond our boundaries. To hold that the provisions of the Financial Responsibility Act of 1945 are applicable to automobile accidents which occur within the Reservation of the United States Naval Academy would be merely to say in other words that the General Assembly of Maryland has the authority to enact laws to be enforced upon federal territory.

It follows, therefore, in our opinion, that Chapter 456 of the Acts of 1945 has no application to motor vehicle accidents occurring within the reservation occupied by the United States Naval Academy.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES—FINANCIAL RESPONSIBILITY ACT OF 1945 —WHERE EMPLOYEE IS DRIVING A MOTOR VEHICLE OWNED BY A CUSTOMER OF HIS EMPLOYER, BOTH OF WHOM ARE INSURED AGAINST LIABILITY FOR TRAFFIC ACCIDENTS, THE MERE DENIAL OF LIABILITY BY BOTH INSURANCE COMPANIES FOLLOWING A COLLISION DOES NOT AUTHORIZE THE SUSPENSION OF EMPLOYER'S LICENSE.

May 27, 1947.

Mr. W. Lee Elgin,
Commissioner of Motor Vehicles.

We have your letter, together with enclosures, informing us that an employee of a public garage, while driving a motor vehicle owned by one of the storage customers of his employer, became involved in a collision. The owner of the vehicle as well as the owner of the garage held policies insuring them against loss or damage as a result of highway accidents, yet both insurers deny liability under the respective policies for this particular accident. The denial of liability is apparently predicated upon the contention by each insurer that at the time of the collision, the employee was acting as the agent for the other carrier's insured. Because of the position which has been assumed by the insurance carriers you have suspended the license of the garage employee who was operating the motor vehicle at the time of the collision. You have asked our opinion concerning the propriety of your action in the premises.

By Chapter 456 of the Acts of 1945, several Sections were added to Article 66½ of the Code. The language of the Act reveals an intent to augment the financial responsibility law by permitting, under certain circumstances, the suspension of the licenses of persons and the registration of motor vehicles owned by them following traffic accidents, without the necessity of delaying action until the termination of litigation. The Act requires the operator of every motor vehicle in which any person is killed or injured, or

in which property damage in excess of $50.00 is sustained, to make an immediate report to the Department of Motor Vehicles and within 60 days thereafter the Department is directed to suspend the license of each operator and the registrations of each owner of a motor vehicle involved in such accident, unless such operator or owner, or both, shall deposit security in a sum which will be sufficient to satisfy any judgment which may be rendered as the result of such accident.

The provision regarding the suspension of licenses and registration certificates unless security is given, as required by Section 110B of the Act, does not extend to every owner or operator, because that Section provides expressly that it shall not apply:

> "1. To such operator or owner if such owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;
>
> "2. To such operator, if not the owner of such vehicle, if there was in effect at the time of such accident an automobile liability policy or bond with respect to his operation of motor vehicles not owned by him; . . ."

It is our opinion that paragraphs 1 and 2, above quoted, of Section 110B negative the right to suspend the license of the employee by whom the vehicle was being operated at the time of the collision. Paragraph 1 it seems to us, is quite clear in withdrawing from the provisions of Section 110B the operator or owner of a vehicle if the owner had in effect at the time of the accident an automobile liability policy with respect to the vehicle involved. We understand that it is not denied that such a policy exists, and that the contention of the Insurance Company is directed solely to the point that no liability exists under that instrument. On the other hand, paragraph 2, above quoted, exempts the operator of a motor vehicle from the provisions of Section 110B if such operator was not the owner of the vehicle, and

if there was in effect at the time of the accident an automobile liability policy or bond with respect to the operation by him of motor vehicles which he did not own. It is a fair assumption that exactly that kind of policy is carried by the garage which employed this operator.

The matter of determining which insurance carrier is liable is a judicial question which neither your Department nor this office is authorized to decide, but in any event it is our view that the existence of these policies brings the case within the provisions of the exceptions which we have set forth above, and it is accordingly our opinion that the suspension of the operator was unauthorized.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES — FINANCIAL RESPONSIBILITY — CERTIFICATE OF INSURANCE MAY BE WITHDRAWN IF FILED BY MISTAKE WHEN THERE IS ACTUALLY NO POLICY IN FORCE, BUT SUCH CERTIFICATE MAY NOT BE WITHDRAWN BECAUSE OF THE CONTENTION THAT THERE IS NO LIABILITY UNDER THE TERMS OF AN OUTSTANDING POLICY OF INSURANCE.

May 28, 1947.

Mr. W. Lee Elgin,
Commissioner of Motor Vehicles.

We have your recent letter asking our views concerning questions which have arisen under Chapter 456 of the Acts of 1945. You have referred to two cases involving motor vehicle accidents, and you ask our opinion regarding the procedure to be followed.

An insurance carrier by which a certificate was filed in one case has notified you that its certificate was filed in

error, and that it should now be disregarded. The reason assigned is that the policy does not provide public liability and property damage coverage. In the other case, the insurance company has requested that its certificate be disregarded because the motor vehicle there was not being operated by a licensed operator. The questions presented, therefore, are whether the certificates may be withdrawn, and if they may be so withdrawn, is the Department authorized at this time to invoke the suspension provisions of the Act inasmuch as the 60-day period following receipt of the reports of the accidents has passed.

It is provided by Section 110A of Chapter 456 of the Acts of 1945 that the operator of every motor vehicle involved in an accident within this State shall immediately make a written report thereof to the Department, while Section 110B requires that within 60 days after the receipt of the report of an accident which has resulted in bodily injury or death, or property damage in excess of $50.00, the Department shall suspend the license of each operator and all registrations of each owner of the motor vehicle involved in such accident, unless the requirements of the Act are met.

The provisions of Section 110B do not apply where the owner and operator are insured under an automobile liability policy. If there is insurance in existence the company which issued the policy is required to furnish your Department with written notice that such policy was in effect at the time of the accident.

We find in the law no provision from which we can conclude that if, through error, an insurance company certifies that it has an outstanding policy in a given case, such error may not be corrected. In dealing wit ha similar question under the Financial Responsibility Act of 1931 it was held:

> "Where duplicate coverage has been filed by different companies, apparently in error, and without the knowledge or consent of the assured, it is

clear that a different situation presents itself. Most policies provide that they do not go into effect until the first premium is paid or credit advanced therefor by the agent. Where several policies are filed and the assured accepts but one of them, only this one is in effect. The others were never accepted by the assured or given any force and effect. Therefore, the thirty-day notice requirement does not apply to them."

20 Opinions of the Attorney General, 554.

Accordingly, it is our opinion that, where such certificates have been mistakenly filed, they may be withdrawn.

However, with respect to the second case above mentioned, where the insurance carrier has requested cancellation of the certificate, not because of the non-existence of insurance, but because the person who was driving the automobile at the time of the accident was an unlicensed operator, we believe that the liability of the insurer is a matter which under the law is not for your determination. As we have pointed out in previous opinions concerning Chapter 456 of the Acts of 1945, if an automobile liability policy is in existence, you do not have the authority to determine the extent of the insurance carrier's liability, if any. It is merely your duty to accept and file the certificate showing that such insurance exists.

You have asked if, in view of the requirements that you suspend an operator's license and owner's registration within 60 days after the receipt of the report, you may, in the first case above mentioned, proceed to take that action at this time inasmuch as that period has expired. In 27 Opinions of the Attorney General 59, we had before us for interpretation the provision of Section 63 of Article 2B of the Code, which required the State License Bureau to decide appeals within 30 days from the date of the receipt by it of the record. In that case we said:

"In our opinion, this language imposes a clear duty and obligation on your Bureau to determine

all appeals which come to it within the time set by the statute. However, we have no doubt that a decision made by your Bureau on appeal after 30 days from the time of receipt of the papers would be valid. There is no provision in Section 63 which compels or necessarily tends to the conclusion that failure to act within the 30-day period nullifies a decision when made. The general rule of law is that a statute which specifies the time for the performance of an official duty will not be regarded as a limitation on the exercise of the power granted, unless the statute contains negative words denying the exercise of the power or authority after the time named."

It follows, in our opinion, that you may now suspend the license and registration certificate in the first case above mentioned, unless the party complies with the requirements of the statute.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES—AMBULANCE OWNED BY PRIVATE COMPANY MAY BE DESIGNATED AS AUTHORIZED EMERGENCY VEHICLE.

July 1, 1947.

Mr. W. Lee Elgin,
Commissioner of Motor Vehicles.

We have your recent letter in which you advised us that the American Ambulance and Oxygen Service, which has been operating in Baltimore for ten years, has requested permission to install sirens on its motor vehicles. You ask

if the motor vehicles operated by that Company are authorized emergency vehicles within the meaning of the motor vehicle law.

Section 234(b) of Article 66½ of the Code provides that:

> "No vehicle shall be equipped with nor shall any person use upon any vehicle any siren, whistle, or bell, except as otherwise permitted in this subsection. . . .
>
> "Any authorized emergency vehicle may be equipped with a siren, whistle or bell, . . . but such siren shall not be used except when such vehicle is operating in response to an emergency call . . ."

Authorized emergency vehicles are defined by Section 2(1) of Article 66½ of the Code as:

> "Vehicles of the fire department, salvage department, police vehicles, and such ambulances and emergency vehicles of municipal departments or public service corporations as are designated or authorized by the Commissioner or the Chief of Police of an incorporated city."

The answer to your question is to be determined by the meaning to be attributed to the definition contained in Section 2(1) above quoted. In interpreting Acts of the General Assembly, the cardinal rule is to ascertain the legislative intent. *State v. Petrushansky*, 183 Md. 67, and cases there cited. It can hardly be contended that the only ambulances which fall within the scope of authorized emergency vehicles are those of municipal departments or public service corporations designated or authorized by the Commissioner or the Chief of Police of an incorporated town. Such construction would leave entirely beyond the provisions of the law ambulances which are operated by hospitals or private enterprises which engage in the business of supplying ambulance service. Likewise, beyond the scope of that interpretation of the law would be ambu-

lances owned and operated by large corporations for the purpose of transporting their own employees to hospitals or other places where medical treatment may be obtained.

We cannot assume that calls made by ambulances owned by private companies are of less urgency than those made by ambulances owned and operated by municipal departments or public service corporations, and it is our opinion that in enacting Article 66½ of the Code, the General Assembly did not intend to make any distinction between them. We think the proper interpretation to be placed upon Section 2(1) is that, in addition to the other vehicles therein mentioned, authorized emergency vehicles include such ambulances as are designated or authorized by the Commissioner or Chief of Police of an incorporated town, and that their ownership and operation are not limited to municipal departments and public service corporations.

It follows, therefore, in our opinion that the Commissioner of Motor Vehicles and the Chief of Police of an incorporated city may designate privately owned ambulances as authorized emergency vehicles, and that when so designated, such vehicles are entitled to the benefits of the provisions of Article 66½ of the Code relating thereto.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES—FINES AND FORFEITURES—FINES LEVIED FOR VIOLATIONS OF PARKING ORDINANCES SHOULD BE REMITTED TO LOCAL AUTHORITIES.

Mr. Samuel Owings, 4th,
Trial Magistrate.

July 1, 1947.

We have your letter of June 24th informing us that the town of North Beach, which is an incorporated town gov-

erned by a Mayor and six Councilmen, has restricted parking on certain of its streets. Arrests for violations of the ordinance are made by town officers. You ask if the fines which you impose for these violations are to be turned over to the Commissioner of Motor Vehicles or to the Town Treasurer.

While Article 66½ of the Code expressly provides that its provisions are intended to be State-wide and that local sub-divisions shall have no right to make or enforce any local law, ordinance or regulation upon any subject for which provision is made in that Article, Section 135 thereof, among other things, does authorize local sub-divisions, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, to regulate the standing and parking of vehicles.

Section 285 of that Article provides that all fines, penalties and forfeitures "imposed or collected under any of the provisions of this Article, shall be paid over on the second and fourth Mondays of each month after receipt thereof to the Department." It is our view that a fine imposed for the violation of a valid ordinance regulating the parking of motor vehicles on streets and highways under the jurisdiction of the town authorities is payable to the town, rather than to the Department of Motor Vehicles, because such fine is collected under the terms of the ordinance, rather than under the provisions of Article 66½. We are informed by the Department that this is the practice which has prevailed for many years. See 7 Opinions of the Attorney General, 319.

You ask, too, if cases involving violations of the parking ordinances should be placed upon the motor vehicle docket furnished you by the Department of Motor Vehicles, or upon another docket. Section 269 of Article 66½ of the Code requires the Department of Motor Vehicles to prescribe and furnish a uniform system of dockets to all Trial Magistrates to be used "in all cases arising under any of the provisions of this Article." Following the same reasoning, if the offense arises under a town ordinance, rather

than under Article 66½ of the Code, we believe that the town docket would be the proper place to record the proceedings.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES—REGISTRATION—A VEHICLE MAY NOT BE REGISTERED UNDER THE SHUTTLE RELAY LAW UNLESS BOTH THE TRACTOR AND SEMI-TRAILER ARE OWNED BY THE SAME PERSON.

July 8, 1947.

Mr. W. Lee Elgin,
Commissioner of Motor Vehicles.

We have your recent letter inquiring about the provisions of the law relating to what is generally known as shuttle relay operations. It appears that A is in the business of leasing trucks, tractors and semi-trailers to various persons, and that it has leased two such tractors to B, who, himself owns one tractor and four semi-trailers, which are used in shuttle relay operations. The two leased tractors are titled in the name of the owner, although under the terms of the lease B has the exclusive use and control of them. The question is whether the arrangement above described falls within the provisions of the law regulating shuttle relay operations.

Chapter 99 of the Acts of 1947 provides for the registration fees to be paid on various types of motor vehicles, and by Chapter 658 of the Acts of 1947, it is provided:

> "(b) Upon receipt of an application in proper form for the registration of semi-trailers operated under the shuttle or relay system, it shall be the duty of the Department, after due investiga-

tion, to issue additional registration plates not exceeding one additional for each two truck-tractors registered by the owner without extra cost and the fee for any additional trailers other than those hereinabove specified but not exceeding one for each two truck-tractors shall be one-half the regular registration fee."

Several years ago this Department had occasion to discuss at some length various phases of the shuttle relay law in an opinion found in 24 Opinions of the Attorney General, 598. In considering the provisions of the law, it was there said: "The purpose of this Section was to enable the owner of a tractor and two semitrailers, which he intended to operate under a shuttle or relay system, to use one semi-trailer on the highways with the tractor, while the other semi-trailer was not in use."

It is our view that the plain wording of Chapter 658 compels the conclusion that both the tractors and the semi-trailers must be registered in the name of the same owner in order to have the benefit of registration under the shuttle relay law.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES—TITLE CERTIFICATES—TITLING TAX—TAX PAYABLE UPON TITLE TRANSFERRED TO A CORPORATION FORMED BY THE MEMBERS OF A PARTNERSHIP.

July 10, 1947.

Mr. W. Lee Elgin,
Commissioner of Motor Vehicles.

We have your recent letter, together with its enclosure, in which you informed us that the three members of a

partnership operating a charter and school bus business have formed a corporation, and have transferred to the corporation the busses which were a part of the partnership assets. The question presented for our consideration is whether this transaction is subject to the 2% excise tax imposed on the issuance of certificates of title to motor vehicles.

Section 25A of Article 66½ of the Code, as amended by Chapter 560 of the Acts of 1947, provides for the imposition of an excise tax for the issuance of every original certificate of title for a motor vehicle, and for the issuance of every subsequent certificate of title for a motor vehicle in the case of a sale or resale thereof on and after July 1, 1947, at the rate of 2% of the fair market value of such motor vehicle.

The attorney representing the partners who have incorporated their business has informed us that certain partnership assets, including the motor vehicles and an amount of cash, were turned over to the corporation which, in turn, issued an equal number of shares to each of the individuals comprising the partnership. The problem is, therefore, whether this transaction constitutes a sale within the meaning of the Act.

In 46 Am. Jur. page 195, it is said that the term "sale", in a very broad sense, signifies the transfer of property from one person to another for a consideration of value without reference to the particular mode in which the consideration is payable, and in this sense the term includes "barter." When used in a somewhat narrower sense, the term includes the transfer of personal property for a price or a consideration estimated in money, and when the term is used in such sense it includes a transfer of personal property at a fixed money price payable in cash or in goods. In a still narrower and more strict sense, the term means a transfer of title for money. See also 55 C. J. page 37. In *Associates Discount Corp. v. Fay* (Mass.) 30 N. E. 2d 876, 132 A. L. R. 519, the Supreme Judicial Court of Massachu-

setts observed that at common law the authority to sell did not include the authority to exchange or barter, but that in statutes the word "sale" is commonly construed as including exchange or barter.

The Court of Appeals of Maryland has given its approval to a broad interpretation of this term because in *Eastern Shore Trust Co. v. Lockerman*, 148 Md. 628, Judge Offutt, speaking for the Court, said: "To sell means ordinarily to transfer to another for a valuable consideration the title or the right to possess property."

Furthermore, the Uniform Sales Act, Code, Article 83, Section 19(2) defines a sale of goods as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."

Quite recently we considered the application of Section 220 of Article 81 of the Code, as amended by Chapter 253 of the Acts of 1945, in connection with a conveyance of real estate by two individual owners thereof to a corporation formed by them, and for which they received stock of the corporation. We held that the recording tax imposed by the above-mentioned statute was applicable, and in the course of the opinion, it was observed that:

> "It is a well established principle that a corporation is a distinct legal entity, separate and apart from its stockholders. Thus, where a corporation takes fee simple title to real estate under a general warranty deed, it holds the property in its own name and right and not in trust for the stockholders. This would be true in ordinary circumstances even though there were only a single stockholder. Moreover, where the corporation pays for the real estate by issuing shares of its stock, the transferor has received actual and valuable consideration for his grant."

(Opinion to Benjamin L. Barnes, Clerk of the Circuit Court for Somerset County, dated January 28, 1947.)

Revenue statutes are to receive a reasonable construction with a view to carrying out their purposes and intent. *Shell Oil Co. v. Brownley,* 181 Md. 8, and we think the net result of the authorities which we have cited is that the transaction about which you inquire is a sale within the meaning and intent of Section 25A of Chapter 560 of the Acts of 1947, and that upon the issuance of titles for the motor vehicles the 2% excise tax based upon their fair market value must be collected. It cannot be said that the transfer of the motor vehicles was not a sale within the meaning of that term, as defined by the Court of Appeals in the *Lockerman* case. The issuance of capital stock to the individuals comprising the partnership certainly furnished the valuable consideration for the transfer and if the term "sales or resales" as used in the Act was to be understood and applied as meaning something which altered the *Lockerman* case, the General assembly, we must presume, would have furnished us with its own definition.

We are unable to conclude that the Legislature, without furnishing some other statutory standard by which a sale was to be defined, intended to repudiate the definition adopted by the Court of Appeals.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES — FINANCIAL RESPONSIBILITY — DEPARTMENT MAY NOT DETERMINE WHO IS LIABLE FOR DAMAGES IN ACCIDENT CASES.

July 16, 1947.

Mr. W. Lee Elgin,
Commissioner of Motor Vehicles.

We have your letter of July 14th enclosing copy of a letter which you received from Mr. Omer T. Kaylor, of the

Washington Bar, relative to the suspension of the license and registration of a person involved in a motor vehicle accident. Mr. Kaylor points out that his client was free from fault and he has requested that you remove the suspension if it is possible to do so.

Section 110B of Article 66½ of the Code, as enacted by Chapter 456 of the Acts of 1945, requires you to "suspend the license of each operator and all registrations of each owner of a motor vehicle in any manner involved in such accident." As we have pointed out in numerous opinions to you concerning the construction and application of the Act of 1945, we find no provision which authorizes you to determine who is the negligent party and to impose upon him alone the penalties prescribed by that Act.

It is our opinion that you must obey the legislative command as set forth in Section 110B of Article 66½ of the Code unless the parties give evidence of financial responsibility as provided for in the law. The suggestion of Mr. Kaylor that his client will never again be able to operate a motor vehicle because of his inability to deposit the amount of money which you have required, is answered by Section 110B of that Article, which provides for the duration of suspensions under that Act.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES—REGISTRATION—TRUCK CHASSIS, MOUNTING A REVOLVING CRANE, USED INCIDENTALLY ON HIGHWAYS, NOT SUBJECT TO REGISTRATION REQUIREMENTS.

August 29, 1947.

Mr. W. Lee Elgin,
Commissioner of Motor Vehicles.

We have your letter of August 27 with which you enclosed copy of a letter addressed to you by Mr. J. Temple Smith, an attorney at law, and two photographs.

It appears that Mr. Smith's client purchased a used, revolving crane from a branch of the War Assets Administration, at Richmond, Virginia, and, upon making a telephone inquiry of your Department, he was informed that it was necessary for him to purchase tags for that device. From the photographs, it appears that the revolving crane is mounted on a truck chassis, having the usual type cab, hood and headlights. Mr. Smith's letter states that the equipment "is primarily constructed for and practically always used for construction work on location and which is not primarily used for transportation of persons or property and is only incidentally operated or moved over the highways". Article 66½, Section 2 (54) defines "Special Mobile Equipment" as follows:

> "Every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including farm tractors, road construction or maintenance machinery, ditch-digging apparatus, well-boring apparatus and concrete mixers. The foregoing enumeration shall be deemed partial and shall not operate to exclude other such vehicles which are within the general terms of this section."

By Section 21 of the same Article, every motor vehicle, trailer and semi-trailer when driven or moved upon a high-

way is made subject to the registration and certificate of title provisions of the motor vehicle law, except . . . "Any special mobile equipment as herein defined; . . ."

In 18 Opinions of the Attorney General 358, it was held that a self-propelled well-digging machine was not subject to the registration requirements of the motor vehicle law. We believe that the machine in question falls within the same category. While it appears that the crane and the machinery by which it is operated are placed upon a truck chassis, it is our view that its use on construction work and its movement on the highways being limited to those occasions when it is traveling from one job to another bring it within the exceptions provided for in Section 21. Of course, if the crane were removed and the vehicle used as a truck the case would be otherwise.

It follows, therefore, that its registration was not required by law and that, upon the surrender of the tags and certificate of title, the fees paid therefor should be refunded.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES—SPECIAL CHAUFFEURS' LICENSES—SPECIAL CHAUFFEURS' LICENSES ARE REQUIRED ONLY WHEN VEHICLES ARE IN USE AS PUBLIC OR COMMON CARRIERS.

October 27, 1947.

Mr. W. Lee Elgin, Commissioner,
Department of Motor Vehicles.

We have your recent letter with which you enclosed a request from a member of the Department of Maryland State Police for a ruling from us on the interpretation of Section 81 of Article 66½ of the Code. This Section deals with special chauffeurs' licenses, and the precise question to which our attention is directed is whether a person driving

a vehicle which is registered so as to permit its use as a public or common carrier of passengers is required to hold a special chauffeur's license even though at the time of his operation the vehicle is not used for hiring purposes.

Section 81 of Article 66½ of the Code, as amended by Chapter 562 of the Acts of 1945, provides, in part, that:

> "No person who is under the age of eighteen (18) years shall drive any motor vehicle while in use as a school bus, nor any motor vehicle while in use as a public or common carrier of persons, nor shall any person drive such vehicle until he has been licensed as a chauffeur and received a special chauffeur's license * * *."

We think the answer to this question must be determined not only from an examination of Section 81 but from other portions of Article 66½ of the Code dealing with chauffeurs' licenses. Section 78 of Article 66½ prohibits the operation of a motor vehicle by any person who does not hold a valid license as an operator or chauffeur and the operation of a vehicle by a person as a chauffeur is forbidden unless he holds a chauffeur's license. The term "chauffeur" is defined by Section 2 (4) as:

> "Every person who is employed for the purpose of operating a motor vehicle and every person who operates a motor vehicle while in use as a public or common carrier of persons or property, or for hire."

If we construe the provisions of Section 81 as requiring a special chauffeur's license to be held by a person operating a motor vehicle which may lawfully be used to carry passengers for hire, regardless of whether the vehicle is actually being used for that purpose at the time, it would be unlawful for a garageman or repairman to drive said vehicle as an incident to testing and adjusting its mechanical parts. We do not believe that this was intended by the General As-

sembly. We think the purpose of Section 81, especially when considered with the other provisions to which we have referred, is to require a special chauffeur's license when the vehicle is being used for hiring purposes and that when it is withdrawn, even temporarily, from serving the public, the requirement of Section 81 need not be met by its operator.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

MOTOR VEHICLES—APPEALS—THE STATE HAS NO GENERAL RIGHT OF APPEAL IN CASES INVOLVING VIOLATIONS OF MOTOR VEHICLE LAWS.

November 19, 1947.

Mr. Harry B. Clark,
State's Attorney for Talbot County.

We have your letter in which you have asked if the State is permitted to appeal to the Circuit Court from an acquittal by a Trial Magistrate of a person charged with a violation of the motor vehicle laws.

Section 264 of Article 66½ of the Code, as enacted by Chapter 1007 of the Acts of 1943, provides, in part, that "* * * any person so convicted of any offense under this Article shall have the right to appeal from the judgment * * *." In *Crichton v. State*, 115 Md. 423, the Court of Appeals, in dealing with Section 140 (c) of Chapter 207 of the Acts of 1910, which provided similarly that "* * * any person so convicted of any offense under this sub-title shall have the right to appeal from the judgment * * *," held that that Section gave a right of appeal to the convicted person only and distinguished it from the language of what was then Section 12 of Article 52 of the Code, which conferred a right of appeal upon both the State and the accused in criminal cases tried before justices of the peace.

In 2 Opinions of the Attorney General 122, former Attorney General Ritchie concluded that the State could not appeal from an acquittal by a Magistrate of a person charged with violating the motor vehicle law. That result was based upon Section 159 of Chapter 687 of the Acts of 1916; the pertinent language of which was identical to the Act of 1910 above quoted.

By Chapter 85 of the Acts of 1918, the motor vehicle laws were repealed in their entirety and a revised motor vehicle code was adopted. By Section 158 of that Act, the precise language heretofore quoted giving the right of appeal to a convicted person was used without alteration. Again, by Chapter 506 of the Acts of 1920 extensive amendments were made to the motor vehicle laws as enacted by Chapter 85 of the Acts of 1918 but Section 158 was not amended.

We think it is abundantly clear that Section 264 of Article 66½ of the Code restricts the right of appeal to the person convicted. This language is certain and unambiguous and, when considered in the light of the numerous revisions which have been made in the motor vehicle laws, even as recently as the enactment of Chapter 1007 of the Acts of 1943, and the construction which was placed thereon by former Attorney General Ritchie and by the Court of Appeals of Maryland in *Crichton v. State, supra,* we can reach no other conclusion than that the convicted person, and he alone, may appeal. The General Assembly in these various enactments is presumed to have had knowledge of the construction placed upon them and when on the several occasions it amended the law but omitted to alter the provision relating to appeals, it must be concluded that the judicial and administrative interpretations which had been placed upon that provision disclosed correctly the legislative intent. *Mayor & City Council of Baltimore v. Machen,* 132 Md. 618.

HALL HAMMOND, *Attorney General.*

OFFICES

OFFICES—JUSTICE OF PEACE—CLERK EMPLOYED IN OFFICE OF FEDERAL COLLECTOR OF INTERNAL REVENUE MAY BE A JUSTICE OF THE PEACE.

January 2, 1947.

Hon. J. Wilmer Cronin,
Aberdeen, Maryland.

You ask us whether the gentleman employed as a Zone Deputy in the office of the Collector of Internal Revenue, whose position is under civil service, may be a Trial Magistrate, in view of the language of Section 4 of Article 52 of the Code, which prohibits a Justice of the Peace from acting as such if he holds "office" under the government of the United States.

The answer to your question turns, therefore, on whether or not the position occupied by the gentleman is to be regarded as an "office" within the meaning of the prohibition of Section 4, or whether it is merely employment.

In 14 Opinions of the Attorney General, 228, it was held that one employed as a clerk in the Veterans' Bureau might hold the position of Justice of the Peace, since his duties were clerical and did not involve the exercise of any of the sovereign powers of the government. A similar ruling was made in 22 Opinions of the Attorney General, 474, in the case of one employed in the Works Progress Administration. We take it that the gentleman as to whom you write comes within the category of those dealt with in the two opinions cited. You advise us that the Internal Revenue Bureau has ruled that the employee might accept the position as Trial Magistrate, and we assume that this ruling was made on the theory which we are adopting, that the work

done by the man involved is not such as to make him an "officer" within the technical meaning of that word.

It is our view, therefore, that the man as to whom you write may accept and execute the position of Trial Magistrate without running afoul of Section 4 of Article 52.

HALL HAMMOND, *Attorney General.*

OFFICERS—SHERIFFS

OFFICERS — SHERIFFS — ACT OF LEGISLATURE INCREASING SALARY OF SHERIFF MAY NOT BE MADE TO APPLY TO INCUMBENT.

May 16, 1947.

Mr. Juniper S. Teats,
Sheriff of Garrett County.

We have your letter of April 22nd asking the effective date of Senate Bill No. 476, which provides the salaries to be paid to the Sheriffs in the various Counties, and directs the Sheriffs to pay the fines, costs, fees and charges collected by them to the County Commissioners or the Mayor and City Council of Baltimore, as the case may be. Although this Bill was passed as an emergency measure, it cannot become effective until June 1, 1947. See 26 Opinions of the Attorney General, 328.

Section 493 of Article 12 of the Code of Public Local Laws provides that the Sheriff of Garrett County shall receive from the County a salary of $1,500 a year, payable quarterly in lieu of all fees, except fees in civil cases, payable by others than Garrett County or the State of Maryland. Section 37A(k) of Senate Bill No. 476 directs that your salary shall be $2,000 per year and $600 for expenses.

Inasmuch as Article III, Section 35 of the Constitution forbids the increase or decrease of the salary or compensation of any public officer during his term of office, it is our opinion that the provisions of Section 493 of Article 12 of the Code of Public Local Laws must govern your compensation for the remainder of the term which you are now serving.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

PENSIONS

PENSIONS—THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION MAY PARTICIPATE IN RETIREMENT SYSTEM.

June 9, 1947.

Mr. J. Bond Smith, General Counsel,
The Maryland-National Capital Park and
Planning Commission.

This is in reply to your letter of June 4th asking our opinion as to whether The Maryland-National Capital Park and Planning Commission, its members, officers and employees are entitled to avail themselves of membership in the Employees' Retirement System of Maryland.

This is to advise you that we are of the opinion that members, officers and employees of your Commission are entitled to avail themselves of membership in the Employees' Retirement System of Maryland. Section 18 of Article 73B of the Code entitles any officer or employee of a municipal corporation to participate in the State Employees' Retirement System, provided the legislative body of such municipal corporation approves. Section 17 of said Article defines a municipal corporation as a county, incorporated town, municipality or other political subdivision of the State. That same Section 17 defines the legislative body of a political subdivision to include the board or commission having authority or control over a political subdivision. Thus if the members of the Commission approve, the members, officers and employees may participate in the State Employees' Retirement System.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

PENSIONS—TRANSFER FROM ONE RETIREMENT SYSTEM TO ANOTHER.

November 28, 1947.

Mr. J. P. Mannion, Director,
Employees' Retirement System.

This is in reply to your letter of November 6, 1947, in which you ask our opinion as to whether a member of the State Police from May 3, 1932, to May 31, 1942, who re-entered the State employment on April 1, 1944, may transfer from the pension system of the Maryland State Police to the Employees' Retirement System under Chapter 664 of the Acts of 1947. During the period from May 31, 1942, to April 1, 1944, the person in question was in private employment.

We are of the opinion that said employee may not transfer from the pension system of the Maryland State Police to the Employees' Retirement System under Chapter 664 of the Acts of 1947. Said Chapter 664 adds Sections 25, 26, 27 and 28 to Article 73B of the Annotated Code of Maryland and provides for transfers between retirement systems. Sections 25 and 26 provide for transfer by a person who is at the present time a member of a retirement system to another retirement system and are in no way applicable to the situation of the former member of the State Police. Section 28 provides that "a member of one of such retirement systems on June 1, 1947, who was a member of another such system immediately prior to entering his present system may now effect such a transfer." This is the only Section under which the person in question might hope to effect a transfer. He cannot, however, qualify for transfer under Section 28 because he was not a member of another system immediately prior to entering his present system, the Employees' Retirement System, which he entered on April 1, 1944. Immediately prior thereto for a period of one year and eleven months, the person in question was in

private employment and not a member of any retirement system.

It is our opinion that Section 28 would permit this employee to transfer only if he had remained a member of the pension system of the Maryland State Police up to April 1, 1944, when he re-entered State employment and became a member of the Employees' Retirement System. As previously noted, such was not the case and, therefore, the transfer is not authorized by Chapter 664 of the Acts of 1947.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

PENSIONS—STATE SENATOR—MAY RECEIVE A SERVICE RETIREMENT FOR PRIOR STATE SERVICE AS A COURT CLERK AND ELECT NOT TO JOIN THE RETIREMENT SYSTEM AS A STATE SENATOR.

December 19, 1947.

Mr. John P. Mannion, Director,
Employees' Retirement System.

This is in reply to your letter of December 2, 1947, inquiring as to whether Mr. Robert A. Shallcross, who was Clerk of the Circuit Court for Kent County from November 30, 1927 to January 1, 1947 and who on November 5, 1947 was elected State Senator for Kent County and took office as State Senator on January 1, 1947, may voluntarily retire as of January 1, 1947 and receive a service retirement allowance while at the same time serving as State Senator and receiving compensation from the State as such. We understand that as of January 1, 1947, Mr. Shallcross was over sixty years of age.

Section 7 (1) of Article 73B of the Annotated Code provides that any member of the State Employees' Retirement System may voluntarily retire from State service upon at-

taining the age of sixty, and Section 7 (2) provides that upon such retirement, said member shall receive a service retirement allowance consisting of an annuity and a pension. There is no provision in the law preventing a State employee who is a member of the Retirement System from retiring at the age of sixty, taking a service retirement allowance and then accepting private employment, with the result that he receives both an annuity and pension for retirement from State service and at the same time receives compensation for private employment. Likewise, there is no prohibition in the law against a State employee who is a member of the retirement system retiring from service at the age of sixty, taking a service retirement allowance and re-entering state service, with the result that he receives an annuity and a pension for retirement from State service and at the same time receives compensation for State service in the new position. The Retirement System law contains a provision however, which effectively prevents both working for the State and receiving a pension from the State for retirement from prior service. Section 3 (1) of Article 73B provides that any person who shall become an employee of the State must also become a member of the Retirement System as a condition of employment and shall not be entitled to receive any pension or retirement allowance from any other pension or retirement System supported wholly or in part by the State of Maryland. The term "employee of the State" is broadly defined in Section 1 (3) to include any regular classified or unclassified officer or employee of the State for whom compensation is provided by State appropriation or from State funds. Thus, in most cases where a retired employee of the State receiving a State pension under the Retirement System, reenters State employment, he must reenter the Retirement System as a condition of employment and thereupon give up his retirement allowance. We understand that it has always been the policy of the Board of Trustees of the Retirement System that no person may receive a pension under the retirement System and also be employed by the State and receive compensation therefor. This

policy of the Board is sound, not because there is any express prohibition in the law against working for the State and also being retired by the State under the Retirement System, but because the Retirement System law by making it a condition of employment that every employee of the State be a member of the Retirement System prevents a person reemployed by the State from retaining his retirement allowance.

There is, however, an exception to the above. Section 3 (5) of Article 73B provides in part:

> "Notwithstanding anything to the contrary in this Article, membership in the retirement system shall be optional with any class of elected officials, or with any class of officials appointed for fixed terms. * * * All officials hereafter elected or appointed may become members of the System upon making application therefor within six months after their election or appointment * * *."

This provision of the law permits a State Senator to elect not to become a member of the Retirement System and membership in the system is not a condition of employment by the State in the office of State Senator. Since, as previously stated, there is no prohibition in the law against being pensioned by the State and also being employed by the State, a State Senator who, by virtue of previous State employment, has the right to retire from State service and accept a pension may continue to hold that pension in spite of election to the office of State Senator because in such office he may elect not to rejoin the Retirement System. We are, therefore, of the opinion that Senator Shallcross may voluntarily retire as a member in service having attained the age of sixty and receive the service retirement allowance accorded him by Section 7 (2) of Article 73B, and at the same time serve as State Senator and receive from the State compensation for such office.

We are further of the opinion that no rule, regulation or practice of the Board of Trustees of the Retirement Sys-

tem may prevent a State official from exercising the right given him by Section 3 (5) to elect not to enter the retirement System while at the same time exercising the right granted by Section 7 (1) to retire on an annuity and pension for prior State service in another position.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

PENSIONS—EMPLOYEES OF GAME AND INLAND FISH COMMISSION MAY NOT HAVE RETIREMENT PAY OR PENSIONS INCREASED FROM "STATE GAME PROTECTION FUND."

December 31, 1947.

Mr. Garner Wood Denmead, Chairman,
Game and Inland Fish Commission.

In your letter of December 12th you ask us whether or not the Game and Inland Fish Commission has authority to increase the retirement pay or pensions of employees in the field service of that Commission from the moneys in "the State Game Protection Fund".

Section 18 of Article 99 of the Annotated Code of Maryland (1939 Ed.) provides that the Clerks of the various Courts shall transmit to the Comptroller of the State all moneys received by them for licenses and the amounts so received shall be placed in a separate fund known as "the State Game Protection Fund". Said Section goes on to say:

> "The moneys in said fund shall be used solely for the salaries and expenses of the State Game and Inland Fish Commission, the State Game Warden and his subordinates, and for scientific investigation and the protection and propagation of birds, wild fowl, inland fish and game."

Section 4 of Article 99 of the Code, as amended by Chapter 195 of the Acts of 1947, provides for the appointment of a Director of the Game and Inland Fish Commission, and states that he shall be so appointed under the provisions of the Merit System. The Chapter further provides that the officers and employees of the Game and Inland Fish Commission shall remain under the Merit System. Section 6 of Article 99 provides for the appointment of Deputy Game Wardens, specifying that all appointments shall be made under the Merit System and in accordance with Article 64A of the Code.

Section 3 of Article 73B of the Code (1943 Supp.) states:

> "Any person who shall become an employee as herein defined, after the date of establishment, shall become a member of the Retirement System as a condition of employment, and shall not be entitled to receive any pension or retirement allowance from any other pension or retirement system supported wholly or in part by the State of Maryland, anything to the contrary notwithstanding."

In view of the explicit provisions restricting the use of the funds in the "State Game Protection Fund" as noted above in Section 18 of Article 99, and considering the fact that the Director of the Department, the Deputy Game Wardens and employees of the Department are within the provisions of the Merit System, and further, in view of the limitation set forth in Section 3 of Article 73B "Pensions", it is our opinion that the Commission may not use moneys from the State Game Protection Fund to increase the retirement pay of employees.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

POLICE COMMISSIONER

POLICE COMMISSIONER—TAXICAB BUREAU IS AUTHORIZED TO REVOKE OR SUSPEND DRIVER'S LICENSE.

May 22, 1947.

Mr. Hamilton R. Atkinson,
Police Commissioner.

You have asked our opinion whether the Supervisor of the Taxicab Bureau may take original jurisdiction in hearing and determining cases involving violations of the laws relating to the operation of taxicabs.

Chapter 411 of the Acts of 1943 added 16 new sections to Article 4 of the Code of Public Local Laws. By this Act the Taxicab Bureau was created and its duties and powers were defined. All persons desiring to drive taxicabs within the City of Baltimore are required to obtain a license from the Bureau and to comply with the requirements imposed by that Act. Section 381L of the Act of 1943 provides that:

> "The Supervisor of the Taxicab Bureau or any other persons designated by the Police Commissioner of Baltimore City is hereby vested with jurisdiction to hear and determine all cases involving violations of this subtitle or of any rules and regulations of the Taxicab Bureau and to suspend the driver's license for such period of time as he may determine, or to revoke the same. In case a driver's license be revoked or suspended, the driver's identification card and badge shall be forthwith returned to the Taxicab Bureau and the employer shall be forthwith notified of the suspension or revocation. Any licensee shall have the right to appeal from any such suspension or re-

> vocation in the same manner that appeals may now be made in the case of suspension or revocation of licenses by the Commissioner of Motor Vehicles. The Supervisor may issue a temporary license and badge to an applicant for a period not exceeding fifteen days."

We think it is clear under the provisions of the quoted Section that the Supervisor or other person designated by you has jurisdiction to hear and determine cases involving the violation of Chapter 411, and the rules and regulations which have been promulgated under the provisions of that law. This authority is comparable to that conferred by law upon various administrative boards to revoke or suspend licenses for specified causes.

The Act in question requires every driver of a taxicab in Baltimore City to obtain a taxicab driver's license from the Bureau and certain requirements as to age, physical condition, ability to read and write the English language, and the like are enumerated. Section 381-I imposes numerous requirements upon licensees, such as keeping written records of all trips on approved forms, reporting accidents to the Bureau, charging only the fare established by law, and others of a similar nature. If the licensee fails to observe these provisions, or if he violates any valid rules or regulations promulgated under the authority of the Act, the Supervisor of the Bureau or other person designated by the Police Commissioner is authorized to hear charges brought against such licensee and if the charges are sustained, the license of the violator may be suspended or revoked.

Section 381N provides that in addition to the suspension or revocation of a driver's license, a violation of the Act or of the rules and regulations shall constitute a misdemeanor and, upon conviction, the driver shall be subject to a fine of not less than $5.00 or more than $50.00 for the first offense, or not less than $10.00 or more than $100.00 for each subsequent offense. The Supervisor of the Bureau does not, of course, have the authority to impose a fine

under this Section, that is entirely a matter for the courts, but the Supervisor of the Bureau may proceed with a hearing under Section 381L notwithstanding the fact that charges may not have been preferred under Section 381N.

A prior acquittal on the criminal charge does not, in our opinion, destroy the right of the Bureau to proceed with a hearing based upon the same facts, neither does a subsequent acquittal affect the validity of the action theretofore taken by the Bureau in revoking or suspending a driver's license.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

POLICE COMMISSIONER OF BALTIMORE CITY—PENSION ALLOWANCE OF RETIRED CHIEF CLERK OF OLD TRAFFIC COURT NOT TO BE INCREASED WITHOUT LEGISLATIVE ENACTMENT.

November 20, 1947.

Mr. Hamilton R. Atkinson, Commissioner,
Baltimore City Police Department.

We have at hand your correspondence and a copy of letters between you and John J. White, Jr., a retired chief clerk of the Traffic Court. The question presented by these communications is whether or not the compensation paid the retired chief clerk should be increased in view of the fact that the Legislature has, on several occasions, increased the salary of active members of the Police Department, thereby automatically increasing the retirement allowance of members holding the same grade or position.

It is contended by the retired chief clerk that he is entitled to an increase in pension adjusted to the basis of one-half of the pay of active members holding similar grades

or ranks since Section 947 of the Baltimore City Charter (1938 Edition), provides:

> "This Act shall be construed to mean that at all times hereafter the remuneration of every retired member of the police force of Baltimore City shall be one-half the remuneration or pay of those members of the police force in active service occupying a grade or rank similar to the grade or rank occupied by the retired member at the time of his retirement, and that whenever the remuneration for any of the grades or ranks of the active members of the Police Department are increased, the remuneration of those retired members of the Police Department who held the same grade or rank at the time of their retirement that the increased pay applies to, then in that event the remuneration of the retired member of that grade or rank shall be one-half of such remuneration as the increase provides for, and no less."

and Section 205K of Chapter 433 of the Acts of 1939 says "* * * nothing herein contained shall affect the status or pension rights of former employees of the Traffic Court now on retirement."

Investigation discloses that the subject in question was retired on May 31, 1937, which was prior to the enactment of Chapter 433 of the Acts of 1939, which abolished the old Traffic Court and established the "Traffic Court of Baltimore City". This law also abolished the office of chief clerk of the Traffic Court and established in lieu thereof the office of supervisor. Section 205K of said Act further provides, in part:

> "Any of the present employees of the Traffic Court appointed by the Police Commissioner or Board of Police Commissioners from the eligible list of the Station House or Headquarters clerks

> and who are participants in, or contributors to, the Police Department Pension Fund, *if retained by the Chief Magistrate as clerical assistants,* shall continue to be treated as Police Department employees for the purpose of the Police Department Pension Fund and retain all rights and privileges in said Fund to the same extent as enjoyed prior to the passage of this Act; nothing herein contained shall affect the status or pension rights of former employees of the Traffic Court now on retirement."

It is here particularly noted that it is true that the Act says "nothing herein contained shall affect the status or pension rights of former employees of the Traffic Court now on retirement". This means that his pension can, under no circumstances, be lowered because of the passage of this Act or does it give you authority to increase same. If the party in question had been retained by the Chief Magistrate in the position of supervisor or some other clerical position, then he would, of course, be entitled to the increased benefits resulting from pay increases granted by the Legislature, but since he had been retired prior to the effective date of this Act and his pension fixed by law, the Act very specifically states that nothing therein shall affect his pension rights; and, under its express provisions, it is our opinion that he is not entitled to any increased pension allowance.

A similar question was answered by this office in 13 Opinions of the Attorney General 228 and there it was said:

> "This conclusion may seem to work a hardship upon the retired marshal and deputy marshals in that they are denied an increase of their pension rate, while their fellow retired officers of different grades or ranks are given such benefits. This matter, however, is subject entirely to the control

of the Legislature, and until you are specifically authorized by an Act of Assembly to do so, the Attorney General is of the opinion that you cannot properly increase the pension heretofore paid to these retired officers."

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

RACING COMMISSION

RACING COMMISSION—LICENSES—TROTTING AND PACING MEETINGS.

September 25, 1947.

Mr. J. William Graham, Secretary,
Maryland Racing Commission.

You have asked our opinion as to whether the Racing Commission, under Section 16 of Article 78B, may issue a license to any fair or trotting association for holding trotting races at which purses are awarded, but at which there is no betting. Section 16 provides that "in addition to the licensing of racing as hereinbefore provided, the Commission is authorized in its discretion to issue licenses for the holding of trotting and pacing meetings at which there may be offered stakes, purses and awards." The section goes on to provide that not more than one license with pari-mutuel betting privileges shall be issued in any county or in Baltimore City, and that no such license shall be issued in Carroll, Dorchester, Frederick, Montgomery or Wicomico counties. It is our opinion that the prohibition against issuing "such license" in the above named five counties is limited to licenses with pari-mutuel betting privileges, and that the Commission may license a trotting meet in those counties at which stakes and purses are offered, provided there is no betting..

The statute contains no provision for a license fee for trotting and pacing meetings at which there is no betting, but we believe that the Commission may charge a filing fee to cover the cost of issuing a license.

We are also asked whether the Commission has supervisory power over trotting and pacing meetings at which there is no betting. We are of the opinion that the Com-

mission definitely does have such supervisory power, because Section 16 expressly so provides.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

RACING COMMISSION LICENSES TO CONDUCT HARNESS RACING—MASTER PLAN BALTIMORE CITY—ZONING—POWER OF CONDEMNATION—LICENSE TO BE ISSUED IN THE DISCRETION OF THE COMMISSION.

October 6, 1947.

Mr. Stuart S. Janney, Jr., Chairman,
The Maryland Racing Commission.

On September 24, 1947, there was filed with the Maryland Racing Commission an application by Baltimore Trotting Races, Inc. for a license to conduct harness racing for a period of twenty days (or for a longer period if allowed by the Commission) on a tract of land located entirely in Baltimore County. The land in question is, and has for some years been, a part of a privately owned airfield. A hearing on the application was held by the Commission on September 30, 1947, at which time the applicant produced evidence (both oral and documentary) relating to the qualifications of its members, its financial structure, its proposed plant, the type and character of races to be held, and the proposed method by which racing is to be conducted by it. At the conclusion of the applicant's case, an assertion was made on behalf of certain protestants that the Maryland Racing Commission could not legally license the applicant to conduct racing on the proposed site because (a) the license, if granted, would conflict with the terms and conditions of the master plan of the City of Baltimore and, (b) the license, if granted, would conflict with the general pow-

ers of the State of Maryland and the City of Baltimore to condemn the premises in question for airport purposes. The applicant denied the validity of these assertions and contended that objections to the use of the property were inappropriately made before the Commission.

You have asked whether, in our opinion, the adopted master plan for the City of Baltimore or the existence of the power to condemn for airport purposes, exercisable either by the State of Maryland or the City of Baltimore, places any legal restrictions against the granting of a license to the applicant in the present case. You have also asked us to consider whether it would be appropriate for the Maryland Racing Commission, in the instant case, to hear protests on behalf of property owners and other interested parties against the use of the land in question as a trotting track.

In order that this matter may be viewed in its proper setting, it is necessary, at the outset, to describe the nature of the license which may be granted by the Commission under Section 16 of Article 78B of the Annotated Code of Maryland (1939 Ed.), as enacted by Chapter 502 of the Acts of 1947. Section 16, *supra,* provides, in general, that the Commission is authorized to issue licenses for the holding of trotting and pacing meets. Once such licenses are issued, the Commission is given the same supervisory powers over the meets and the persons licensed that it has over meets and persons licensed under Section 7 of Article 78B, *supra* (which deals with the so-called "mile" tracks) and under Section 14 of Article 78B, *supra* (which deals with the so-called "half-mile" tracks).

The licenses authorized to be issued under Sections 7 and 14 of Article 78B, *supra,* have a two-fold purpose. On the one hand, these licenses are concerned with the character, type and fitness of the persons or associations who are to become the licensees. On the other hand, the licenses run to locations at which the racing is to be conducted. This later proposition is made clear, we think, by the general prohibi-

tion, contained in both the Sections under consideration, against the removal of any mile or half-mile race meet from the track or tracks now in operation unless approval for the change is first obtained from the Commission. Thus, Section 7 of Article 78B, *supra,* as amended by Chapter 502 of the Acts of 1947, states that it is the intent and purpose of that Section

> ". . . to insure that no new or additional tracks *or places for holding or conducting races shall be licensed* . . ." (Emphasis supplied.)

To the same effect, Section 14 of Article 78B, *supra,* as amended by Chapter 502 of the Acts of 1947, states that if any organization conducting a half-mile race meet shall abandon its present track, it may with the approval of the Commission:

> ". . . be awarded a license and dates for racing *at a new track within the same county* in which it has heretofore conducted racing . . ." (Emphasis supplied.)

The provisions for granting licenses for trotting and pacing meets have been woven into the statutory scheme relating to the licensing of the mile and half-mile tracks by Chapter 502 of the Acts of 1947. This being the case, it is our opinion that the licenses which may be granted under Section 16 of Article 78B, *supra,* are concerned not only with the persons or organizations who are to conduct the meets, but also deal with the places or locations at which the proposed meets are to be held.

Since the licenses to be issued under Section 16 of Article 78B, *supra,* involve the places at which proposed trotting meets are to be held, it is necessary, in the instant case, to determine whether there are any existing legal obstacles preventing the issuance of such a license in connection with the property under consideration. In our opinion, no such legal restrictions are now in existence.

No legal prohibition against the use of the site in question for harness racing is imposed by the master plan for the proposed physical development of Baltimore City. The reason for this conclusion lies in basic fact that the Legislature, in granting to the City of Baltimore the power to adopt such a plan, has expressly restricted its operation to the territorial limits of the City. For example, Chapter 584 of the Acts of 1933 which empowered the Mayor and City Council of Baltimore to prepare a plan for the physical development of the City, confined the extent of that power to the adoption of regulations for the subdivision of land "within the territorial limits of the City of Baltimore". And sub-section 29(J) of Section 6 of the Baltimore City Charter as enacted by Chapter 548 of the Acts of 1945, which regranted to the City the power to make and enforce a master plan, states:

> "To provide for the making and enforcement of plans for the development of areas and properties *within the city.*" (Emphasis supplied.)

The grant of plan-making powers by the Legislature to the City has been exercised most recently by the adoption of the Baltimore City Charter, approved November 5, 1946. An analysis of the Sections of the Charter dealing with the Department of Planning (Section 102 to Section 122) fails to reveal any attempt on behalf of the Mayor and City Council of Baltimore to extend the legal scope of the master plan to property situated wholly in Baltimore County. It follows, therefore, that the master plan for the proposed physical development of Baltimore City cannot and does not impose any legal restrictions against the granting of a license to hold trotting races on property situated wholly in Baltimore County, even though the land in question is contiguous to an area dedicated to airport purposes by that plan.

In our opinion the existence of the power to condemn property for airport purposes, exercisable either by the State of Maryland or the City of Baltimore, imposes no

legal restrictions against the granting of a license to the applicant in the present case. It is true that the State Aviation Commission, in the name of the State, has the power to condemn property for the purposes of establishing airports and air navigation facilities, and in like manner to acquire existing airports and air navigation facilities which are neither owned nor controlled by a State municipality. Section 86(a) of Article 1A of the Annotated Code of Maryland (1939 Ed.), as enacted by Chapter 896 of the Acts of 1947. And we may assume for the purposes of this case that the broad general language contained in Chapter 48 of the Acts of 1947 grants to the City of Baltimore the power to condemn land or property in any county in the State for the purpose of establishing, constructing and equipping an airport or airports. The fact remains, however, that at the present time, neither the State nor the City has seen fit to commence condemnation proceedings with respect to the land under consideration. It must follow, therefore, that the inchoate power to condemn for airport purposes held by the State and City places no greater legal restriction upon the use of the land now optioned to the applicant than is imposed by the general State power to condemn any property for a public use. We hold that the inchoate and unexercised power of condemnation imposes in this case no legal barrier to the exercise of the discretion reposed in the Commission by the statutes.

One collateral question, however, remains in connection with the existence of a master plan for the proposed physical development of Baltimore City; i.e., the general problem of zoning. While it is true that Baltimore City possesses no power to adopt regulations for land situated wholly in Baltimore County under either its general powers or the terms of Chapter 13 of the Acts of 1944 (relating specifically to airport zoning), the fact remains that Baltimore County has such power. See Chapter 877 of the Acts of 1943; Chapter 502 of the Acts of 1945; Chapter 915 of the Acts of 1947. Pursuant to this power, the County, by an order and resolution adopted January 2, 1945, zoned the property

under consideration in this case as an "A. Residential" zone.

Under Section XIII of the zoning regulations and restrictions of Baltimore County, entitled "Powers Relative to Special Exceptions and Special Permits" an application may be made for the use of property classified as "A. Residential" for purposes other than the building of single family houses. It appears, however, that at the present time no such application could be made for a permit to use property included in an "A. Residential" zone for commercial race tracks since that exception is not specifically made a part of Section XIII, *supra*. It is our opinion, therefore, that while the present prohibition against the use of the property in question imposed by the zoning regulations and restrictions of Baltimore County does not constitute a legal restriction against the granting of a license in this case, any license granted should be made subject to the proper zoning of the property by the qualified officials of Baltimore County. If this were not done, it is conceivable that a license would be granted which could not be used, with the result that another applicant might fail to receive, or be injuriously delayed in receiving, a license for the same racing days.

It has been suggested by the applicant that the Commission should not hear and take into consideration the protests of property owners and other interested parties against the use of the land in question for a trotting track. We do not agree. As stated above, the license to be issued here is directly concerned with the place at which the racing is to be conducted. Moreover, Section 16 of Article 78B, *supra*, as enacted by Chapter 502 of the Acts of 1947, specifically states that:

> ". . . the Commission is authorized *in its discretion* to issue licenses for the holding of trotting and pacing meetings. . . ." (Emphasis supplied.)

In considering those Sections of the racing laws which deal with the licensing of the half-mile tracks, we have

pointed out that unless the grant of a license was made mandatory, the Commission should proceed with caution. Thus, in 6 Opinions of the Attorney General 474, it was stated that:

> "The Commission will remember, however, that the issuance of such a license is entirely within the discretion of the Commission, a discretion which it should exercise under such circumstances with great care."

And in 30 Opinions of the Attorney General 92, we pointed out that:

> "If the Racing Commission should determine that an application should not be issued for any bona fide reason it deems sufficient, the applicant could not compel the issuance of a license."

In view of the fact that Section 16 of Article 78B, *supra*, specifically conditions the granting of a license on the exercise of the *discretion* of the Commission, we think that the opinions discussed above are controlling and that, as a result, any interested person should be heard on the qualifications of the organization or the location to be licensed. To grant such a hearing would not result in the usurpation by the Racing Commission of the powers of a zoning board, to deny such a hearing would, in effect, restrict the area of discretion vested in the Commission by the Legislature which the statute has left unrestricted. The exercise of discretion certainly means the consideration and weighing of all facts which may be material to the successful operations of a licensee at a particular location not only from the standpoint of the licensee but also from that of the State, the public, and racing in general.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

RACING COMMISSION—RELIEF FUND—MANNER IN WHICH MAY BE SPENT.

November 4, 1947.

Mr. J. William Graham, Secretary,
The Maryland Racing Commission.

You have asked our opinion as to how the Maryland Racing Commission may expend moneys from the Relief Fund. Under Section 19 of Article 78B of the Annotated Code of Maryland, as enacted by Chapter 786 of the Acts of 1947, the Racing Commission is authorized to expend moneys from said Fund "to aid stable attendants and other race track personnel who *become* ill or who *are* injured in the performance of their duties on any of the several tracks in Maryland", and to pay a burial allowance not to exceed $100 to defray the burial expenses of each stable attendant or other personnel connected with the race tracks of Maryland "*who shall be in need* of such assistance". The Act further provides "that the Secretary of the Maryland Racing Commission *shall* investigate all requests for aid and report the results of his investigation to the said Commission". You ask whether the Commission may pay to the Horsemen's Benevolent and Protective Association the sum of $1,876.77 to reimburse said Association for relief moneys spent by it during the year 1946.

We must advise you that we are of the opinion that Chapter 786 of the Acts of 1947 does not authorize you to reimburse the Horsemen's Benevolent and Protective Association for relief moneys spent by it prior to the effective date of said Act on June 1, 1947. As originally introduced in the Legislature, the Act would have permitted the Racing Commission to turn over relief moneys to the Horsemen's Benevolent and Protective Association and the Jockeys' Guild. The Legislature amended the Bill, after introduction, to require that the moneys be spent by the Racing Commission itself. Furthermore, the Act is written in the

present and future tenses and contemplates expenditures from the Relief Fund to meet requirements that arise after its effective date.

You also ask whether the Commission may reimburse the Horsemen's Benevolent and Protective Association for relief expenditures made by it after June 1, 1947. The Act contemplates that all expenditures from the Relief Fund shall be made directly by the Commission after investigation of all requests for aid by the Secretary of the Commission. Strictly speaking, it was not intended that the Commission should reimburse any other organization for expenditures made by it. We believe, however, that the spirit of the law will be complied with if in reimbursing the Horsemen's Benevolent and Protective Association for relief expenditures made after June 1, 1947, you require an itemized account of such expenditures and are satisfied, after investigation, that all such moneys were paid on behalf of track personnel who became ill or who were injured in the performance of their duties on any of the tracks of this State, or to defray the burial expenses of personnel connected with the tracks of this State in need of such assistance.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

REAL ESTATE COMMISSION

REAL ESTATE COMMISSION—LICENSES—INDIVIDUALS SUBDIVIDING AND OFFERING FOR SALE THEIR OWN PROPERTY —NOT REQUIRED TO PROCURE LICENSE UNLESS ENGAGED IN REGULAR BUSINESS OF DEALING IN REAL ESTATE.

March 25, 1947.

Mr. W. G. Nicholson, Executive Secretary,
Real Estate Commission.

We have your letter of March 4, 1947 in which you ask whether, in our opinion, individuals who desire to subdivide their land must apply for and be issued a broker's license, as required by Section 343, et seq. of Article 56 of the Annotated Code of Maryland (1943 Supp.).

Sub-section (a) of Section 343 of Article 56, supra, defines a real estate broker as any person, association, copartnership or corporation, foreign or domestic, who for another and for a fee, commission or any other valuable consideration * * * is engaged in the business of subdividing and selling land and building lots or sites. Sub-section (f) of Section 343, supra, specifically excepts from the term real estate broker, owners or lessors of property, unless their principal and regular business is that of purchasing, selling, engaging or trading in real estate and options and leases thereon.

In construing this Section we have held that a person buying and selling real estate for himself as a speculator is subject to the provisions of the real estate broker's law, and is required to secure a license. 30 Opinions of the Attorney General, 94. The rationale upon which that opinion was pitched, however, was that your Board should determine as a fact that the principal and regular business of

the speculator in question was that of dealing for his own account in real estate or leases and options thereon, or subdividing and selling land in building lots or sites.

In the present case you have stated that in many cases the individuals in question have owned the land for many years and that they now believe that due to the housing shortage it is an opportune time to divide and sell their acreage for building lots. It may well be, therefore, that such individuals do not intend to adopt as their principal and regular business the subdividing and selling of land and building lots or sites. To the contrary, the individuals in question may be engaged in one isolated transaction which will be consummated by means of a series of sales of their own property and will, in substance, be doing nothing more than realizing upon an investment. If such is the case, it is our opinion that the provisions of the Act are inapplicable and that the vendors of the real estate in question are not required to secure a real estate broker's license.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

REGISTERS OF WILLS

REGISTER OF WILLS—JOINT WILLS—WHEN ADMISSIBLE TO PROBATE.

April 3, 1947.

Mr. Frisby N. Willson,
Register of Wills for Kent County.

We have your letter of March 11th, in which you state that a joint will of husband and wife has been offered to your office for probate. You further state that one of the spouses in question is still living and ask whether, in view of this fact, the will may be offered for probate at this time.

Section 353 of Article 93 of the Annotated Code of Maryland (1939 Edition) authorizes the Orphans' Courts or the Registers of Wills to take the probate of any will, testament or codicil whether the same relates to real or personal estate, or to both real and personal estate. Although this Section does not refer specifically to joint wills, the weight of general authority seems to be that such wills may be offered for probate upon the death of the first testator as his will. In this connection, the following appears in 1 PAGE ON WILLS, Section 107, page 227:

> "There is no dispute as to the admissibility to probate of wills of the first and second types, by which (1) the survivor is to take the property of the one dying first, or (2) by which separate interests are disposed of in separate clauses. Such wills are to be admitted to probate, if in other respects regular, upon the death of the first testator, as his will."

In our opinion, the joint will which has been offered for probate in your office is admissable to probate at this time.

HALL HAMMOND, *Attorney General.*

REGISTER OF WILLS—CONDITIONAL WILLS—NOT REQUIRED TO BE FILED WHERE CONTINGENCY FAILED TO OCCUR.

December 4, 1947.

Mr. Carlton V. West,
Register of Wills for Caroline County.

We have your letter of November 25, 1947, in which you state that Miss Caroline P. Redden, a resident of Caroline County, died on May 27, 1947. On September 10, 1947, there was presented to your office a paper writing dated August 1, 1944, and executed by the decedent and by Lizzie G. Redden, her mother, which purported to be a will. This paper reads in part, as follows:

> "We, Lizzie G. Redden and Caroline Phillips Redden (being mother and daughter), both of Caroline County in the State of Maryland, do make and publish this, our joint last will and testament, the same being a joint will of joint funds and property, and is intended to be operative only in case of the death of the testators occurring simultaneously, or so nearly so as to preclude the surviving testator from making other disposition of the property herein given and bequeathed."

On November 12, 1947, Lizzie G. Redden, the mother of Caroline P. Redden, died testate, and her will has recently been filed in your office. In view of the fact that

Lizzie G. Redden lived six months and fifteen days longer than Caroline P. Redden, you ask whether, in our opinion, the paper writing dated August 1, 1944, and signed jointly by Lizzie G. Redden and Caroline P. Redden can be filed in your office as a will.

It is well settled that a will may be conditional or contingent, to be operative only upon the happening of a definite and certain event. A contingent or conditional will has been described as "one, by the terms of which, the will is not to take effect unless some condition precedent has happened, or which is not to take effect, if some specific condition has happened." 1 Page on Wills, Sec. 92, P. 204.

That contingent or conditional wills have long been recognized in this State is evidenced by general statements of Maryland text writers and decisions of the Court of Appeals. Thus, in commenting upon the general subject, the following appears in Miller, "Construction of Wills," Sec. 2, pages 5 and 6:

> "A will may be conditional or contingent, that is, it may be operative only upon the happening or not happening of an event, provided the condition or contingency is clearly stated in the will itself; extrinsic evidence not being admissible to show that a will complete on its face, validly executed, and written animo testandi was intended not to be operative upon the occurrence of an unexpressed contingency."

In *Wagner v. McDonald*, 2 H. & J. 346, a paper was exhibited for record as the last will and testament of C. W. and was proved to have been signed by him at the time that he was about to leave the State. The paper writing stated in part:

> "If I should not come to you again, my son M. W. shall pay, out of C. W.'s. bond, which I have from him, to E. S. seventy pounds."

Evidence was given that C. W. went to Kentucky and returned, and that he lived for several weeks thereafter. The court held that at best the paper writing in question was a conditional will, and that since the condition had been satisfied, the paper could not be admitted to record as the last will and testament of C. W.

In *Sewell v. Slingluff*, 57 Md. 537, the Court of Appeals again stated that conditional wills are recognized in this State. In that case it was said at page 551:

> "Every condition allowed by law can be put in a will, and no good reason can be shown why every testator who desires a conditional will does not make one. The books are full of such wills. No one is left to the necessity of trusting a part of his testamentary disposition to the uncertain memory of a witness."

And in *Kelleher v. Kernan*, 60 Md. 440, the Court of Appeals, in reaching its decision, reviewed with approval a number of contingent or conditional wills.

In the present case the paper writing offered to you for filing as a will states in clear and unambiguous terms that it "is intended to be operative only in case of the death of the testators occurring simultaneously." We hold that this document was a conditional will and that, since the specific contingency failed to occur, the paper is not a will and therefore cannot be filed as such in your office.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

RETAIL SALES TAX

RETAIL SALES TAX—COMPUTATION OF TAX—TOKENS MAY BE USED TO FACILITATE THE COLLECTION OF THE TAX BUT NOT TO CHANGE THE RATE THEREOF.

July 18, 1947.

Hon. James J. Lacy,
State Comptroller.

You point out to us that there has been considerable comment in the press and in a number of letters you have received as to the fact that the sales tax on sales from $.09 to $.50 and on sales between $.50 and $1.00, $1.00 and $1.50, etc., is not a true two percent tax, but a greater tax which, on a $.09 sale, becomes an eleven percent impost. You add that you have been urged to invoke the discretion given you in paragraph (h) of Section 301 of Chapter 281 of the Acts of the General Assembly of 1947, which is the Sales Tax Act, to adopt a token or prepaid receipt system designed to permit the payment of only two percent of the actual amount of the sale. You ask us whether you, as Comptroller, have authority to collect only a straight two percent tax on the actual sales price in view of the express and specific imposition of a greater tax provided by Section 260 of the Act.

Section 260 provides that for the privilege of engaging in the business of selling tangible personal property and of dispensing certain selected services as defined,

> ". . . a vendor shall collect from the purchaser a tax of two percentum (2%) of the price of each separate retail sale made in this State on or after the first day of July, 1947. The tax imposed by this section *shall be paid by the purchaser and*

shall be computed subject to the terms and conditions of Section 269 of this sub-title *as follows:*

(a) On each sale where the price is from nine cents (9c) to fifty cents (50c), both inclusive, one cent (1c);

(b) On each sale where the price is from fifty-one cents (51c) to one dollar ($1), both inclusive, two cents (2c);

(c) On each fifty cents (50c) of price or fraction thereof in excess of one dollar ($1), one cent (1c)."

In our opinion, there is no ambiguity or vagueness in this language. On the contrary, it is plain, explicit, specific and mandatory, and the imposition of the tax is, of course, the very core and heart of the Act.

Paragraph (h) of Section 301, under the heading "General Powers of Comptroller," authorizes you "To employ in the collection of the tax whenever practicable tokens or prepaid receipts and to sell the same to vendors for use by them, it being hereby declared to be the Legislative intent the use of tokens or prepaid receipts be availed of to the greatest possible extent." This general language must be read in relation to all other parts of the Act. The general power "to employ *in the collection of the tax*" tokens or prepaid receipts and "to sell the same to vendors for use by them" makes it plain to us that the token or prepaid receipt method was to facilitate the collection of the tax as specifically imposed by the Legislature and not to authorize a change in the amount of the tax. One of the arguments used to the Legislature by those opposed to the sales tax was that vendors would be subjected to complicated and burdensome bookkeeping details in the collection of the tax. It was suggested by several members of the Legislature that the use of the token or prepaid receipt system might eliminate some of this bookkeeping and help insure the collection by the State of all taxes paid by purchasers. As I

take it, the legislative intent in amending the original Act by the insertion of paragraph (h) was an effort towards this end.

Despite the fact that many self-accepted leaders of advanced legal thinking deride it as naive, over-simplified and destructive of the right of enlightened judicial interpretation, we are convinced of the soundness of the theory of statutory construction that the most natural and accurate expositors of the meaning of the Legislature are the words it employed to convey that meaning, accepting their normal and customary use. Under this test, the tax imposed is plainly two percent of the sales price, except where that figure is not exactly one or more cents, in which case a fraction of a cent is to be treated as a cent. We find no warrant in the law permitting you to collect less than the Legislature has said is the tax imposed. All that you may do is to facilitate the collection of that specified tax, if you deem it desirable, by use of tokens or prepaid receipts.

HALL HAMMOND, *Attorney General.*

RETIREMENT SYSTEM

RETIREMENT SYSTEM—EMPLOYEES OF HOUSING AUTHORITY OF BALTIMORE CITY NOT ELIGIBLE FOR MEMBERSHIP.

February 19, 1947.

Mr. Stanley Scherr, Attorney at Law.

We have your letter of February 11 in which you ask whether the employees of the Housing Authority of Baltimore City are eligible for benefits under the Employees' Retirement System of the State of Maryland. You state that the employees in question receive no compensation from State funds and are not considered by you to be State employees.

Sub-section 3 of Section 1 of Article 73B of the Annotated Code of Maryland (1943 Supp.) defines employee as "any regular classified or unclassified officer or employee of the State for whom compensation is provided for by State appropriation or whose compensation is paid from State funds." The Section further provides that the term "employee" shall exclude "any class of employees whose compensation is only partly paid by the State or who are serving on a temporary basis."

In view of the fact that the employees of the Housing Authority of Baltimore City receive no compensation from State appropriations or from State funds, it is our opinion that they are not eligible for pension benefits as provided in Article 73B of the Annotated Code of Maryland (1943 Supp.).

RICHARD W. EMORY, *Deputy Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

SHERIFFS

SHERIFFS—ELIGIBILITY TO SUCCEED SELF.

March 24, 1947.

Mr. Guy Anders,
Sheriff of Frederick County.

In your letter of February 18th you pointed out that prior to the ratification of Chapter 785 of the Acts of 1945 by the voters of Maryland, Section 44 of Article 4 of the Constitution prescribed that a sheriff in each county shall hold office for a term of two years and that he should not be eligible to succeed himself. In amending this constitutional provision, the term of the sheriff in each county was increased to four years and the provision against an incumbent succeeding himself was expressly omitted.

We are, therefore, of the opinion that the sheriff for Frederick County or any other county may succeed himself in office.

HALL HAMMOND, *Attorney General.*

SHERIFFS—WHETHER PREMIUM ON BOND GIVEN TO INDEMNIFY SHERIFF IS ALLOWABLE AS A PART OF THE COSTS IN A FI. FA. PROCEEDING, THE MATTER MAY BE REFERRED TO THE COURT FOR ITS DETERMINATION.

November 19, 1947.

Mr. Joseph C. Deegan,
Sheriff of Baltimore City.

We have your letter of November 6th with which you enclosed a letter from an attorney at law, from which it

appears that in a recent case you required a plaintiff to give you a bond of indemnity before you executed a writ of fieri facias. This bond was executed by a corporate surety and the plaintiff has requested you to include the premium of $15.00 as a part of the costs. You have questioned your right to do this in view of the opinion rendered by this office on June 1, 1935, and reported in 20 Opinions of the Attorney General 675. The effect of that ruling was that the premium on an indemnity bond of this character is not within the provision of Section 10 of Article 24 of the Code and cannot therefore be included as a part of the costs.

The attorney has called your attention to *Eisler v. Eastern States Corp.*, ———— Md. ———, 46 A 2d 630, which he contends is authority for his request. Section 10 of Article 24 of the Code provides that when, in any action or proceeding at law or in equity, a bond is required to be filed and the surety upon such bond is a surety company authorized by the laws of this State to execute such bonds, the party entitled to recover or to be allowed his costs in such action or proceeding may have included as his costs such reasonable sum as may be paid by him to such surety company for executing said bond.

In the ruling above referred to reference was made to an opinion reported in 18 Opinions of the Attorney General 443, where the same question was discussed and a similar result reached. There, in discussing Article 24, Section 10 of the Code, it was said that the statute did not create a right to charge as part of the Court costs a premium on an indemnity bond since the bonds there referred to were those "required" to be filed by statute. The bond which was the subject of the controversy in *Eisler v. Eastern States Corp.*, supra, was an appeal bond and, in concluding that the premium thereon was properly taxable, the Court of Appeals said:

> ". . . Although the bond in question was not a necessary incident of the appeal, it was required to effectuate the appeal and to prevent the discov-

> ery ordered by the Chancellor and denied by this Court. We do not believe the legislature intended any such limitation of the statute. We conclude that the legislature did not intend that the word 'required' be restricted to bonds necessary by law or by mandatory authority, but that this word meant bonds required under the orderly rules of practice necessary to accomplish the object of the litigation. As the appeal bond here was necessary to prevent the discovery, which was the question on appeal, the appeal bond now in question was 'required' as specified in Article 24, Section 10, supra, and, therefore, under the provisions of that section it was properly taxed as costs in the case. . . ."

While we find no statutory provision requiring the filing of a bond to indemnify the Sheriff for damages suffered by a third party as a result of a wrongful levy and seizure of property under a writ of fieri facias, there can be little doubt that the Sheriff may thus protect himself. In 2 Poe on "Pleading and Practice", Section 683, it is said that if upon proceeding to execute the writ the Sheriff is notified that the goods are claimed by a third party, he may very properly refuse to proceed further until the question of the ownership is determined or until he is indemnified against all damages to which he may become liable by executing the writ. The construction placed upon Article 24, Section 10 by the Court of Appeals that the bonds which are within the scope of that statute are those which are required under the orderly rules of practice, rather than those required by statute, seems to us to be broad enough to include an indemnity bond. However, it is unnecessary for us to decide the question and it is to be doubted whether, under the circumstances, it would even be proper for us to do so, where the matter is pending in court and the decision of the Judge may be obtained.

Article 87, Section 16 of the Code provides that any Sheriff may make one or more returns of the proceeds of

sale under any fieri facias where dispute is known to exist as to the distribution of the proceeds of sale and that the court may ratify one of the returns or may reject all returns, and remand the same to the Sheriff for further return, and an appeal is provided to the Court of Appeals. It is our view that the proper course of procedure is for you to make two returns, one including and the other excluding the premium on the indemnity bond, and the court may then determine the question by ratifying the return which, in its opinion, is proper.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

SMALL LOANS

SMALL LOANS—LICENSEE—MAY CLOSE OFFICE ON SATURDAY.

May 16, 1947.

Mr. Truman B. Cash,
Administrator of Loan Laws.

You have asked our opinion as to whether a small loan company licensed under Article 58A of the Annotated Code of Maryland is prohibited by that Article from closing its office on Saturday.

This is to advise you that it is our opinion that a small loan company may close its office on Saturday without special legislation authorizing it to do so. Legislation was required to authorize banks to close on Saturday because of the negotiable instruments law governing the presentment of bills and notes, and particularly Section 11 of Article 13 of the Code. There is no such prohibition applicable to small loan companies.

RICHARD W. EMORY, *Deputy Attorney General.*

SMALL LOANS—INDUSTRIAL FINANCE COMPANIES—PERSON DEDUCTING IN ADVANCE 6% INTEREST PER ANNUM AND PROVIDING FOR PAYMENT IN EQUAL MONTHS INSTALLMENTS MUST PROCURE LICENSE.

February 26, 1947.

Mr. John W. Downing,
Bank Commissioner.

This is in answer to your letter of January 28, 1947.

We understand your question to be whether a company which deducts in advance interest at the rate of 6% per annum on loans from $300 to $1,500, payable in equal monthly installments over a period of six to twenty-four months, must be licensed as an industrial finance company

STATE EMPLOYEES

STATE EMPLOYEES—COMPULSORY RETIREMENT NOT APPLICABLE TO EMPLOYEE NOT MEMBER OF RETIREMENT SYSTEM.

June 9, 1947.

Mr. W. D. Owens,
State Employment Commissioner.

This is in reply to your letter of June 6th inquiring as to whether Chapter 696 of the Acts of 1947 requires retirement by July 1, 1947, of a State employee who has attained the age of 70 years, but who is not a member of the State Employees' Retirement System. Chapter 696 amends Section 7(1)(a) of Article 73B of the Code. The language pertinent to your inquiry is as follows:

> "Any member in service who is not an elected or appointed official of the State and who attains the age of seventy (70) years on or before July 1, 1947 . . . shall continue only until July 1, 1947 . . ."

As you point out the requirement as to retirement pertains to "any member in service." Section 1(4) of Article 73B defines a member as a State employee included in the membership of the Retirement System. Interpreting Section 7, as amended by Chapter 696 of the Acts of 1947, in the light of the definitions which appear in Section 1 of the Article, we conclude that the requirement that a State employee retire at the age of 70 pertains only to a member of the State Employees' Retirement System. Thus if an employee has elected to remain out of the System, he is not by this law required to retire at the age of 70. Such has been the uniform interpretation of the compulsory retirement provisions in Article 73B. 26 Opinions of the

Attorney General 335, 30 Opinions of the Attorney General 105.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

STATE EMPLOYEES—MEMBERS OF UNITED STATES ARMY OR NAVY RESERVE NOT TO BE PAID COMPENSATION WHILE ON ACTIVE DUTY.

June 10, 1947.

Mr. W. D. Owens,
State Employment Commissioner.

This is in reply to your letter of May 22nd asking whether State employees who are members of the United States Army or Navy Reserve are entitled to any State compensation when called to active duty. As you point out Section 41 of Article 65 provides that all State employees who are members of the organized militia are entitled to leave of absence without loss of pay, time or efficiency rating on all days during which they shall be engaged in field or coast defense training. Section 41 applies only to the State militia, since Section 5 of Article 65 defines "organized militia" as including the National Guard, the State Guard and the Reserve Militia.

We can find no provision in the Maryland law authorizing payment of compensation to State employees in the United States Army or Navy Reserve during such period as they may be on active duty. There would seem to be no reason for distinguishing in this regard between State militia and the United States Army and Navy Reserve, except that in the case of the State militia the Legislature has authorized continuance of State employees' compensation, but

has not done so in the case of the United States Army and Navy Reserve. We must advise you, therefore, that in the absence of legislation the compensation of State employees who are in the United States Army or Navy Reserve shall not continue while they are called on active duty.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

STATE EMPLOYEES—HOLIDAYS—HOURLY PAID EMPLOYEES ARE ENTITLED TO AVERAGE DAILY WAGE ON STATE HOLIDAYS.

August 22, 1947.

Mr. Robert M. Reindollar, Chairman,
State Roads Commission.

Mr. Robert Clapp, Special Assistant Attorney General for the State Roads Commission, has requested that we write you an opinion as to whether hourly paid employees of the State Roads Commission are entitled to their average daily wages for July 4 and 5 in spite of their absences from work. July 4 is a holiday under Section 9 of Article 13 of the Annotated Code and July 5 was declared by the Governor to be a holiday under said same Section.

It is our opinion that under Section 78 of Article 100 of the Annotated Code, as enacted by Chapter 510 of the Acts of 1947, hourly paid employees are entitled to their average daily wages for July 4 and 5, in spite of their absences from work. We are also of the opinion that it is improper to credit their pay for those days to vacation leave. Chapter 510 of the Acts of 1947 provides, in part:

> "Every State employee shall be entitled to observe with pay, all legal holidays in the State of

> Maryland, as designated in Section 9 of Article 13 of the Annotated Code of Maryland (1939 Edition) . . ."

You will note that this Section applies to every State employee and does not exclude from its benefits hourly paid employees.

Several precedents exist for this opinion:

Section 41 of Article 65 provides that all employees of the State shall be entitled to leave of absence without loss of pay in order to engage in field training of the organized militia. This Section has been interpreted by this office to mean that hourly paid employees are entitled to their average weekly wage while attending the National Guard encampment. 21 Opinions of the Attorney General 657.

Section 22 of Article 64A provides that every classified employee shall receive certain vacation and sick leaves with pay. The Board of Public Works has properly ruled that hourly paid employees who are within the classified service are entitled to vacation and sick leaves under this Section.

Chapter 766 of the Acts of 1945 provides that hourly employees of the State Roads Commission who have worked as highway maintenance men for a period of two years may qualify for classification as such and become entitled to vacations with pay and sick leaves, although technically not in the classified service under the merit system.

Since hourly paid employees are entitled to benefits granted "to every employee" in the case of Section 41 of Article 65 and "every classified employee" in Section 22 of Article 64A, we conclude that hourly paid employees are entitled to observe legal holidays with pay under Chapter 510 of the Acts of 1947, which extends such right to "every State employee".

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

STATE HOSPITAL

STATE HOSPITAL — UNCLAIMED FUNDS — FUNDS DO NOT ESCHEAT TO STATE IN ABSENCE OF LEGISLATION.

June 9, 1947.

Mr. Joseph O'C. McCusker, Secretary,
Board of Public Works.

This is in reply to your letter of May 26, 1947, inquiring as to whether the Board of Public Works may approve a request of the Crownsville State Hospital to close an account entitled "Died and Discharged Patients", and to pay the amount of $1,195.33 in such account into the State Treasury. We understand that this account represents personal funds of patients who have died leaving no relatives, or who have escaped without leaving any trace of themselves or relatives.

We are of the opinion that such funds belong to the next of kin of a deceased patient, and in the case of an escaped patient belong to the patient himself if alive, or to the next of kin of an escaped patient who is deceased. We are also of the opinion that such funds may not be appropriated by the State without some legislative provision for escheat of unclaimed funds to the State. We do not find any such provision in the law.

Section 233A of Article 16 of the Code provides that unclaimed funds in the hands of a fiduciary, such as a receiver, trustee or executor, shall, after a lapse of seven years, be paid over to the city or county for schools. Section 53A of Article 17 provides that unclaimed funds in the hands of a Clerk of the Court shall, after the lapse of seven years, escheat to the State. Section 18A of Article 88B provides for the disposition of unclaimed property and funds in the hands of the State Police. We do not know of

any similar statutory provision governing the disposition of unclaimed funds held by a State institution such as the Crownsville State Hospital. We believe, therefore, that, in the absence of legislation, such funds must continue to be held for the patient or his next of kin, as the case may be.

We do not know of any reason, however, why the Crownsville State Hospital may not close the account "Died and Discharged Patients", and pay the funds into the State Treasury which may serve as a depository for the funds until they are either claimed, or statutory authorization for their escheat to the State is provided.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

STATE POLICE

STATE POLICE—UNCLAIMED MONEY AND PERSONAL PROPERTY HELD BY POLICE REVERT TO POLICE PENSION FUND IF NOT CLAIMED WITHIN ONE YEAR.

December 16, 1947.

Colonel Beverly Ober, Superintendent,
Maryland State Police.

You ask us for a ruling concerning the disposition of certain money and property seized and held by the State Police Department as a result of a raid on a gambling establishment in Cecil County on November 23, 1946.

Your report of the raid states that there was confiscated by your Department the sum of $1,178.37 in cash, a check in the amount of $250.00, made payable to cash, and other items of personal property, including a loud speaker and amplifier, microphones, etc. You state this property is now and has been since the raid held by the Department of State Police, and you further advise that to date no claim to any of the property has been made.

The disposition of said property is controlled by the provisions of Section 18A of Article 88B of the Code (1943 Supplement). This Section provides that all personal property, except money, coming into possession of the Police Department, which is not claimed by the party entitled thereto within one year shall be disposed of by public auction, and the proceeds of such sale after the deduction of expenses, shall be credited to the Pension Fund of the Police Department. Then the statute goes on to say: "and all lost, abandoned, unclaimed or stolen money shall also be paid into said Fund."

It is clear, therefore, under the provisions of said Section the personal property can now be disposed of by auction in

the manner set forth in Section 18A, since more than one year has elapsed since the property came into the possession of the Department, and the proceeds, after deducting costs, paid into the Pension Fund. The money can also be paid into the said Fund.

There is legal authority to the effect that the check referred to above can be treated as money. *Baltimore and S. R. Co. v. Faunce,* 6 Gill. 88. This check should be presented to the bank on which it is drawn for payment, and if honored, the proceeds should also be credited to the Pension Fund.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

STATE ROADS COMMISSION

STATE ROADS COMMISSION — FREEWAYS — AUTHORITY TO PROHIBIT TRUCKS FROM USING HIGHWAY.

January 28, 1947.

Mr. Robert M. Reindollar, Chairman,
State Roads Commission.

This is to acknowledge your letter of January 16, 1947, and the file attached thereto, relating to a serious traffic condition existing on the so-called Jarrettsville Pike, Route 146. This condition is alleged to arise because of continued traffic law violations by heavy trucks, and the question that is raised by your letter and the above file is whether any authority exists for restricting the use of this road to light vehicles.

It appears from the file that the major portion of the traffic violations is caused by through traffic coming from Pennsylvania and points north, and that other routes could be made available to such traffic which are much shorter in distance.

It was previously ruled by this office in an opinion reported in 19 Opinions of the Attorney General, 463, that the State Roads Commission is without authority to designate certain roads for trucks and other roads for pleasure vehicles and to prohibit traffic contrary to such designation.

Since the rendition of the above opinion, the Legislature has adopted Chapter 487 of the Acts of 1941, now codified as Sections 150-155, inclusive, of Article 89B of the Annotated Code of Maryland (1943 Supplement), sub-title "Freeways." Section 151 permits the Commission, by resolution, to designate all or any portion of a State highway as a "Freeway," and Section 153 provides that upon such designation, the Commission may regulate the use of such "Free-

ways" by various classes of vehicles or traffic, provided an alternate route is available or made available for such restricted or prohibited classes.

From the file it appears that the highway in question is not, in its entirety, a State highway, since portions of it are under the jurisdiction of Baltimore County and of Baltimore City, in addition to that portion under the jurisdiction of the State. This being true, it is not, in its entirety, subject to being declared a "Freeway," and accordingly, it is my opinion that there is not at present any statute authorizing the Commission to prohibit the use of this highway by heavy truck traffic. Moreover, even though it could be declared a "Freeway," any restrictions adopted by the Commission with respect to its use by heavy trucks, will have to make provision for such use in connection with service to homes and businesses abutting thereon.

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION—ABANDONMENT OF HIGHWAY.

January 29, 1947.

Mr. Robert M. Reindollar,
Chairman, State Roads Commission.

This is to acknowledge your recent letter and its attached file, relating to the Bladensburg Road in the Town of Kensington.

It appears from the file that jurisdiction over this road was taken by the State Roads Commission some time ago, but that the proposed construction project which gave rise to such taking, was abandoned. Accordingly, the Commission abandoned the roadway involved, but question has now arisen as to whether legislation is necessary to return jurisdiction to the Town of Kensington.

It was ruled by the Court of Appeals of Maryland in *Hoffman vs. State Roads Commission,* 152 Md., 466, that this Commission has full authority, in its discretion, to abandon any portion of a State road, and this decision was followed in 20 Opinions of the Attorney General, page 740. It was also ruled in 15 Opinions of the Attorney General, 295, that the effect of such abandonment is to return jurisdiction to a county in instances where the county is given authority over roads in that particular section.

In view of the foregoing, it is my opinion that the Commission had authority to abandon the particular road here involved, and that the Town of Kensington has the same jurisdiction over it that it has over other streets within the municipality.

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION—PARKING—NO AUTHORITY TO ESTABLISH TAXICAB STANDS ON STATE HIGHWAYS.

April 15, 1947.

Mr. P. A. Morison,
Assistant to Chief Engineer.

This is to acknowledge your letter of April 11, 1947, enclosing an application by the Brooklyn Vets Cab, 1016 Bristol Place, Brooklyn, Maryland, for the exclusive right to park cabs in front of 5000 Ritchie Highway.

A similar inquiry has been received from Mr. William F. Childs, Jr., Director of the Traffic Division, relating to the establishment of such a cab stand on the west side of the Crain Highway, just south of the old Annapolis Road, in Glenburnie. Accordingly, I am replying to you and sending a copy to Mr. Childs, as this ruling will apply to both situations.

No authority exists in the State Roads Commission for the establishment of stands of this type on State highways. Sections 188 to 191, inclusive (the later section having been amended by Chapter 185 of the Acts of 1945), of Article 66½ of the Annotated Code of Maryland, 1943 Supplement, contains certain specific prohibitions with relation to parking at designated locations. These sections contain no provision for the establishment of cab stands by the State Roads Commission, and the only other sections that might be deemed applicable are Sections 137 and 138 of the above Article. These sections empower the Commission to establish a manual and specifications for a uniform system of traffic control devices, and authorize the placing of such devices upon all highways, under its jurisdiction, in order to regulate, warn or guide traffic.

The Commission has adopted such a manual, and has established certain "no parking" signs set forth therein. A sentence of the sections above referred to, however, shows that these signs may only be used to regulate, warn or guide traffic, and may not be used to give an exclusive privilege for parking on State highways. Such has always been the interpretation of the power of the Commission to prohibit parking under the statutes in existence prior to the adoption of the new Motor Vehicle Code, referred to above.

See:

23 Opinions of the Attorney General, page 447.

22 Opinions of the Attorney General, pages 599, 607 and 608.

There is nothing in the new code that indicates a change in meaning.

In view of the aforegoing, it is my opinion that the Commission has no authority to establish taxicab stands on State highways.

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION—FEDERAL FUNDS—CONTRACTS—COMMISSION MAY ENTER INTO INDEMNITY CONTRACT IF NECESSARY TO SECURE FEDERAL FUNDS.

April 30, 1947.

War Department,
United States Engineer Office.
Philadelphia, Pa.

This is to acknowledge your letter of April 29, 1947, relating to the authority of the State Roads Commission of Maryland to enter into an indemnity contract in connection with the above construction project.

As stated in my letter to you of February 25, 1947, some question may arise as to the authority of the Commission to enter into such an agreement because it is quite clear that no such authority exists with respect to an indemnity contract with a private person. However, with respect to such contracts made necessary in order for the State to obtain Federal funds, Section 48A (1) of Article 89B of the Annotated Code of Maryland (1939 Edition) as enacted by Chapter 964 of the Acts of 1945, provides as follows:

> "The State Roads Commission of Maryland, the counties, the City of Baltimore, the cities, municipalities, towns, special taxing areas and the other state and local agencies and sub-divisions of government in the State of Maryland and their duly elected or appointed officers are hereby expressly authorized and empowered to do any and all acts and things necessary or desirable to comply with the terms, conditions and provisions of the Act of Congress approved December 20, 1944, entitled 'Federal-Aid Highway Acts of 1944', together with any amendments thereto and regulations promulgated in connection therewith."

The above section was repealed and re-enacted, with amendments, by Chapter 560 of the Acts of 1947. This

amendment continues the authority of the State Roads Commission to do such acts as are necessary to obtain Federal funds. It is not effective, however, until June 1, 1947.

Although contracts of indemnity are not specifically dealt with either by the above quoted section or by the 1947 amendment, you will note that there is a broad authority granted to do any and all acts necessary to comply with any regulations of the Federal Government for the purpose of obtaining Federal funds.

In my opinion, therefore, the State Roads Commission of Maryland may enter into the above-mentioned indemnity provisions for the aforesaid purpose.

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION—MUNICIPALITIES—DISTRIBUTION OF GASOLINE TAXES TO MUNICIPALITIES.

May 6, 1947.

Mr. William F. Childs, Jr.,
Director, Traffic Division.

This is to acknowledge your letter of May 1, 1947, stating that in the Town of Midland, in Allegany County, there are two sections of road, one paralleling a railroad on the north and another on the south. It appears that both sections are maintained by the Town of Midland, but that the Town has advised you that that portion of the road on the south side of the railway is within the right of way of the Railroad Company. You ask whether this road should be included in your inventory of county roads as required by Senate Bill 359, which will, on June 1, 1947, become effective as Chapter 560 of the Acts of 1947.

The above Act requires the State Roads Commission as of June 30, 1947, to make a computation of county road mileage for the purpose of determining certain distributions of revenues arising out of the gasoline tax and the Department of Motor Vehicles, and Section 12 of that Act (enacting Section 1A through (E) of Article 89B of the Annotated Code of Maryland) contains the definitions of terms as used in the Act. Sub-section (D) describes a county road as any public road excluding State Roads and including hard surface or paved streets of municipalities (except Baltimore City), title to which, or the easement for the use of which, is vested in a public body or governmental agency by grant, condemnation or dedication.

Under the facts as contained in your letter, the Town of Midland has neither a fee simple title or ceasement for use of the street in question, and accordingly, it should not be included in the inventory that you are now making.

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION—MERIT SYSTEM—VETERANS—RESTORATION OF VETERAN TO STATE SERVICE.

May 13, 1947.

Hon. William Preston Lane, Jr.,
Governor of Maryland.

In your recent letter you have attached a file relating to the position of Resident Maintenance Engineer in one of the counties, and to a dispute as to which of two persons is now entitled to hold the above position.

In addition to the file forwarded with your letter, we have examined the files in the office of the State Roads Commission which are quite voluminous. It is a practical impossibility to state, in detail, all of the facts relating to this

question, but they appear to us to be substantially as set forth below:

On November 25, 1942, one of the contestants for the position of Resident Maintenance Engineer in this particular County, who, at the time, held a position in the Merit System designated as Road Inspector, was granted leave of absence to enter the Military Service of the United States. At that time there was no position designated as "Resident Maintenance Engineer", and the Road Inspector, for the particular county involved, was charged with the duty of maintaining both the county and State roads in that county.

Some time after the above date, the second contestant for the position here involved became Road Inspector, which position he held on June 1, 1943, at which time, Chapter 413 of the Acts of 1943, codified as Section 2A of Article 89B of the Annotated Code (1939 Edition) became effective. This section provides, in part, as follows:

> "2A. (a) On or after June 1, 1943, in any County of the State where the State Roads Commission has jurisdiction over the maintenance of both the State and county roads, it shall be the duty of the State Roads Commission to confer the title of 'Resident Maintenance Engineer' upon that person who, on June 1, 1943, already has charge of the maintenance of both the State and county roads for the State Roads Commission in that County, and after the title of 'Resident Maintenance Engineer' is conferred upon that person, it shall be the duty of the State Roads Commission to certify his name to the State Employment Commissioner with the salary not to exceed Three Thousand ($3,000) Dollars per year, to be paid, and the State Employment Commissioner is hereby ordered and directed to classify the said employee as 'Resident Maintenance Engineer' for that particular County, without any further examination or restriction, except

> in case of vacancies which may occur from time to time on account of death, or removal for inefficiency or neglect of duty, in accordance with the provisions of Article 64A of the Annotated Code of Maryland (1943 Edition) such position shall be filled in accordance with the provisions of said Article 64A."

Pursuant to the above Act the second applicant was designated as Resident Maintenance Engineer for the particular County, his name was certified in such capacity to the State Employment Commissioner, and he was so classified in the Merit System as required by the Act. It should be noted that this Act permits the removal of a person so designated only for inefficiency or neglect of duty in accordance with the provisions of Article 64A.

Subsequent to the above, and on or about October 25, 1943, the first contestant, having received an honorable discharge from the Army of the United States, applied for reinstatement as a road inspector. In compliance with this application, he was restored to such position, and in accordance with the Standard Salary Board Act, his former salary of Two Thousand ($2,000) Dollars was increased to Twenty-four Hundred ($2,400) Dollars, per year, thus giving him credit, not only for his four years of prior service as a road inspector, but also for his period of army service. Subsequent to this, however, efforts were made to have this veteran appointed to the position of "Resident Maintenance Engineer" in reliance upon the provisions of Chapter 333 of the Acts of 1943, codified as Section 95 of Article 65 of the Annotated Code of Maryland (1943 Supplement) which provides, in part, as follows:

> "Any person heretofore or hereafter inducted into the land or naval forces of the United States for training and service pursuant to the Act of Congress known as the Selective Training and Service Act of 1940, or any subsequent Acts of a

similar nature, and any member of any reserve component of the land or naval forces of the United States, who is on active duty or service, or who may be ordered or assigned to active duty or service, as well as any person, who, since the effective date of the aforesaid Act of Congress, has heretofore enlisted in or who may hereafter enlist in the armed forces of the United States, and who, because of such induction or in order to perform such active duty or service, or because of such enlistment, has left or leaves a position, other than a temporary position, in the employ of the State of Maryland, or of any department or agency thereof, shall (1) if he receives a certificate of satisfactory completion of such duty, (2) if he is still qualified to perform the duties of such position, and (3) if he makes application for reemployment within forty (40) days after he is relieved from such active duty or service, be restored to such position or to a position of like seniority, status and pay. Upon reinstatement, the time spent by such person in the military service shall be added to his seniority, he shall be entitled to the same pay which persons having the same seniority and doing the same kind of work in the department or service involved are receiving, and he shall be restored to any merit system or civil service status held by him at the time he entered such military service, just as though his employment had not been interrupted."

Federal Laws (50 U.S.C. Section 403) relating to a situation such as this merely recommend to State and local governments reinstatement of former employees to their old or similar positions wherever possible, and thus the above section which was in effect at the time of the veteran's application for his old position is the only law binding upon the State in this connection. This Act requires that all former employees with a certificate of satisfactory

service, who are still qualified to perform their duties and who apply for reemployment within forty (40) days after their discharge, shall be restored to their old positions *"or to a position of like seniority, status and pay."*

The Act further provides "that such employees shall be entitled to the increments of their position and to be restored to the Merit System and Pension status, just as though their employment had not been interrupted." There is no requirement in the Act for restoration to a different position or to one that he *might* have attained had be remained in the employ of the State. As long as the returning employee is restored to the same position, receives at least as much salary as he did when he left the State service and gets the increments and seniority status which would have accrued to him, the requirements of the statute are met.

As has been shown, in accordance with the veteran's own application, he was restored to the old position that he held, that of road inspector, and he received all seniority pay increases that would have accrued to him had he remained in the State service. To have restored him to the position of Resident Maintenance Engineer for the particular county involved, would have meant his restoration to a different position, in fact one that did not even exist at the time that he entered the service, and would have required the removal of the Resident Maintenance Engineer for that county in violation of the above quoted act, which permits his removal only for inefficiency or neglect of duty and after compliance with the provisions of the Merit System Law.

It appears, therefore, that under the law, as it existed at the time of the veteran's return from service, he received all that he was entitled to under the statute.

Agitation for his appointment as Resident Maintenance Engineer, however, has continued since his restoration as Road Inspector in October of 1943, despite the fact that he took, on February 15, 1944, an examination for Jr. Assistant Highway Engineer, Grade I, and was placed on the eligible list for this position. This agitation culminated in

the temporary appointment of the veteran as a Resident Maintenance Engineer on May 16, 1946, and in his taking an examination for such position, such examination being limited to qualified employees of the State Roads Commission residents of the particular county involved, and he being the only person taking the examination. He has passed this examination and is on the eligible list, but under the Merit System Act, can be given an appointment in this capacity only where there is an existing vacancy, or only if Chapter 800 of the Acts of 1945 which added eleven (11) new sections to Article 96½ of the Annotated Code of Maryland, and which repealed Section 95 of Article 65, first above quoted, gives him rights greater than those which he had at the time of his return from the armed forces.

Space does not permit setting forth the above Act in full, but the substance of the Act is to require the restoration of a veteran to the same position or to a comparable position of like duties, qualifications and pay, and if involved, of like classification, seniority and status if the veteran is still qualified to perform the duties of such position, and if he makes application for reinstatement within ninety (90) days from the date of separation from the armed forces. The reclassification, renaming or regrading of any position left by a second world war veteran to enter the armed services does not affect the veteran's right to reinstatement, and the right to determine what is a comparable position is vested in the State Employment Commissioner, whose determination is binding "unless arbitrary or wholly unreasonable".

A question might well arise whether the veteran contestant in this instance is entitled to rely upon Chapter 800 of the Acts of 1945, when he was properly restored to duty approximately one and one-half (1½) years prior to its effective date, particularly when, with respect to the position of Resident Maintenance Engineer, Chapter 953 of the Acts of 1945, amending Section 2A of Article 89B of the

Annotated Code of Maryland (1943 Supplement) as enacted by Chapter 413 of the Acts of 1943, again specified that all Resident Maintenance Engineers employed by the State Roads Commission on June 1, 1945, should continue in the same classification unless removed for inefficiency or neglect of duty, in accordance with the provisions of Article 64A of the Code, or unless promoted in accordance with the provisions of said Article.

Moreover, since the veteran was separated from the armed services in 1943, he could not apply under the Acts of 1945 for his old or a comparable position within ninety (90) days of his discharge, since that Act was not in effect at the time of his discharge, nor within ninety (90) days thereafter. It appears, therefore, that those veterans discharged more than ninety (90) days prior to the effective date of Chapter 800 of the Acts of 1945, which was an emergency law, approved April 27, 1945, could not comply with the conditions precedent to its application, and accordingly, it seems apparent that the Legislature did not intend that it apply to those veterans already restored to their positions in the State service under laws in effect at the time of their discharge.

Apart from the above, however, the Employment Commissioner who, as has been shown, is given the authority by Chapter 800 to determine what is a comparable position, has ruled by letter dated September 6, 1945, to the State Roads Commission that Chapter 800 refers to a "position the veteran left and not to another and different position the veteran might have been promoted to had he not entered the armed services." This position was reiterated by the Employment Commissioner under letter of October 16, 1945, to the State Roads Commission, with the express approval of the then Attorney General, under letter to the State Employment Commissioner dated October 11, 1945.

In view of the fact that the veteran contestant in this situation has been restored to duty in the position that he left when he entered the armed forces, and has received and

continued to receive all of the increments, seniority and status of that position, it is our opinion that he is not entitled to a different position created subsequent to his entry into the service, and that the person now holding the position of Resident Maintenance Engineer for the particular county involved by virtue of specific legislative Acts, relating to that position, may be removed from it only in accordance with the provisions of Article 64A. The taking of an examination for the position of Resident Maintenance Engineer and his temporary appointment as a Resident Maintenance Engineer by the veteran contestant only has the effect of making him eligible for appointment to such a position when a vacancy occurs.

HALL HAMMOND, *Attorney General.*

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION—BUDGET AMENDMENT—FERRY SYSTEM—CONSTRUCTION FUND MAY BE USED TO SUPPLEMENT PROCEEDS OF BOND ISSUES IN ORDER TO IMPROVE FERRY SYSTEM.

May 14, 1947.

Mr. Walter N. Kirkman, Director,
Department of Budget and Procurement.

In your recent letters you have asked our opinion as to a certain budget amendment forwarded by the State Roads Commission to Governor Lane for approval.

From the facts as we have ascertained them, it appears that Chapter 755 of the Acts of 1945, authorized the State Roads Commission to issue bonds in the aggregate principal amount, not to exceed $1,500,000. "sufficient for paying" (1) expense of the bond issue; (2) cost of construction or acquisition of one or more ferry boats; (3) cost of construction of slips, etc. at Matapeake and Sandy Point; (4)

cost of purchase and installation of traffic control equipment and (5) cost of construction of suitable buildings necessary to properly accommodate passenger traffic; office buildings, employees' quarters and the equipment of all buildings at any or all of the termini used by the Ferry System.

On October 1, 1945, the above Chesapeake Bay Ferry System Improvement Bonds were sold and the gross proceeds in the amount of $1,503,942.25 were deposited with the State Treasurer under a separate control account 704-6 in the list of appropriations for the State Roads Commission.

On June 30, 1946, the above account number was amended by State Roads Commission budget amendment No. 28, under title "Ferry System Improvement Bonds" and because of previous vouchers for various projects in connection with the Ferry System, the amount was reduced to $1,162,842.75. Prior to that time, on January 9, 1946, a contract for a new boat, in the amount of $667,607. with an escalator clause for increased construction, etc. costs was let, and on May 9, 1946, a contract for the construction of a terminal at Matapeake, in the amount of $1,202,776.03, was let. There was no escalator clause in this contract.

Accordingly, it will be seen that on June 30, 1946, the date of the Commission's budget amendment No. 28, there were commitments against the proceeds of the bond issue greater than the amount of the gross proceeds of the bonds, and this action was taken by the Commission after a discussion with the then Governor, in which the Commission was advised to proceed with getting the work under contract, and that appropriate approval of a budget amendment transferring funds from the State's construction account would be forthcoming upon submission.

On January 31, 1947, the original budgeted sum of $1,503,942.25 had been expended plus an overdraft with the Comptroller of $139,871.40, which was permitted by the Comptroller, because of the above mentioned arrangement

with the Governor. In addition to the above overdraft in actual disbursements, there are substantial additional contractual obligations which must be paid for the improvement of the Ferry System, and accordingly, on or about February 20, 1947, State Roads Commission Budget Amendment No. 9, prepared for the fiscal year beginning July 1, 1946, was forwarded to the Budget Director. This amendment sets up for the improvement of the Ferry System, under Item 704-6, mentioned above, the sum of $300,000, and subtracts that amount from the State's New Construction Account, consisting of all funds of the Commission, not specifically dedicated by the Acts raising the revenues involved. You have asked our opinion whether the proceeds of the bond issue for Ferry Improvement may be supplemented by funds derived from the State's construction and reconstruction account.

First of all, it should be stated that the procedure here followed is not recommended, for it would seem that where funds in a particular account are found to be insufficient to pay the actual cost of the project covered by that account, a budget amendment should be effectuated prior to incurring additional liabilities. Failure to follow this procedure, however, does not invalidate the action of the Commission in forwarding, nor that of the State Comptroller, in accepting vouchers drawn against an account having insufficient funds for the State Roads Commission had to its credit with the Comptroller, funds against which these vouchers could have been drawn without the necessity of a budget amendment.

It has been specifically ruled in 27 Opinions of the Attorney General, 330, that the State Roads Commission may use its power of eminent domain to condemn property for a terminal site at the ferry, because the ferry system is an integral part of the State Highway System. See 30 Opinions of the Attorney General, 143, and compare 26 Opinions of the Attorney General, 365, the latter of which opinions authorizes the use of general construction funds of the Commission to build bridges.

In view of the aforegoing, it is apparent that upon the exhaustion of the proceeds of the bond issue, the State Roads Commission might have drafted its vouchers upon its construction funds for additional obligations in connection with the Ferry System, without the necessity of a budget amendment, at all. It did not do so because, as a matter of accounting, it desired all expenditures for the improvement of the Ferry System, to appear in one budget item.

This opinion may appear to be unduly complicated, but if so, it is because the complications are of an accounting rather than of a legal nature. The opinion cited clearly discloses that the Ferry System is a part of the State Highway System, and this being true, the State Roads Commission's construction account may be used for its improvement. The fact that one method of accounting rather than another was used to accomplish such expenditure does not, in any way, change the legal problem involved. Nor does the fact that the bond issue was for a fixed sum limit the powers of the Commission in this respect. The Act authorizing their issuance does not, in any way, restrict the general authority of the Commission as to reconstruction or improvement of the highway system.

It should be pointed out, however, that under the system of accounting adopted, a budget amendment may now be approved by the Governor under the provisions of Section 8 of Article 15A of the Code, as amended by Chapter 986 of the Acts of 1945. Since approval, if given, will be under the above section, there is no necessity for action by the Board of Public Works.

HALL HAMMOND, *Attorney General.*

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION—MUNICIPALITIES—TRAFFIC CONTROL DEVICE—MUNICIPALITY MUST OBTAIN PERMIT TO ERECT TRAFFIC CONTROL DEVICE ON STATE HIGHWAY.

July 1, 1947.

Mr. C. Albert Skirven,
District Engineer, State Roads Commission.

This is to acknowledge receipt of your letter of June 20, 1947, asking whether a municipality has authority, without obtaining the permission of the State Roads Commission, to erect a traffic control signal on a State maintained highway within the corporate limits of the municipality.

Section 138(b) of Article 66½ of the Annotated Code of Maryland (1943 Supplement) provides:

> "No local authority shall place or maintain any traffic control device upon any highway under the jurisdiction of the State Roads Commission except by the latter's permission and in accordance with the direction of the Commission."

This is a statutory confirmation of a previous opinion to the same effect found in 24 Opinions of the Attorney General, page 720.

In view of the aforegoing, the municipality should obtain a permit from the State Roads Commission of Maryland prior to the erection of the traffic control device upon the State maintained highway referred to. I suggest, however, that where the device is to be erected within a corporate limit, the permit should be granted, unless of a type not approved by the Commission, or unless its erection would materially impede traffic upon the public road.

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION—EMPLOYEES—EMPLOYEES RETIREMENT SYSTEM—EMPLOYEE OVER 70 NOT MEMBER OF RETIREMENT SYSTEM MAY CONTINUE EMPLOYMENT.

July 1, 1947.

Mr. Robert M. Reindollar,
Chairman, State Roads Commission.

This is to acknowledge receipt of your recent letter relating to the status of an employee of the State Roads Commission.

I understand from the file forwarded with your letter that this employee was over the age of seventy (70) when the Employees' Retirement System, Chapter 377 of the Acts of 1941, codified as Article 73B of the Annotated Code of Maryland (1943 Supplement), was adopted, and that because of his age, he elected not to become a member of the System. Accordingly, despite the fact that he was above the retirement age as fixed by the Act, he properly was continued as an employee, it being ruled in 26 Opinions of the Attorney General, 335, that such employees could continue in the service of the State and were not required to be retired.

Chapters 695 and 696 of the Acts of 1947, make certain changes with respect to the age of retirement, but the application of these Acts is restricted to those who are members of the System. Accordingly, in an opinion of the Attorney General, dated June 7, 1947, it was again ruled that unless a State employee is a member of the System, there is no requirement that he be retired at the age of seventy (70).

In view of the aforegoing, it is my opinion that the State Roads employee in question, may continue his services despite the fact that he is over the age of seventy (70).

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION—FEES FOR OVERWEIGHT VEHICLES—NO REFUND TO STATE CONTRACTOR BY REASON OF IMPOSITION OF FEES FOR OVERWEIGHT VEHICLES.

August 7, 1947.

Mr. Wilson T. Ballard,
Chief Engineer, State Roads Commission.

This is to acknowledge receipt of your letter of July 25, 1947, stating that certain contractors are requesting a refund of fees paid on account of permits issued for the movement of oversized and overweight vehicles, and asking how such requests should be treated. Their contention is that when they bid on State construction contracts no such fees were imposed by the State, and accordingly, no payment of such fees, as a cost of doing business, was contemplated by them.

Fees for the operation of oversized motor vehicles were first imposed by Chapter 99 of the Acts of the General Assembly of Maryland of 1947, amending Sections 74, 75 and 76 of Article 66½ of the Annotated Code of Maryland (1943 Supplement), which Act was effective March 12, 1947.

It may be admitted that the payment of such fees in the instances mentioned by you were not contemplated by the contractors at the time their bids for State highway construction work were submitted, but it is quite clear that a change in the tax of a State, thus causing increased expense to a State contractor, does not give rise to a right of refund such as is claimed.

For instance, in *Deming vs. United States,* 1 Court of Claims, 190, the plaintiff sued for losses occasioned by fulfilling a contract of sale with the Government for imported goods. He asserted that his loss in fulfilling the contract arose as a result of an Act of Congress which had increased the import duty on the goods to be furnished. The Court of Claims dismissed the petition for the reason that the in-

crease in import duty was an Act passed by Congress as a general law applicable with equal force to similar contracts between individuals, and that the "United States as a contractor is not responsible for the United States as a law giver."

In this case the act imposing fees for the operation of overweight vehicles applies equally throughout the State to those contracting with private parties, as well as to those contracting with the State and the fact of such increase gives rise to no claim against the State as a contractor.

In my opinion, therefore, you should decline to recommend any claim for refund of these fees.

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION—GASOLINE TAX—MUNICIPALITIES—GREENBELT—DISTRIBUTION OF GASOLINE TAX TO MUNICIPALITIES.

August 14, 1947.

Mr. William A. Codd, Chief Auditor,
State Roads Commission.

This is to acknowledge your letters of July 22, 29 and August 4, 1947, forwarding a list of municipalities (including special taxing areas) requesting distribution of gasoline tax and motor vehicle revenue funds pursuant to Section 14 of Article 89B of the Annotated Code of Maryland, as enacted by Chapter 560 of the Acts of 1947.

Charter provisions of the listed municipalities and special taxing areas have been checked by this office, and it has been found that in each instance the municipal corporation and special taxing areas have authority to maintain streets.

In the case of the Town of Greenbelt, in Prince George's County, however, it appears that while this is a municipality, authorized to maintain streets, at the present time this municipality has no title to such streets, title thereto being in the Federal Government. Accordingly, no distribution to Greenbelt should be made under these specific provisions of the Act above referred to.

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION — COUNTIES — GASOLINE TAX — EXPENDITURE OF GASOLINE TAXES DISTRIBUTABLE TO COUNTIES.

August 19, 1947.

Mr. William A. Codd, Chief Auditor,
State Roads Commission.

This is to acknowledge your letter of August 6, 1947, in which you state that the County Commissioners of Cecil County have requested that you set aside the sum of Five Thousand ($5,000) Dollars from that County's share of road funds accruing under the provisions of Chapter 560 of the Acts of 1947, to be used by them for debt service on existing outstanding road obligations of the county. You have asked advice as to your authority to comply with this request.

Chapter 560 of the Acts of 1947 provides in general for the establishment of certain funds derived from gasoline tax and motor vehicle revenues and for a distribution of 20% of these funds to the counties and municipalities of the State (excluding Baltimore City, which receives 30%) on a road mileage basis. This distribution is made to the counties and municipalities direct where these sub-divisions are doing road construction and maintenance with their own forces, but in the case of those counties whose road construction and maintenance is done by the State Roads

Commission, a credit is given on the books of the Commission for that county's share. Section 13 (d) of Article 89B of the Annotated Code of Maryland, as enacted by the above Chapter 560 of the Acts of 1947.

Cecil County, under Section 156 of Article 89B of the Code as enacted by the above Act, is one of these counties whose road construction and maintenance is performed by the State Roads Commission, and therefore, that county's share is carried as a credit to that county on the books of the Commission. It does not follow, however, that the county has authority to expend its share for previously existing "road obligations".

Section 13 (d) (1) of Article 89B, enacted as above, permits expenditures of the funds paid or credited to the counties in such amounts as may be necessary to furnish debt service "with respect to outstanding bonds or other evidences of debt heretofore issued by such county or any municipality within the county for construction, reconstruction or maintenance of roads or streets *to the extent that gasoline tax revenues have heretofore been lawfully dedicated, pledged or otherwise committed* to such debt service; ****" (emphasis supplied)

With respect to future bond issues, that is, those issued after the effective date of the Act, the counties and municipalities are authorized to use funds distributable under the Act for their payment, but it will be noted that the only authority given for the payment of bonds issued prior to effective date of the Act, is where the county's share of the gasoline tax has been pledged.

You have advised me that the Cecil County Bonds in question were issued prior to the effective date of Chapter 560 of the Acts of 1947, and contain no pledge of gasoline tax revenues for their payment.

In view of the aforegoing, therefore, it is my opinion that no authority exists for the payment of these bonds from funds credited to Cecil County derived under this Act.

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION — EMPLOYEES — OVERTIME — RULES AND REGULATIONS AS TO PAYROLL PRACTICES.

August 21, 1947.

Mr. Robert M. Reindollar,
Chairman, State Roads Commission.

This is to acknowledge your letter of August 12, 1947, forwarding to me a proposed draft of regulations, changing the payroll period in the State Roads Commission from a semi-monthly to a bi-weekly basis, and establishing fixed procedures for the calculation of work weeks in the various departments, sick leave, vacation leave, overtime pay and other matters involving personnel administration. You have asked two specific questions with respect to these regulations, and because of their voluminous nature, I am undertaking, in this letter, to pass only upon the specific questions asked.

Your first question is whether hourly employees of the State Roads Commission are entitled to be paid for legal holidays, where no work is performed. Because of the fact that they are hourly employees, being paid only for time actually worked, it has never been the practice within the State, to make payment to them for legal holidays.

However, Chapter 510 of the Acts of 1947, which added a new section to Article 100 of the Annotated Code of Maryland (1939 Edition), to be known as Section 78, specifically provides, in part:

> "Every State employee shall be entitled to observe, with pay, all legal holidays of the State of Maryland, as designated in Section 9 of Article 13 of the Annotated Code of Maryland (1939 Edition);"

The Act is all inclusive and makes no distinction because of the manner in which State employees are paid, and you

are, therefore, advised that hourly employees should be paid for legal holidays on the basis of the normal number of hours usually worked per day. I have discussed this matter with Attorney General Hall Hammond, who concurs in this view.

Your second question asks whether regulations may be adopted authorizing the deduction of a day's basic pay in cases where employees who earn a fixed salary, are absent without authorized leave on a regular work day, or fail to respond when needed and called upon to work on some other day, even though the employee may have worked 48 or more hours in the work week, and will receive overtime pay for hours worked in excess of 48.

It is proposed by these regulations that all employees of the State Roads Commission shall be deemed as on call in the case of emergencies or press of work at all times, but that a certain established work week for various classes of employees be fixed in order that it may be determined whether these employees have earned their basic salary. Unauthorized absence under the regulations will bring about a failure to earn basic salary for the time involved, and will not be a "deduction" as your letter phrases it, but will rather be a non-payment to an employee, because of not doing the amount of work required to earn the salary specified.

Basic salary is entirely apart from the overtime pay fixed by Chapter 1015 of the Acts of 1945, enacting Section 77 of Article 100 of the Annotated Code of Maryland, which provides for overtime pay in the case of work by State employees in excess of 48 hours in any one week. Thus under the proposed regulations an employee might conceivably work because of emergencies over 48 hours in 5 days, thus earning overtime pay. On the other hand, if an established work week is 6 days, and he is absent without authority on the sixth day, he would not receive credit on his basic pay for this sixth day.

There are various sections of the Code granting authority to State agencies for the establishment of administrative

practice within the State service. Section 5 of Article 78A authorizes the Board of Public Works, upon recommendation of the Comptroller, to adopt rules covering matters of business administration in the various departments.

Section 5 of Article 64A of the Code authorizes the Employment Commissioner, with the approval of the Governor, to adopt rules carrying out the provisions of Article 64A, and Section 18 of Article 64A authorizes the Commissioner alone, by rule, to prescribe standards of performance for any positions or classes of positions, and to prescribe the form and scope of the records that appointing authorities shall keep the actual performance, output and conduct of employees. In addition the Employment Commissioner, acting alone, by Section 22 (b) of Article 64A of the Annotated Code (1943 Supplement) may adopt rules necessary to carry out the provisions of Section 22, with respect to sick leave and vacation leave of employees.

Rules and regulations with respect to salary standards may be adopted by the State Employees' Standard Salary Board under Sections 16 and 17 of Article 64A, as amended by Chapters 9, 781 and 930 of the Acts of 1945, and by Chapter 287 of the Acts of 1947.

With respect to the specific question asked regarding the earning of base pay, it would appear that the Employment Commissioner, acting alone, under Section 18 of Article 64A, may adopt the rules in question.

Out of an abundance of caution, however, and because of the fact that representatives of the Employees' Standard Salary Board and of the Board of Public Works were present at the meetings in which these proposed rules were discussed, I recommend that they be adopted officially by the Employment Commissioner and by these other agencies, with the approval of the Governor, in accordance with their established procedures, prior to attempting to give them force and effect.

Your third question relates to the soundness of the principle as proposed in these regulations of not allowing

compensatory time off for work on Saturdays by employees who regularly work a 5 day week.

As has been shown under the ruling on your second question, there appears to be ample authority in the statutes for the establishment of a rule that all employees of the State Roads Commission are on call at all times, even though certain classes of employees may regularly work only a 5 day week. If the necessity of the work of the Commission requires one of these 5 day week employees to work on Saturday, I find nothing in the statute that compels the giving of compensatory time off. Of course, if more than 48 hours is worked, the employee will be entitled to overtime compensation in accordance with Chapter 1015 of the Acts of 1945. Compensatory time off, however, is only required as an alternative to payment for a day's work on legal holidays, as defined in Section 9 of Article 13 of the Code, under Chapter 510 of the Acts of 1947.

As previously stated, I am passing on no other legal questions that may arise in connection with these proposed regulations, nor am I ruling upon their policy.

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION — COUNTY ROADS — FEDERAL FUNDS — DUTIES WITH RESPECT TO COUNTY ROADS WHERE FEDERAL FUNDS ARE INVOLVED.

October 8, 1947.

Mr. Robert M. Reindollar, Chairman,
State Roads Commission.

This is to acknowledge your letter of September 19, 1947, asking several questions with respect to the authority of the State Roads Commission in connection with county road projects where federal funds are to be matched with funds payable to the county from gasoline tax and motor vehicle

revenue, or with funds otherwise raised in the county by taxation or otherwise.

It appears that, in connection with projects for which such county funds are to be allocated, to be matched with federal funds, the county in many instances, even though having its own road organization, requests the State Roads Commission to make surveys, to prepare plans and to award and supervise the construction of the projects involved. You have asked whether this is permissible under Chapter 560 of the Acts of 1947.

This Act provides in general for distribution of certain gasoline and motor vehicle tax revenues to the counties under a mileage basis. As originally proposed, the State Roads Commission was to have no duty or authority in connection with construction or maintenance of county roads, it being the intention of the Act to require the State Roads Commission to give its entire attention to the State System of Highways, as distinguished from county road work.

Many of the counties, however, whose road work had in the past been done by the State Roads Commission and paid for out of these counties' share of the former "One and One-Half Cent Lateral Roads Tax" believed that a continuance of this system in their counties, would be more economical and consequently, with respect to eleven counties, the State Roads Commission was directed to retain their shares of funds from the new distribution, and to continue the maintenance and construction of their roads. The remaining counties, however, were actually to receive their share of the above revenue and to do their work through their own road departments, which might be either a county road board or the County Commissioners. In such counties where county funds alone are involved, Section 14(c) of Chapter 560 specifically provides that the Commission shall have "no duties, responsibilities or authority with respect to construction, reconstruction or maintenance of any road other than State roads." An exception, however, is contained in the same section "with respect to qualifying for

the receipt, administration and expenditure of Federal funds for roads", and there is a further provision in Section 17 of the Act, authorizing and empowering the State Roads Commission "to act as the agent or representative of any such political subdivision for the purpose of negotiating, contracting or dealing with the Federal Government or its authorized representatives with respect to construction and reconstruction under the Federal Act, and to undertake all contracts, plans, specifications and estimates relating thereto and to supervise directly the construction and reconstruction work and labor done pursuant to such Acts."

The State Roads Commission is further empowered "to do any and all acts and things necessary or desirable to comply with the terms, conditions and provisions and to obtain the benefit of the provisions of the Federal Acts." Funds made available to Maryland under the Federal Highway Act of 1944 are payable to the State, and there is no Federal requirement that they be apportioned to the counties for expenditure. As a matter of policy, the Commission has made such apportionment, but even so, the Public Roads Administration looks to the State rather than the County for compliance with the terms under which they are made available. Failure to comply with these requirements results in a loss to the *State* of these Federal funds. Consequently, it seems preferable and it is certainly desirable that the Commission supervise closely projects that are to be financed with Federal funds, since the Commission, through experience in prior years, is more familiar with the policies of the Public Roads Administration.

In view of the foregoing, it is my opinion that although the Commission is prohibited from any activity in connection with roads other than State roads in counties having their own road organization where funds originating in those counties or allocable to those counties are alone involved, you have authority where such funds are to be matched with Federal funds payable to the State of Maryland under the Highway Act of 1944, to do anything found necessary or desirable to comply with the Federal Act,

even though the roads involved when completed, will remain in the county system and will not become a part of the State System of Highways.

It follows, therefore, that you may also perform these acts where the projects will become a part of the State System of Highways.

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION — COUNTY ROADS — MUNICIPAL STREETS—AUTHORITY TO CONSTRUCT AND MAINTAIN COUNTY ROADS AND MUNICIPAL STREETS.

October 9, 1947.

Mr. Robert M. Reindollar, Chairman,
State Roads Commission.

This is to acknowledge your letter of September 19, 1947, relating to the authority of the State Roads Commission to do certain work upon streets in the various municipalities throughout the State. It appears that, under prior laws, the Commission, at the request of the authorities in some municipalities not having their own street departments, would, in many cases, perform maintenance or construction work upon town streets not a part of the State Highway System under an agreement whereby the town reimbursed the Commission for the actual cost of the work involved plus an added 15% for overhead. Your question relates to whether this practice may be continued under Chapter 560 of the Acts of 1947.

As has been previously pointed out in an opinion to you dated October 8, 1947, the above Act, as originally introduced, contemplated a distribution of a portion of motor vehicles and gasoline tax revenues to the counties and municipalities, and was intended to prohibit the Commis-

sion from doing any work on roads other than those in the State Highway System. The Legislature, however, amended the Act to provide that in eleven (11) named counties, funds allocable to those counties should be retained by the Commission (after a deduction for shares due municipalities in these counties) to be used for county road maintenance and construction. It should be here noted that the term "County Road" as used in the Act is defined to be not only roads outside of incorporated towns, excluding State Roads, but also hard-surfaced or paved streets of municipalities (except in Baltimore City), title to which or the easement for the use of which is vested in a public body or governmental agency by grant, condemnation or dedication. Section 1A (D) of Article 89B of the Annotated Code (1939 Edition) as enacted by Section 12 of Chapter 560 of the Acts of 1947.

Thus in the eleven (11) named counties the Commission has authority to perform work not only on county roads as the term is commonly understood, but also on the above described municipal streets within those counties. The Act contemplated, however, that where a municipality asked for its share of funds allocable to it from gasoline and motor vehicle revenues work on its streets would be performed by or under its supervision. While the Act does not prohibit the Commission from doing work on municipal streets in those eleven (11) counties, it cannot do so unless work is recommended by the County Commissioners for, in the absence of such recommendation, the Commission is prohibited by the Act from doing any county road work whatsoever except where, according to the opinion above cited, Federal funds may be involved.

In view of the foregoing, with respect to municipalities in the eleven (11) named counties whose road work is performed by the State Roads Commission, municipal streets should be treated as any other county road without regard to whether it is within the corporate limits of any town. The municipal authorities should request that the County Commissioners include such streets in the county road pro-

gram recommended to the Commission. Obtaining such inclusion should not be difficult because the municipalities have or will receive their share of motor vehicle and gasoline tax revenues, in cash, and may reimburse the county for the construction or maintenance cost.

This ruling is in accordance with the spirit of Chapter 560 of the Acts of 1947, in that it permits this Commission to treat municipal streets just as any other county road, and will not require additional administrative bookkeeping and accounts for municipal street construction and maintenance.

With respect to municipal streets in counties actually receiving their distribution of gasoline and motor vehicle revenues and doing their own road work, it is quite clear that, except where Federal funds are involved, the Commission is without authority to do work except upon State Highways. See Opinion above referred to and Section 14 (c) of Article 89B as repealed and re-enacted by Section 14 of Chapter 560 of the Acts of 1947.

You, therefore, have no authority to enter into contracts with municipalities in the above counties for construction or maintenance of municipal streets. This, again, is in line with the spirit of Chapter 560 of the Acts of 1947, which was intended, at least, in part, to cut down the overhead of the Commission by authorizing it to give its attention solely to State Highways wherever possible. It is suggested, however, that the municipalities which, of course, are receiving their share of gasoline and motor vehicle revenues under the Act may make an arrangement with the Road Board or County Commissioners for their counties for construction and maintenance of City streets, and for payment out of the funds that the municipalities have received and will receive.

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION—MUNICIPAL LIABILITY FOR RELOCATION OF WATER MAINS.

October 14, 1947.

Mr. William F. Childs, Jr.,
Acting Chief Engineer.

This is to acknowledge your letter of October 10, 1947, advising that in connection with the resurfacing of the Governor Ritchie Highway it will be necessary to make adjustments to certain facilities of the City of Baltimore, such as raising manhole covers and frames. You have asked whether the cost of making these adjustments must be borne by the State Roads Commission or by Baltimore City.

This question has been the subject of numerous rulings reported in:

28 Opinions of the Attorney General, 209

27 Opinions of the Attorney General, 339

24 Opinions of the Attorney General, 700

The rule established by these opinions is that where a utility, either publicly or privately owned, is given the right to establish its facilities within the limits of the right of way and subsequent improvement necessitates a relocation of these lines, that the obligation is upon the utility to relocate the same at its own expense.

The opinion above referred to, reported in 28 Opinions of the Attorney General, 209, expressly makes this rule applicable to the Baltimore City Water Department. You have not stated in your letter whether these facilities were placed in the Commission's roadbed through permit of the Commission, or whether they were located at the particular places involved through grant from landowners existing prior to the State Roads Commission's construction. If the right of the utility existed prior to the rights of the public

in the highway, the State Roads Commission must bear the cost of relocation.

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION—PERMITS FOR EXCAVATION OF HIGHWAY—BOND MAY BE REQUIRED BEFORE GRANTING PERMIT.

December 9, 1947.

Mr. William F. Childs, Jr., Chief Engineer,
State Roads Commission.

This is to acknowledge your letter of November 25, 1947, asking for an interpretation of certain phases of Chapter 66 of the Acts of the General Assembly of Maryland for the Special Session of 1947, adding a new section to the Montgomery County Code (1939 Edition), being Article 16 of the Code of Public Local Laws of Maryland, title "Montgomery County", sub-title "Washington Suburban Sanitary District", said new section to be known as Section 1189A. This new section authorizes the Washington Suburban Sanitary Commission, in its discretion, to discontinue the practice of constructing water or sewer house connections and to authorize such connections to be made by a Master Plumber, registered in the Washington Suburban Sanitary District under the supervision of the Commission.

Two of our District Engineers are concerned about the provisions of this Bill, because the making of house connections will some times require openings in State Highways, and because, ordinarily, Master Plumbers are not equipped to make the temporary repairs and servicing of the Highways, nor to make the permanent repairs that will be required by reason of such openings. You have asked my opinion whether if the Suburban Sanitary Commission authorizes the making of these water or sewer house connections by Master Plumbers, you may require a permit

for the opening of the State Highways, and may require them to place bonds to assure the satisfactory restoration of the surfacing of the Highways.

Section 21 of Article 89B of the Annotated Code of Maryland (1939 Edition) provides, in part, as follows:

> "******No such highway shall be dug up for laying or placing pipes, sewers, poles or wires or railways, or for other purposes, and no trees shall be planted or removed or obstructions placed thereon without the written permit of the State Roads Commission, or its duly authorized agent, and then only in accordance with regulations of said Commission; and the work shall be done under the supervision and to the satisfaction of said Commission; and the entire expense of replacing the highway in as good condition as before shall be paid by the person to whom the permit was given or by whom the work was done,*****"

In view of the foregoing, it is obvious that Master Plumbers desiring to make an opening in the State Highways, must obtain a permit in accordance with the regulations of the Commission, and must perform their work under the supervision and to the satisfaction of said Commission. The requirement of a bond for the satisfactory performance of these statutory obligations is a reasonable one and in my opinion, is well within the power granted by the above quoted section.

I might add that I have discussed this question with the General Counsel for the Washington Suburban Sanitary Commission, who advises that that Commission has also considered the problem that you present, and is in accord with the view that a bond should be obtained, or that some other method be devised to assure the proper restoration of the Highways.

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATE ROADS COMMISSION—SPEED LIMITS, AUTHORITY TO REDUCE.

December 19, 1947.

Mr. P. A. Morison,
Assistant Chief Engineer.

This is to acknowledge your request of December 17, 1947, wherein you ask that this office render an opinion as to whether the State Roads Commission has the authority to reduce speed on county roads in a county in which we maintain the roads for the County Commissioners.

Section 157 (h) of Article 66½ of the Annotated Code of Maryland (1943 Supplement), as amended by Chapter 299 of the Acts of Maryland, 1947, states, in part, as follows:

> "Whenever the State Roads Commission shall determine upon the basis of an engineering and traffic investigation that any prima facie speed hereinbefore set forth is greater than is reasonable or safe under the conditions found to exist at any place upon any public highway within this State outside the corporate limits of any municipality or upon any State maintained street within the corporate limits of any municipality, said State Roads Commission shall determine and declare a reasonable safe prima facie speed limit thereat which shall be effective when appropriate signs giving notice thereof are erected upon any such highway or street. Violation of the provisions of this sub-section shall constitute reckless driving, to wit: operating at a rate of speed greater than is reasonable and proper."

From the file it appears that the road in question falls within the definition of "any public highway", and is also outside the "corporate limits of any municipality". Accord-

ingly, and in view of the above recent legislation, it is my opinion that the State Roads Commission has the authority to set the speed limit on this road based on the results of an "engineering and traffic investigation."

ROBERT E. CLAPP, JR., *Special Asst. Attorney General.*

STATUTES

STATUTES—CHAPTER 704 OF THE ACTS OF 1947 DOES NOT REPEAL BY IMPLICATION CHAPTER 9 OF THE ACTS OF 1947.

CONFLICT OF LAWS—REPEALS BY IMPLICATION ARE NEVER FAVORED UNLESS ABSOLUTELY NECESSARY FROM EXPRESS WORDING OF STATUTE.

July 10, 1947.

Mr. Walter D. Owens,
State Employment Commissioner.

In your recent letter, you ask us to interpret what appears to be conflicting provisions in two Bills passed by the Legislature during the 1947 Session.

These laws are Chapter 9 of the Acts of 1947 and Chapter 704 of the same Session. Under the provisions of Chapter 9, the compensation of the Chief Inspector and Assistant Inspectors of the Board of Hairdressers and Beauty Culturists was removed from the explicit provisions of the law, with the provision that the compensation shall be as provided in the budget. Chapter 704 amends the law relating to hairdressers and beauty culturists generally, but retains the provision which was in the old law which stated that the salary of the Chief Inspector shall not exceed $2100 per year, and increases the salaries of the Assistant Inspectors from $5 to $7 per day. You state that the salary of the Chief Inspector as now established by the Salary Standard Board under existing provisions of the law is $2400-$3000 per year and if the provision of Chapter 704 should prevail, the said salary must be reduced to the maximum of $2100 per year.

An examination of the Senate and House Journals discloses that Senate Bill 94, now Chapter 9 of the Acts of

1947, was introduced and read in the Senate for the first time on January 7, 1947, finally passed the House of Delegates on January 30, 1947, and was signed by the Governor on February 14, 1947. The only change in the then existing law occasioned by the passage of said Chapter 9 is to remove the specified salary of the Chief Inspector and Assistant Inspectors from the law and provides that their compensation shall be as provided in the budget. In examining the title of the Bill, we find that it says:

> ". . . relating to the compensation of the Chief Inspector and Assistant Inspectors of the Board of Hairdressers and Beauty Culturists."

This method of eliminating the specific salary provision from the law and making provisions therefor in the budget was used a number of times in this and recent sessions of the Legislature. The desirability of this change is, we think, apparent and needs no discussion here, except to point out that this is only one of a number of like enactments and it was obviously the legislative intent that this specific change be made.

An examination of the Journals shows that House Bill 90, now Chapter 704, was introduced and read for the first time in the House of Delegates on January 7, 1947, the same date Chapter 9 was read for the first time in the Senate, but did not finally pass the Senate until March 27, 1947, and was signed by the Governor on April 25, 1947. Under the provisions of said Chapter 704, we find that the law relating to hairdressers and beauty culturists was generally amended. These amendments, in most part, include increasing the qualifications of operators, junior managers and managers and providing for more stringent inspection regulations and safety rules. It is pointed out, however, that under the provisions of this Act the compensation of the Board members is increased from $10 to $15 per day, with the maximum compensation for any one year raised from $200 to $1500; the compensation of Assistant Inspectors is increased from $5 to $7 per day, and traveling

expenses are increased from $.05 to $.06 per mile. This Act does not serve upon its face to decrease the salary of anyone connected with the Board. The salary of the Chief Inspector was retained in the repeal and re-enactment at the same figure ($2100) per year, as existed prior to its re-enactment.

The question now is: Do the provisions of Chapter 704 repeal by implication the provisions of Chapter 9, which provided that the salary of the Chief Inspector and Assistant Inspectors shall be as provided for in the budget?

In *Baltimore v. German American Fire Insurance Company,* 132 Md. 380, the Court of Appeals, at page 385, said:

> "Repeals by mere implication are never favored by the Courts. If the subsequent Act can be made, by any reasonable construction or intendments, to stand with the previous Legislation, that construction will always be adopted. It is only when there is a plain, unavoidable and irreconcilable repugnancy between the Acts that the latter is said to repeal the former by implication. . . . This is specially true of Acts passed at the same session of the Legislature. In such case there is a strong presumption against the implied repeal, and they are to be construed together if possible, so as to give effect to each, . . . In *Cain v. State,* 20 Texas 350, the Court there said 'it is not to be supposed; nothing short of expressions so plain and positive as to force upon the mind an irresistible conviction or absolute necessity would justify a Court in presuming that it was the intention of the Legislature that their Acts passed at the same session should abrogate and annul one another.' "

In view of the very decided rule above quoted as established by the Maryland Court of Appeals, it behooves us to reconcile these two Acts. This, we think, can be done. Chapter 9, referred to above, distinctly provides that the compensation of the Chief Inspector and the Assistant

Inspectors shall be as provided for in the budget. This law provides this and nothing more. Chapter 704, on the other hand, repeals and re-enacts a number of Sections relating to hairdressers and beauty culturists. The obvious purpose of this Bill was to strengthen the rules, regulations and qualifications pertaining to hairdressers and beauty culturists. The fact that the Section relating to the salary of the Chief Inspector provides that the compensation of the Chief Inspector be the same as established by the law prior to 1947, does not, in our opinion, repeal by implication the express provisions of Chapter 9, passed on a prior date at the same Session of the Legislature, which provides that the compensation shall be provided for in the budget. Especially is this true since Chapter 514, the Budget Bill, which finally passed both Houses on March 26, 1947, at page 105, provides that the salary of the Chief Inspector for the Board of Hairdressers and Beauty Culturists shall be $3,000 for 1948 and the same amount for 1949. If the two Acts herein discussed are considered along with the budget, there is actually no conflict as to the salary of the Chief Inspector. However, since the latter Act provides for a daily increase in the compensation of the Assistant Inspectors and the daily rate is not provided for in the budget the specific rate of $7 per day as established in Chapter 704 should prevail.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

TAXATION

TAXATION—INHERITANCE TAX—BEQUEST IN TRUST TO PAY FUNERAL BILL NOT EXEMPT AS A CHARITABLE DISPOSITION.

January 7, 1947.

Mr. Robert L. Wheeler,
Register of Wills for Harford County.

Your letter of January 3, 1947 states that the will of W. Littleton Baldwin, recently probated in your office contains the following bequest:

> "Should my sister, Catharine Baldwin, now at Spring Grove Sanitarium, outlive me, then I hereby devise to Ryland L. Mitchell, in trust, for the purpose of paying her funeral bill at the time of her death, the sum of Three Hundred Dollars ($300.00)."

You state that Catharine Baldwin is still living and that the specific bequest has been deposited in a bank until such time as it is needed. You ask whether the bequest is subject to the collateral inheritance tax.

You will note that the bequest is not specifically made for the perpetual upkeep of a grave or graves, nor is it made for the use of a corporation, trust or community chest or foundation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes. Accordingly, the provisions contained in Section 110 of Article 81 of the Annotated Code of Maryland (1943 Supp.), exempting such bequest is not applicable. Moreover, while expenses incurred in the administration of an estate are generally deductible for the purpose of comput-

ing the inheritance tax (see 23 Opinions of the Attorney General, 620, 621, and opinions there cited) the bequest made by W. Littleton Baldwin cannot so qualify.

In our opinion, the $300.00 left to Ryland L. Mitchell in trust by the bequest set forth hereinabove is subject to the collateral inheritance tax.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—GIFT IN CONTEMPLATION OF DEATH—TRANSFER BY DECEDENT TO HIMSELF AND WIFE AS TENANTS BY THE ENTIRETIES DEEMED IN CONTEMPLATION OF DEATH.

January 7, 1947.

Mr. Edward E. Coursey,
Register of Wills for Queen Anne's County.

We have your letter dated December 10, 1946 in which you state that John H. Burchard died intestate in Queen Anne's County on November 20, 1946. You further state that the decedent, in 1945, caused his farm to be conveyed to his wife and to himself as tenants by the entireties, that the decedent made a similar transfer of his personal property in July, 1946, and that in October, 1946, the decedent caused his bank account to be established as a joint trust account with his wife with right of survivorship. You ask whether any part of the estate is subject to Maryland inheritance tax.

In the usual case, property held by husband and wife as tenants by the entireties is not subject to the inheritance tax. 27 Opinions of the Attorney General, 378; 22 Opinions of the Attorney General, 637. In addition, any interest of a surviving spouse in money on deposit in the names of

husband and wife, passing to such surviving spouse, is free of tax. See Section 111 of Article 81 of the Annotated Code of Maryland (1943 Supp.) as amended by Chapter 742 of the Acts of 1945. However, Section 111 of Article 81, supra, provides in part, as follows:

> "The taxes imposed by the two preceding sections of this sub-title shall apply to all tangible or intangible property, real or personal, passing * * * by deed, gift, grant, bargain or sale, made in contemplation of death, * * *."

Section 111, supra, further provides in part:

> "Any transfer of a material part of his property, in the nature of a final disposition or distribution thereof, made by a decedent within two years prior to his death, except a bona fide sale for an adequate and full consideration in money or money's worth, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section."

In 27 Opinions of the Attorney General, 378, it was held that where a tenancy by the entireties or joint ownership is created through a transfer by decedent in contemplation of death, the transfer is disregarded and the property is taxed at its entire value.

Since the transfers made by Mr. Burchard covered a material part (if not all) of his entire estate, and because they were made within two years prior to his death, it must be presumed that such transfers were made in contemplation of death. To escape the tax, the taxpayer must sustain the burden of proving to the contrary. This may be accomplished only by clear and convincing proof to the effect that the transfers were made for purposes associated with life. *United States v. Wells*, 283 U.S. 102 (1931). If, in your opinion, the taxpayer fails to meet this burden,

the tax is payable on the value of the entire property transferred.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—REVALUATION OF REMAINDER INTEREST—NO FURTHER TAX DUE ON ENHANCEMENT.

January 10, 1947.

Mr. J. Walter Grumbine,
Register of Wills for Carroll County.

Your letter of December 17, 1946 states the following facts: A, who died on November 28, 1940, and whose will was probated on December 3, 1940, bequeathed and devised certain improved real estate to B, her husband, for life, with the provision that upon the death of the life tenant, the property should be sold and the proceeds added to the residue of the decedent's estate. Decedent's will further provided that the residue of the estate should pass to certain life tenants, with remainders over to nephews and nieces specifically named in the will.

On July 21, 1941, the Orphans' Court of Carroll County approved the first administration account of the executor of A. This account showed, among other things, that the entire value of the real estate here involved had been appraised according to its true value, as provided by Section 120 of Article 81 of the Annotated Code of Maryland (1939 Ed.), that the value of the life estate and the estates in remainder had been ascertained, and that the Maryland inheritance tax had been paid on the apportioned value of the life estate and the estates in remainder as permitted by Sections 124 and 125 of Article 81 of the Annotated Code of Maryland (1939 Ed.).

Recently the life tenant has died and the real estate in question has been sold, the sale price being far in excess of the appraised value appearing on the first administration account, as above stated. You ask whether any additional inheritance tax is now due by virtue of the terms of Section 120 of Article 81 of the Annotated Code of Maryland (1943 Supp.).

We have ruled that where a decedent died in 1937, leaving property in trust for his wife for life with remainders over and where both the life and remainder estates were valued and the inheritance tax paid thereon in accordance with the provisions of Section 124 of Article 81 of the Annotated Code of Maryland (1939 Ed.), no further inheritance tax was payable at the death of the life tenant. This was found to be true even though the property subject to tax had appreciated in value during the period covered by the life estate. 29 Opinions of the Attorney General, 240. This opinion is controlling here unless a contrary result is dictated by Section 120 of Article 81 of the Annotated Code of Maryland (1943 Supp.).

Section 120 of Article 81 of the Annotated Code of Maryland (1943 Supp.) provides in substance that when real estate, subject to the tax, passes "directly to one or more heirs or devisees of the decedent" and is sold by the executor "either pursuant to a direction to sell * * * or pursuant to a discretionary power and authority to sell contained in the will, or in the event said real estate is sold to pay debts of the decedent or to pay pecuniary legacies or for any other reason connected with the administration of the estate", then the tax is not to be paid "on the appraised value thereof as is included in the distributive share of any heir, devisee, legatee or distributive (sic) of the decedent." See 27 Opinions of the Attorney General, 463.

The relevant provisions of Section 120, supra, were enacted by Chapter 782 of the Acts of 1941. Section 4 of that Act provided in part that it should "take effect June 1, 1941", and should be applicable with respect to the estates

of all decedents dying after May 31, 1941. It follows that Section 120 of Article 81 of the Annotated Code of Maryland (1943 Supp.) is not applicable to this case, 27 Opinions of the Attorney General 463, 464; 28 Opinions of the Attorney General 275, 278, and that the inheritance tax in question was computed correctly on the basis of the appraised value of the improved real estate, 24 Opinions of the Attorney General 913, 914. Accordingly, no further inheritance tax is now due.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—PAYABLE ON SALES VALUE OF REAL ESTATE RATHER THAN APPRAISED VALUE.

January 14, 1947.

Mr. Harry D. Radcliff,
Register of Wills for Frederick County.

We have your recent letter in which you state that on May 6, 1946 an inventory of jointly held real estate was returned, showing same to be appraised at $12,000, and an inventory of jointly held personal property, showing same to be appraised at $1,346.50, and the collateral inheritance tax was paid on one-half of both of these amounts on June 11th. You state further that, on June 21, the real and the personal property was sold at public sale pursuant to the provisions of the decedent's will, and brought $17,050.00 and $6,635.10, respectively, and you ask whether you should collect the tax on the sales value or the appraised value.

As to the personal property, Section 118 of Article 81 of the Annotated Code (1943 Supp.) provides that the

appraisement shall be subject to modification by the Orphans' Court. That statute reads as follows:

> "When any species of property other than money or real estate shall be subject to said tax, the tax shall be paid on the appraised value thereof as filed in the office of the register of wills of the proper county or city, which appraisement shall be subject to modification by the Orphans' Court appointing such appraisers, for good cause shown; and every executor shall have power under the order of the Orphans' Court, to sell, if necessary, so much of said property as will enable him to pay said tax."

This question was discussed in 26 Opinions of the Attorney General 404, and there it was said:

> "If the limitations of Section 114 (now Section 119 of the Code (1943 Supp.), which places a limitation of thirteen months from the date of administration on a petition for reappraisement) is not applicable, we suggest that the Register, who has a definite interest in the proper valuation of estates inasmuch as he is charged with the collection of inheritance taxes, petition the Orphans' Court for a reappraisement. The executor should be given an opportunity to be heard on the matter."

It is our opinion that the suggestion in the quoted language should be followed in the present case under the same limitations. It will be well, of course, to notify the Executor so that he may be heard upon the question if he so desires.

As to the real estate, Section 120 of Article 81 of the Code (1943 Supp.) provides that:

> "In the event said real estate shall be sold by the executor, either pursuant to a direction to

> sell contained in the will of the decedent or pursuant to a discretionary power and authority to sell contained in the will, * * *"

the tax shall not be paid on the appraised value, but shall be paid on the distributive share of the net proceeds of sale.

There is a further provision in the Section that if the tax has been paid on the appraised value and thereafter there is a sale in excess of the amount on which the tax has been paid, the tax shall be paid on the excess. You advise us that the will in the present case contains a direction to the Executor to sell, and it is clear that collateral inheritance tax must be paid on the amount by which the net distributive share exceeds the amount of the appraised value.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

TAXATION—RECORDATION TAX—TRANSFER OF REAL ESTATE TO A CORPORATION IN EXCHANGE FOR STOCK—TRANSFER SUBJECT TO RECORDATION TAX.

January 28, 1947.

Mr. Benjamin L. Barnes, Clerk,
Circuit Court for Somerset County.

We have your letter of January 25th which asks our opinion with respect to the applicability of Sections 220-221 of Article 81 of the Annotated Code of Maryland (1939 Ed.), as amended, to a conveyance of real estate by certain individuals to a corporation in exchange for its stock.

You state that F. W. Besley and S. Procter Rodgers, coowners of certain real estate in fee simple, have conveyed their interests in the property to Besley and Rodgers, Incor-

porated, a Maryland corporation, in exchange for stock of the transferee. You state further that the real estate had a "net cost" to the transferors, immediately preceding the transfer, of $9,431.25, and that the transferors received in exchange for the property, stock of the transferee in an amount equal in value to this figure. You have asked whether, in our opinion, the transaction is one requiring recordation stamps, as provided by Sections 220-221 of Article 81 of the Annotated Code of Maryland (1939 Ed.), as amended.

Section 220 of Article 81, *supra,* as amended by Chapter 253 of the Acts of 1945, provides in part that a tax is imposed upon every instrument of writing conveying title to real or personal property offered for record and recorded with the Clerks of the Courts in this State. The Section further provides that the term "instruments of writing" shall include deeds and that in the case of instruments conveying title to property, the tax shall be at the rate of ten cents for each $100 of the actual consideration paid or to be paid.

It is a well established principle that a corporation is a distinct legal entity, separate and apart from its stockholders. Thus, where a corporation takes fee simple title to real estate under a general warranty deed, it holds the property in its own name and right and not in trust for the stockholders. This would be true in ordinary circumstances even though there were only a single stockholder. Moreover, where the corporation pays for the real estate by issuing shares of its stock, the transferor has received actual and valuable consideration for his grant.

In many cases, the Maryland Recordation Tax is, in theory, similar to the Federal Stamp Tax. The Federal law imposes an exaction on deeds, instruments or writings whereby lands, tenements or other realty is sold, granted, assigned, transferred, or otherwise conveyed to a purchaser or purchasers. See I. R. C. sec. 3482. The Bureau of Internal Revenue long ago held that transfers of real estate to a corporation in exchange for its capital stock was a convey-

ance subject to tax even though there was but one stockholder, II—1 Cum. Bull. 311, and this ruling has been sustained by subsequent decisions, *Kerr v. United States,* 131 F. (2d) 450 (C. C. A. 7th 1942) ; Cf. *Orpheum Bldg. Co. v. Anglin,* 127 F. (2d) 478 (C. C. A. 9th 1942). Regulations 71, sec. 113.82(f) which now construes the Federal law is consistent with these decisions.

In our opinion, the deed to Besley and Rodgers, Incorporated, is subject to the Maryland Recordation Tax. Under the circumstances we think that the proper measure of the "actual consideration paid or to be paid" is the current value of the property transferred. 23 Opinions of the Attorney General 624, 625, and that value will not necessarily be the same as its "net cost."

In reaching the conclusion stated above, we are not unmindful of the fact that we have held that the recordation tax is not payable where a corporation dissolves and thereafter distributes its real estate to its stockholders. 24 Opinions of the Attorney General 973, 30 Opinions of the Attorney General 193. However, these opinions were based upon the principle that upon dissolution, the stockholders became vested with an equitable title to the real estate and that the subsequent deed was only for the purpose of vesting technical legal title. That is not the situation here, and, as a result, those opinions are not controlling.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—REAL ESTATE SOLD TWO YEARS AFTER CLOSING OF ADMINISTRATION PROCEEDINGS—NO FURTHER INHERITANCE TAX PAYABLE.

January 28, 1947.

Mr. Joseph P. Connor,
Register of Wills for Baltimore County.

We have your letter of January 22d in which you raise a question with respect to the inheritance tax liability of the estate of George E. Wright.

From your letter and the documents enclosed therein, it appears that George E. Wright died on April 22, 1944, leaving a Last Will and Testament, which was duly probated in the Orphans' Court of Baltimore County on May 2, 1944. By this Will, the testator devised all of his property, both real, personal and mixed, to his wife for life, with remainders, upon the death of his wife, to his three daughters in equal shares. The Will further provided that Grace J. Harris should be Executrix of the Will, with full power "to sell any real estate for the purpose of making distribution after my wife's death". The wife predeceased the testator.

The Executrix duly qualified. Thereafter, an inventory was filed which showed no personal property and certain real estate which was appraised at $6,500. A Final Administration Account was passed, which showed, among other things, that the inheritance taxes had been paid on the basis of the appraised value of the real estate.

Approximately two years after the death of the testator, a contract was entered into for the sale of the real property which had been the only asset in the estate. At the insistence of the title examiner, letters of administration, d.b.n., c.t.a., were taken out on the estate (the Executrix having died). Subsequently the administrator d.b.n., c.t.a., filed a report of sale which revealed that the property was sold at a figure considerably in excess of its appraised value as shown on the original inventory.

Under the circumstances outlined above, you ask whether any further inheritance tax is due from the estate of George E. Wright.

We may put to one side the fact that letters of administration d.b.n., c.t.a., were taken out on the estate of the testator, that a report of sale was duly filed and that the report was ratified by the Orphans' Court. The decision here must turn not upon the technical requirements of a title examiner, but rather upon the construction which we place on Section 120 of Article 81 of the Annotated Code of Maryland (1943 Supp.).

Section 120 of Article 81, supra, provides, in part, as follows:

> "In the event said real estate shall be sold by the executor, either pursuant to a direction to sell contained in the will of the decedent or pursuant to a discretionary power and authority to sell contained in the will, or in the event said real estate is sold to pay debts of the decedent or to pay pecuniary legacies or for any other reason connected with the administration of the estate of the decedent, then said tax shall not be paid on the appraised value of said real estate but shall instead be paid on so much of the net proceeds of the sale thereof as is included in the distributive share of any heir, devisee, legatee or distributive of the decedent. In the event the said tax is paid on the appraised value of said real estate before the sale thereof and it should subsequently appear that the tax payable with respect to such portion of the proceeds of the sale thereof as is distributable to the persons hereinbefore named, is greater than the tax paid on the appraised value of said real estate, such excess shall be paid upon the distribution of the proceeds of the sale thereof; * * *."

From the above, you will note that an additional inheritance tax will be due if the price received from the sale of

the real estate exceeds its appraised value where the property is sold either (1) pursuant to a direction to sell contained in the Will of the decedent; (2) pursuant to a discretionary power to sell contained in the Will; (3) where real estate is sold to pay the debts of the decedent or to pay pecuniary legacies; or (4) for any other reason connected with the administration of the estate of the decedent.

Prior to June 1, 1941, the liability for inheritance tax was based on the appraised value of real estate. In such cases, we had ruled that where real estate had been sold during administration, the tax was based on the appraised value of the real estate irrespective of the fact that the sales price exceeded the appraised value—27 Opinions of the Attorney General, 463. On the other hand, we had held that where a Will directed the executors to sell real estate for the purpose of paying pecuniary legacies, the doctrine of equitable conversion required that the tax should be computed upon the sale price of the real estate rather than its appraised value—17 Opinions of the Attorney General, 397.

Because it was thought desirable to base the inheritance tax on the proceeds of sale where real estate was sold as a part of the process of settling an estate, the Legislature, in 1941, enacted Section 120 of Article 81, *supra*. See Report of the Maryland Tax Revision Commission of 1939, p. 32.

In construing this Section, we have held that where real estate was sold by means of a partition proceeding because the gross estate was insufficient to satisfy all obligations thereof, the tax should be calculated on the sales price rather than on the appraised value of the property as shown in the inventory—30 Opinions of the Attorney General, 175, 177. We have also held that where real estate was sold in a partition proceeding by decedent's next of kin under an agreement which divided the decedent's estate between them, the tax should be based on the proceeds of sale rather than the appraised value of the real estate—30 Opinions of the Attorney General, 149. However, where it appeared

that the heirs of a decedent were merely exercising their rights as co-owners in a partition proceeding after the administration of the estate had been closed, we have held that no additional inheritance tax was due even though the sales price of the real estate exceeded its appraised value—27 Opinions of the Attorney General, 375.

In our opinion, the question of whether additional inheritance taxes are due where an executor sells real estate for a price in excess of its appraised value depends on whether the sale was made in connection with or pursuant to the "administration" of the estate. Thus, if realty is sold by an executor for more than its appraised value in order to distribute the proceeds to the legatees who may elect to take cash instead of property, Section 120 of Article 81, *supra,* would apply. On the other hand, if tenants in common of property left to them by Will sell the real estate years after the administration of the estate has been closed, no additional inheritance tax would be payable even though the sales price exceeded the appraised value of the property. This would be true irrespective of the fact that the executor were made a party to the sales proceedings if his joinder were required for technical reasons only.

In the present case, title to the real estate in question had vested in the legatees and the administration of the estate had been closed for nearly two years prior to the time when the property was sold. While it is true that the Will gave the Executor a power of sale "for the purpose of making distribution after my wife's death", it is our view that the mere joinder of the subsequent administrator in the sale made two years after death and settlement of the estate for technical reasons of the title does not make the selling part of the real process of settling the estate. It results, therefore, that no additional inheritance tax is due by reason of the sale of the real estate at a price in excess of its appraised value.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—LIFE ESTATES—DEVISE TO SON IN TRUST FOR MAINTENANCE OF WIFE AND CHILDREN CREATES PRESENT JOINT LIFE ESTATE IN WIFE AND CHILDREN.

February 4, 1947.

Mr. R. Glenn Prout,
Register of Wills for Anne Arundel County.

In reply to your letter of January 27, 1947, about the inheritance tax due on the estate of Richard Earle Davidson, we note that the devise in question is as follows:

> "First: I give, devise and bequeath to my son, George Davidson, all that farm with its improvements lying in the Third Election District of Anne Arundel County, purchased by me from Henry Duvall and wife, and containing 292½ acres (two hundred and ninety-two and one-half acres) of land, more or less, in trust nevertheless, for the use and benefit of such children as he may leave surviving him at his death, the income arising from such farm to be used by my said son for the maintenance and support of his wife and children, and not subject to any claims against my said son or his wife; and upon the death of my said son George, then in trust to his wife, Isabelle Davidson, should she survive him, upon the same uses and trusts as aforesaid, and not otherwise, and upon the death of my son and his wife, or the survivor of them, I give, devise and bequeath the aforesaid tract of land with its improvements, absolutely to the children of my said son, George Davidson, share and share alike. And should it seem best to my son said George Davidson, or his wife, during said Trusteeship to sell the said farm, it is my will and desire, and they are hereby fully authorized and empowered to make such sale without application to any Court for

> that purpose, and to reinvest the proceeds of sale arising therefrom in such other land or securities as to him or her shall seem best, such land or securities to be held in like trust nevertheless as said original devise hereinbefore mentioned; the above authority to sell to apply to any portion of said farm."

This inexpertly drawn devise is not free from doubt, but it is my belief that the interests created are: (1) a joint life estate in the daughter-in-law, Isabelle Davidson, (2) joint life estates in the children living from time to time pour autre vie the son, George Davidson, and the daughter-in-law, Isabelle Davidson, and (3) vested remainders in the children living at the death of the son, George Davidson. It will be noted that (1) and (2) are joint, the consequence of which is that the daughter-in-law, Isabelle Davidson, did not take a life estate in the whole property but took jointly with the children living from time to time.

In view of this interpretation of the devise, the life tenant, Isabelle Davidson, should have paid a collateral inheritance tax in 1925 when the testator, Richard Earle Davidson, died. At that time there was no direct inheritance tax so that the interests devised to the children were free from tax. Valuation of the life estate of the daughter-in-law, Isabelle Davidson, is a difficult matter in view of the fact that she took jointly with the children living from time to time.

The inheritance tax statutes provided, in 1925, that the Orphans' Court should determine in its discretion what proportion the party entitled to a life estate shall pay and that such determination should be final. The Orphans' Court for Anne Arundel County must, therefore, use its best judgment in valuing the life estate of Isabelle Davidson at the time of the testator's death in 1925 and assess a five per-cent collateral inheritance tax thereon.

In answer to your inquiry as to whether the tax upon the interest of Isabelle Davidson should be paid now, the

answer is "yes", and, further, that the tax should have been paid at the death of the testator in 1925.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

TAXATION — INHERITANCE — CLAIMS AGAINST ESTATE —CLEAR VALUE RULE—NO TAX DUE WHERE PROPERTY IS TRANSFERRED TO SETTLE CLAIMS.

February 14, 1947.

Mr. Frank E. Hudson,
Register of Wills for Worcester County.

Your letter of January 22, 1947 states that Glenmore S. Williams, a resident of Worcester County, died testate on November 22, 1945. By his last will and testament, Mr. Williams devised and bequeathed his entire estate, both real, personal and mixed, to his widow. At the time of his death, Mr. Williams was the owner of a remainder interest in certain real estate located in the town of Berlin, which has been appraised at $700.

During the course of administration, the owner of the life estate standing before the remainder interest presented a claim against the estate of the testator in an amount equal to approximately $8,000. After numerous conferences, the life tenant has agreed to accept, in compromise of his claim, the sum of $250 in cash from the executrix of the estate, and a conveyance of the remainder interest by the devisee.

You ask whether or not any inheritance tax is payable on the appraised value of the remainder interest which was owned by the testator at the time of his death.

Section 109 of Article 81 of the Annotated Code of Maryland (1939 Ed.) imposes a tax at the rate of 1% on every

One Hundred Dollars of *the clear value* of any and all property having a taxable situs in this State passing at death to a lineal descendant. Although the law does not provide for the deduction of claims and expenses, it is well established that bona fide expenses of administration, claims against the estate and debts of a decedent are deductible in computing the amount of inheritance tax due. 10 Opinions of the Attorney General 257, 14 Opinions of the Attorney General 300, 16 Opinions of the Attorney General 337, 20 Opinions of the Attorney General 849, 23 Opinions of the Attorney General 620, 27 Opinions of the Attorney General 423. The rationale upon which this result has been reached is that the inheritance tax is imposed upon the privilege of taking property from a decedent measured by the clear value of the estate received.

The fact that the inheritance tax is based on the clear value of the property received has been held to permit a devisee, in computing the amount of inheritance tax, to deduct debts of a decedent which were made a charge on a legacy by the terms of the decedent's will. 23 Opinions of the Attorney General 529. Moreover, we have held that where an estate included fee simple real estate subject to mortgages and liens in excess of its value, there would be no inheritance tax payable on the property if it were sold in order to pay the outstanding claims. 16 Opinions of the Attorney General 337. Similarly in 20 Opinions of the Attorney General 849, it appeared that the decedent died testate, leaving real estate to her sisters and brother. The facts also revealed that the sisters held two notes which were valid claims against the estate. Under these circumstances, we held that the inheritance tax was payable only upon the difference between the appraised value of the realty and the amount of the claim. In reaching this conclusion, we said:

> "It is clear from these rulings that the beneficiaries should only be required to pay a tax upon the property they receive. If the claims against

> the estate can be satisfied out of the personal property, then the real estate distributed to the devisees should pay a tax on the full appraised value, but if the real estate is sold, to pay debts, the devisee should only be taxed on the proceeds of the real estate less the sums necessary to satisfy the claims against the estate."

In each of the opinions discussed above, the common theme has been that substance must control over form in determining the "clear value" of the estate received by a legatee or devisee. Thus, in determining the amount of inheritance tax due, the vesting of technical legal title will not in every case be determinative, the test being rather the actual amount of "clear value" which can be fairly said to have passed after all of the substantive factors have been considered.

In applying the tests outlined above, we have reached the conclusion that no tax is collectible on the value of the remainder interest left to the widow of Glenmore S. Williams. You will notice that in this case there is but one legatee. To settle a claim against the estate (which we have assumed was a bona fide transaction consummated with the approval of the Orphans' Court) the legatee agreed to transfer the remainder interest valued at $700, together with a transfer of $250 in cash by the executrix to the life tenant in settlement of his claim. If the claim had been settled by transferring $950 of cash by the executrix to the life tenant, the full amount paid in settlement would have been deductible. The method actually followed is in substance no different and the tax consequences should be the same.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION — INHERITANCE TAX — DEDUCTIONS — GIFTS TO CHARITIES—REQUIREMENT THAT BEQUEST BE USED OUTSIDE STATE PREVENTS DEDUCTION.

February 17, 1947.

Mrs. Vernie Smouse,
Register of Wills for Garrett County.

We are in receipt of your request for an opinion with respect to the deductibility, for the purposes of the Maryland inheritance tax, on certain bequests made by the Will of George W. Loar.

By Item 10 of the Will, the testator bequeathed the sum of $15,000 to his executors, in trust, upon the limitation that the trustees should pay over annually an amount equal to $3,000, plus any income from the trust corpus, "for assisting in the education of young men who are students at West Virginia Wesleyan College at Buckhannon, West Virginia". The Will further provides that the bequest to the University shall fail if the president, the faculty or any other persons connected with the institution shall teach "any political doctrine tending to undermine belief in a democratic form of government" during existence of the trust. Should the bequest fail for the reasons above stated, the executors are directed to "use and expend annually the said sum of $3,000, or so much thereof as may prove practicable and advisable, for assisting in educating ministerial students at some other college affiliated with the Methodist Church whose teachings are in harmory with my views as expressed herein; and if no Methodist college is found by my executors to conform to such requirements, they shall use and expend such funds annually for like purposes and subject to the same limitations at a college of another denomination". The Will also states that "as to the matters restricting this bequest the judgment of my executors shall control and be final".

By Item 11 of the Will, the testator bequeathed (a) the sum of $1,000 to the Salvation Army to be used at Grafton,

West Virginia; (b) the sum of $2,000 to the Anti-Saloon League of America; (c) the sum of $2,000 to the World's Service of the Methodist Church; (d) the sum of $500 to the Mt. Lake Park Gospel Camp Meeting Association; and (e) the sum of $15,000 to the American National Red Cross. With respect to the bequest to the American National Red Cross, the Will provides, in part, that "I so request that this bequest be used for the relief of the children of Great Britain, Holland, Belgium, Greece and China who have suffered by reason of the present World War, in such proportions as may seem best and most effective to the Red Cross authorities who are in charge of such relief."

You will observe that the bequests outlined above fall into two classes. The first class includes those bequests to West Virginia Wesleyan College, the Salvation Army and the American National Red Cross. In each of these cases, the funds devised are required *by the terms of the Will* to be used by the devisees for activities to be performed outside of the State of Maryland. The second class of bequests includes those made to the Anti-Saloon League of America, the World's Service of the Methodist Church and the Mt. Lake Park Gospel Camp Meeting Association. In each of these bequests, the funds passing under the terms of the Will may be used by the recipient generally, there being no requirement that they be used outside of the State of Maryland.

Section 110 of Article 81 (1943 Supp.) provides, in part, as follows:

> "And provided further that nothing in this section shall apply to property passing, in trust or otherwise, to or for the use of a corporation, trust or community chest, fund, or foundation, created or organized under the law of the United States or of any State or territory or possession of the United States, organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, including the encour-

> agement of art and the prevention of cruelty to children or animals, a substantial part or all of the activities and work of which are carried on in the State of Maryland, and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

In construing this Section, we have held that the Legislature intended to confine the exemption to bequests made to religious or charitable corporations which actually render service within the borders of this State—29 Opinions of the Attorney General 201. While it is unnecessary for a gift to a national charitable institution to be specifically restricted in its application to activities and work carried on in this State before the exemption will be granted—30 Opinions of the Attorney General 234, 237—it must appear that the bequest was in some way related to or a benefit to the citizens of Maryland—30 Opinions of the Attorney General 182, 185.

The correct answer to the question of whether the bequests which fall into the first class are exempt under the statute, as we have interpreted it, is not easy to give. We have reached the conclusion that the bequests lie on the taxable side of the line which must be drawn to divide the exempt from the taxable. There is implicit in the exemption statute the idea of a *quid pro quo*. The exchange of benefits need not be immediate or direct in the sense that the tax free gift, as such, must be applied for the benefit of Maryland or its citizens. It is enough that the recipient carries on all or a substantial part of its activities in the State; in such case the Maryland bequest is added to the general financial reservoir of the recipient and may be visualized as a component part of the financial stream which nurtures the barren portions of Maryland's "religious, charitable, scientific, literary or educational" fields. This is not to say, however, that where the testator, by explicit direction, requires that the bequest must be used out of Maryland, the same answer of exemption must be reached. We see no

reason why the adequacy of a consideration for exemption may not be tested and found wanting. It is true that by stretching the argument thin enough it can be said that bequests of the class now under consideration will permit the recipient to do work which it would otherwise have to pay for from general funds, and that, therefore, the same basis of exemption is present as in the case of general bequests without restriction as to use. However, as a practical matter, in the majority of the cases of restricted gifts (and we believe that to be a reasonable assumption in those here involved) the work made possible by the gift would not otherwise be undertaken, or if undertaken at all, not to the extent permitted by the gift. This being so, it is our view that mutuality of consideration is lacking to an extent which vitiates the statute as far as exemptions of such gifts are concerned. The real purpose of a statute must always prevail over its literal words where that purpose can be read clearly.

The question of whether the bequests which fall into class two outlined above are free from tax will depend upon whether (1) a substantial part of the activities of the charitable institution in question is carried on in Maryland, and (2) whether the charitable institution in question is a corporation, trust or community chest, fund or foundation created under the law of the United States or of any State or territory or possession of the United States. Whether the charitable organization in question carries on a substantial part or all of its work in Maryland is a question of fact to be determined by you after a review of all of the evidence. Moreover, you should be satisfied before granting exemption that the organization is one which will qualify under the statutory language outlined above.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—RECORDATION TAX—DEED RECORDED PRIOR TO IMPOSITION OF TAX—COUNTERPART OF DEED MAY BE RECORDED WITHOUT PAYMENT OF TAX.

February 21, 1947.

Mr. Clayton K. Watkins, Clerk,
Circuit Court for Montgomery County.

We have your letter of February 13, 1947, in which you state that three separate deeds have been offered recently for record in your office which convey the same property. We understand that the property involved amounts to approximately two hundred and fifteen acres, of which about ten acres lie in Montgomery County and the balance in Howard County. You state that the deeds in question were recorded in Howard County prior to the effective date of the recordation tax, but that they have never been recorded in Montgomery County.

You ask whether the three deeds offered for record under the facts outlined above are subject to the recordation tax imposed by Section 220-221 of Article 81 of the Annotated Code of Maryland (1939 Edition), as amended.

Section 220 of Article 81, *supra,* as amended by Chapter 253 of the Acts of 1945, provides, in part, as follows:

> "Any instrument, or counterpart of any instrument, previously recorded, may be recorded in any other county or in Baltimore City, or in more than one place in the records of a particular county or Baltimore City, without the payment of a tax."

The purpose of the above quoted portion of Section 220 of Article 81, *supra,* is to permit the recordation of an instrument conveying title to or impose an encumbrance upon real or personal property in any county or the City of Baltimore without the payment of a tax if that instrument had been previously recorded in another county and

the recordation tax paid. See Section 14 of Article 21 of the Annotated Code, as amended by Chapter 385 of the Acts of 1945. However, we believe that the scope of the Section covers the instant case. In reaching this result, we are not unmindful of the fact that we have held the recordation tax applicable to a deed offered for record and recorded subsequent to June 1, 1937, even though the deed is dated and was delivered to the grantee prior to that date—24 Opinions of the Attorney General 978. In that case, however, the instrument in question had never been recorded, while in the present one the opposite is true; and this must be held to distinguish the two situations.

We hold that there is no recordation tax payable on the three deeds which have been recorded in Howard County and which have recently been offered for record in Montgomery County.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—U. S. BONDS REGISTERED IN NAME OF DECEDENT AND MOTHER—VALUATION OF TAXABLE INTEREST.

February 21, 1947.

Mr. John H. Bouse,
Register of Wills for Baltimore City.

We have your letter of February 12, 1947, relating to the estate of Oscar Cohen. We understand that the assets of the Cohen estate include certain United States Treasury Bonds issued to the decedent or Elizabeth Cohen, his mother. You ask whether these bonds are subject to the Maryland inheritance tax.

We have ruled on numerous occasions that United States Savings Bonds and United States Defense Savings Bonds registered in the name of a decedent and another person in alternative co-owner form are to be considered as property held in joint tenancy and thus taxed to the survivor at one-half their value. — 29 Opinions of the Attorney General 203, 27 Opinions of the Attorney General 401, 24 Opinions of the Attorney General 811, 887. See also Code of Federal Regulations (Cum. Supp.) Title 31, Section 316.2 (d); Section 318.2 (g). This result was modified to some extent, however, by Chapter 742 of the Laws of 1945, which repealed and re-enacted, with amendments, Section 111 of Article 81 of the Annotated Code of Maryland (1943 Supp.). This Section excepts from the impact of the inheritance tax the following: "any registered bond of the United States in the names of husband and wife passing to such surviving spouse".

You will note that the exception provided for in Section 111 of Article 81, supra, relates only to registered bonds of the United States in the names of husband and wife. Since the bonds in the Cohen estate are registered in the names of the decedent and his mother, the statutory exemption does not apply and their liability for tax must be controlled by our former rulings.

Accordingly, we hold that the United States Treasury Bonds, which were issued to Oscar Cohen or Elizabeth Cohen, his mother, are subject to the Maryland inheritance tax calculated on the basis of one-half of the value thereof at the date of the death of the decedent.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—SALE OF LIFE INTEREST BEFORE DEATH OF LIFE TENANT—TAX APPLICABLE TO REMAINDER INTERESTS AT DATE OF SALE OF LIFE ESTATE.

April 3, 1947.

Mr. Frank E. Hudson,
Register of Wills for Worcester County.

We have your letter of January 22, 1947, in which you ask our opinion with respect to the applicability of the Maryland inheritance tax to the estate of William H. Merrill.

It is our understanding that Mr. Merrill died on April 5, 1935, a resident of Worcester County, Maryland, leaving a Last Will and Testament, which provided, in part, as follows:

> "After the payment of all my just debts and funeral expenses, I give, devise and bequeath unto my beloved wife, Eva B. Merrill, all the estate and property, real, personal and mixed, of every kind and description and wheresoever situated, of which I may be seized and possessed, or to which I may be entitled at the time of my death, to be held by her for and during the term of her natural life, if she shall so long continue my widow; and from and after the death or marriage of my said wife, then to my daughter, Annie V. Merrill, and my son, William H. Merrill, Junior, to be held by them absolutely, share and share alike."

The Last Will and Testament of William H. Merrill was admitted to probate by the Orphans' Court of Worcester County on April 20, 1935, and subsequently letters testamentary upon the estate were granted to Eva B. Merrill, the Executrix named in the Will. At the time of his death, the testator was seized and possessed of a certain farm situated in the first election district of Worcester County, known as the "Wheeler Farm." An inventory of the real estate in the estate of William H. Merrill was returned to

the Orphans' Court of Worcester County on August 11, 1936, which revealed, among other things, that the "Wheeler Farm" had been appraised at and for the sum of $4,000.00.

On August 11, 1936, the Executrix of the estate filed a petition with the Orphans' Court which prayed that the life interest of Eva B. Merrill in the farm be exempted from the payment of the direct inheritance tax on the ground that the farm was in a run-down condition and had, for the past several years, produced only enough income to pay the taxes assessed thereon. On the same day, the Orphans' Court passed an Order in which it was adjudged and ordered that the life interest of the petitioner in and to the "Wheeler Farm" be exempt from the payment of any direct inheritance taxes.

On August 12, 1946, Eva B. Merrill, the life tenant and the remaindermen sold the farm in question for $20,000. The sale was made without court sanction of any kind, and for this reason the proceeds of sale are not subject to the jurisdiction of any court or regulatory body. You ask whether, in view of the fact that no inheritance taxes have ever been paid in this matter, such taxes are now payable.

You will observe that the disposition made by the testator was to his wife for life with a vested remainder after the death of the wife in the children of the decedent. This disposition was made, therefore, to lineal descendants and, since the decedent died subsequent to March 16, 1935, it was subject to tax under the terms and provisions of Section 104A, et seq. of Chapter 90 of the Acts of 1935. See Chapter 753 of the Acts of 1943; *Safe Deposit and Trust Co. v. Bouse,* The Daily Record, July 19, 1943; 29 Opinions of the Attorney General, 220, 221; 24 Opinions of the Attorney General, 882, 883; 21 Opinions of the Attorney General, 767.

At the time of the death of the testator, Section 118 of Article 81 of the Annotated Code of Maryland (1935 Ed.) provided in substance that whenever a disposition was made by a decedent in which a life estate was left to one person and a remainder interest to another, the estates could be separately valued for the purposes of the inheritance tax.

Such valuations were to be made by the Orphans' Court of the County or the City in which administration was granted at such time or times as the court should think proper, and thereafter the life tenant and remaindermen were required to pay the tax on the basis of the valuations thus determined. The Section further provided that an appeal might be taken to the Court of Appeals by the State or any person aggrieved from the order of the Orphans' Court "to the same extent and in the same time and manner as from other orders of the Orphans' Courts."

The companion provision of Section 118 of Article 81, supra, was Section 119 of Article 81 of the Annotated Code of Maryland (1935 Ed.). Section 119 provided that whenever an interest in an estate less than an absolute interest was devised by a testator, such interest should be valued by the Orphans' Court and the inheritance tax should be calculated on the value thus determined. The Section further provided that if the person entitled to the estate in question should fail to pay the tax, then "such person or object shall at the time when he, she or it comes into possession of such estate pay a tax on the whole value thereof." A provision for appeal similar to that provided in Section 118 of Article 81, supra, was contained in Section 119.

In the instant case, the Orphans' Court of Worcester County, upon application of the life tenant, determined that the life estate had no value. From this decree the State could have appealed to the Court of Appeals within thirty days. Section 66 of Article 5 of the Annotated Code of Maryland (1924 Ed.). Since no appeal was taken, however, the action of the Orphans' Court in the premises must now be considered as conclusive and no proceedings should be instituted to disturb the determination of that Court.

Although no tax was paid by either the life tenant or the remaindermen upon the disposition of the estate in question, the fact remains that an inheritance tax is payable upon the remainder interest when the remaindermen come into possession of their estates. The question presented here, therefore, is whether under the circumstances in this

case the remaindermen have now come into "possession" of their estates as that term is used in the inheritance tax law.

It is clear beyond doubt that, in certain cases, a life tenant and a remainderman may join for the purpose of disposing of a fee simple absolute interest in their estates. In the majority of cases in this State, such interests are usually merged for the purposes of sale through a court order. Legislative sanction is afforded to this method of procedure by Section 252 of Article 16 of the Annotated Code of Maryland (1939 Ed.). In such cases, however, the court must (if it decrees the sale in accordance with the statute) direct the investment of the proceeds in such a manner as to insure that the same parties will have similar interests in the proceeds of the sale as they had under the original grant. For this reason, where such procedure is followed, the parties are not entitled to a commutation of their estates. *Denson v. Denson,* 125 Md. 357, 362 (1915).

In the instant case, the sale of the fee simple interest was not made by the life tenant and the remaindermen pursuant to an order of court. To the contrary, the sale was the voluntary and independent act of the parties involved. In similar situations, some authorities have held that the proceeds of sale must be retained in trust for the benefit of the life tenant, Cf. *Miracle v. Miracle,* 260 Ky. 624, 86 S. W. 2d 536 (1935), but the better view seems to be that where a life tenant and remainderman unite in a non-judicial sale of their property without agreeing as to a division or disposal of the proceeds, the parties are entitled to receive an estimated value of their estates computed at the time of the sale. Thus in *Foster v. Hilliard,* 77 Fed. Cas. No. 4972, Mr. Justice Story said:

> "It seems to me that, when a sale of real estate is jointly made by two or more persons having independent interests, the natural, nay, the necessary, conclusion, in the absence of all other countervailing circumstances, is that they are to share

> the purchase money according to their respective interests. . . . Now if, in the present case, the tenant for life had separately sold his life estate to the purchaser, there is no pretense to say that he would not have been solely entitled to the principal of the purchase money. What difference can it make, except as to the means of ascertaining the value of his life estate, that he proceeds to make sale, or joins in a sale of the remainder in fee? It does not strike me that there is any. . . ."

See also *Thompson v. Thompson,* 107 Ala. 163, 18 So. 247 (1894). Cf. *Houton v. Hapgood,* 13 Pick. (Mass.) 154 (1832).

In our opinion the remaindermen, by voluntarily joining in the sale of the property with the life tenant have, for the purposes of the inheritance tax, come into possession of their estates. To hold otherwise would, we believe, tend to make uncertain the collection of the tax and the validity of the title in the property conveyed. We can see but little difference in this situation and that in which the life tenant is given power to join with the remaindermen in the sale of the property. In such cases we have held that the sale of the property is the event which brings the remainder interest into possession for the purposes of the tax. 24 Opinions of the Attorney General, 874; 24 Opinions of the Attorney General, 921.

We hold, therefore, that the remaindermen should pay an inheritance tax at the present time based on the value of the remainder interest at the time they joined with the life tenant for the purposes of the sale. This may be ascertained by subtracting from the value of the property at the time of the sale, the value of the estate of the life tenant as computed in accordance with the equity rules of the Supreme Bench of Baltimore City for the valuation of the dower interest.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION — INHERITANCE TAX — LUMP SUM PAYMENTS MADE TO BENEFICIARIES UNDER SOCIAL SECURITY ACT NOT SUBJECT TO TAX.

April 3, 1947.

Miss Ruth R. Startt,
Deputy Register of Wills.

We have your letter of February 25, 1947, in which you ask whether lump sum payments made to survivors pursuant to sub-chapter II—Federal Old Age and Survivors' Insurance Benefits, Title 42, U.S.C.A., Sec. 401, et seq., are subject to tax under the Maryland inheritance tax law.

We have ruled consistently that while proceeds of insurance payable to the estate of a Maryland decedent are subject to tax, such proceeds are not taxable if paid to a named beneficiary. Cf. 19 Opinions of the Attorney General 516 with 22 Opinions of the Attorney General 775. Lump sum payments made upon the death of a fully insured individual under the Social Security Act are made to individuals specified under the terms and conditions of that Act.

For this reason, we hold that such payments are not made to the estate of the decedent and are not, therefore, subject to the Maryland inheritance tax.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION — RECORDATION TAX — AGREEMENTS CONVEYING TITLE TO OR CREATING LIENS OR ENCUMBRANCES UPON PROPERTY—NO TAX REQUIRED FOR RECORDATION OF AGREEMENTS SECURING REAL ESTATE COMMISSIONS—CLERKS OF COURT—AGREEMENT NOT REQUIRED TO BE RECORDED—PERMISSIVE RECORDING.

April 15, 1947.

Mr. Clayton K. Watkins, Clerk,
Circuit Court for Montgomery County.

We have your letter of March 24, 1947, in which you ask whether an agreement, entered into between certain parties to a real estate transaction for the purpose of securing real estate commissions for the broker involved in obtaining a lease, is required by law to be recorded. You also ask whether any recordation taxes will be payable in the event that the agreement in question is recorded.

It is our understanding that the Teck Construction Company, a Delaware corporation, leased certain property located in Montgomery County on July 23, 1946, to United Cigar—Whelan Stores Corporation. The lease was procured between the lessor and lessee by Phil D. Poston, a resident of Montgomery County. In order that Mr. Poston might have evidence of his right to a commission for his services in securing the lease, the lessor and Poston entered into a written agreement which has been offered to you for recordation. This agreement states that Poston is entitled to an agreed commission of two and one-half percent of the total rent (including the fixed rental and any rental in addition thereto paid upon a percentage basis) for the term of the lease and any extension or renewal thereof, plus one-half of a customary sales commission in the event of the sale of the leased property to the lessee, its successors or assigns, or to any other party or parties. The agreement further provides, in part, as follows:

> "3. The commissions provided for herein to be payable to Phil D. Poston, his heirs or assigns, are

hereby assigned out of the rents payable by the lessee, its successors or assigns, or out of the proceeds of any sale, as and when the said rents or said proceeds become due and payable."

Section 1 of Article 17 of the Annotated Code of Maryland (1939 Edition), as amended by Chapter 101 of the Acts of 1945, provides, in part, that "every clerk shall * * * file all papers delivered to him to be filed, and shall record all judgments, decrees, deeds and writings which by law are required to be recorded in the office of which he is clerk * * *." Section 65 of Article 17 of the Annotated Code of Maryland (1939 Edition), as amended by Chapter 510 of the Acts of 1945 provides, in part, "the clerks of the Circuit Courts for the several counties and of the Superior Court of Baltimore City shall record all deeds, mortgages and other instruments affecting the title to or any interest in land, required to be recorded, in a well bound book or books to be titled 'Land Records' * * *."

In construing these Sections, we have held that if an instrument does not purport to convey or otherwise affect title to property it is not required to be recorded. — 25 Opinions of the Attorney General, 131; 28 Opinions of the Attorney General, 244. This rule has been applied to those cases in which the document offered for recordation was an exclusive sales contract for real estate. — 21 Opinions of the Attorney General, 241; an agreement to make a lease —23 Opinions of the Attorney General, 153; and an instrument which merely substituted one person for another with respect to the obligations contained in a deed of trust. — 28 Opinions of the Attorney General, 244. In these cases, we have held that the Clerk may, if he wishes, refuse to record the instrument offered for recordation. — 29 Opinions of the Attorney General, 65.

On the other hand, we have held that even though the Clerk was not required to record a document offered for record, he could, if he wished to do so, record such instruments. — 26 Opinions of the Attorney General, 82. In

such situations, we have pointed out that it is entirely proper to record the instruments in question. — 25 Opinions of the Attorney General, 131; 28 Opinions of the Attorney General, 244.

In the present case, the agreement securing the real estate commissions in question does not, in our opinion, convey or otherwise affect the title to the leased premises. At best, the agreement amounts to no more than an arrangement between the immediate parties to a transaction by which a certain percentage of rents are pledged until the property is sold. Certainly, any purchaser (whether he be the lessee or a third party) would take clear title to the property irrespective of the fact that the vendor had agreed, in advance, to pay a fixed real estate commission from the proceeds of the sale. It is our opinion, therefore, that you may, but that you are not required to, accept the document in question for recordation.

If you accept the agreement entered into between the Teck Construction Company and Phil D. Poston for record, the remaining question is whether any recordation taxes are due. Section 220 of Article 81 of the Annotated Code of Maryland (1943 Supplement), as amended by Chapter 253 of the Acts of 1945, imposes a tax "upon every instrument of writing conveying title to real or personal property, or creating liens or encumbrances upon real or personal property, offered for record and recorded in this State with the Clerks of the Circuit Courts of the respective counties, or the Clerk of the Superior Court of Baltimore City * * *." The term "instrument of writing" is defined by the same Section to include "contracts and agreements". The fact remains, however, that to be subject to tax, the contract or agreement must convey title to or create a lien or encumbrance upon real or tangible personal property. In construing this Section, we have held that if a contract or an agreement which is not required to be recorded is accepted for record, no tax will be payable unless the instrument conveys title to or imposes an encumbrance or lien upon the property covered thereby. — 25 Opinions

of the Attorney General 577; 28 Opinions of the Attorney General 244.

In our opinion, the agreement between Teck Construction Company and Phil D. Poston neither conveys title to real or personal property nor creates liens or encumbrances upon such property. As a result, no recordation tax will be due if the instrument in question is accepted for record.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—DEATH OF REMAINDERMEN BEFORE DEATH OF LIFE TENANT—REMAINDER INTEREST SUBJECT TO TAX—APPROVING METHOD OF EVALUATING REMAINDER INTEREST.

April 29, 1947.

Mr. R. Glenn Prout,
Register of Wills for Anne Arundel County.

Your letter of January 13, 1947 states that Charles B. Houston, a resident of Delaware, died sometime prior to 1931. By his Last Will and Testament, Mr. Houston left his estate in trust, the income to be paid to his wife for life, and after the death of the life tenant the estate to be divided among certain named remaindermen.

One of the remaindermen named in the Will of Charles B. Houston was his niece, one Mary H. McCormick, a resident of Anne Arundel County, who was to receive four thousand dollars ($4,000). Mrs. McCormick died in 1931. By her Last Will and Testament, this decedent left the residue of her estate, as follows:

> "Fourth. I give devise and bequeath the rest and residue of my estate whether now held or here-

after acquired by me to my husband Howard McCormick and to my sister Letitia Rider Houston, share and share alike, but in the event that my said husband does not survive me for the period of six months from the day of my decease, it is my will that the share of my estate so given to him shall go to my said sister Letitia."

Mrs. McCormick's Will was admitted to probate and inventories were duly filed. However, the inventories did not list as a part of her estate the remainder interest which Mrs. McCormick was entitled to receive under the Will of Charles B. Houston. Accordingly neither the inheritance tax nor the tax on commissions was paid on the value of the remainder interest.

The life tenant named in the Will of Charles B. Houston has died within the last few months. As a result, the trustees under Mr. Houston's Will have forwarded four thousand dollars ($4,000) to Howard McCormick, as executor of the Last Will and Testament of Mary H. McCormick. You ask whether any inheritance taxes are now due from the estate of Mrs. McCormick by reason of the receipt of the legacy of four thousand dollars. You also ask whether there are any taxes on commissions due from Mrs. McCormick's estate.

At the time Mrs. McCormick died it is clear that her estate consisted of a remainder interest in the trust established by Charles B. Houston. That the passing of such an interest occasions the inheritance tax and the tax on commissions is now well settled. 19 Opinions of the Attorney General 491, 21 Opinions of the Attorney General 692. Accordingly, the remainder interest should have been valued at the date of Mrs. McCormick's death and an inheritance tax should have been paid on the portion of the interest which passed to the decedent's collateral descendants. A similar valuation should have been made for the purpose of the tax on commissions.

A problem similar to the one in the instant case was presented to this office in 30 Opinions of the Attorney General 157. There, we held that it was proper to value the remainder interest in retrospect and collect the tax. See also 30 Opinions of the Attorney General 212. We also held that in view of the particular circumstances in that case neither penalties nor interest were collectible. 30 Opinions of the Attorney General 157, 159. We believe that those opinions control the result in this case.

In the present case, we hold that the remainder interest which passed at the death of Mrs. McCormick to her sister should be valued and that the executor of the decedent's estate should pay a tax at the rate of 5% based upon this valuation. Since the remainder interest is expressed in terms of dollars, this valuation may be made by reference to Table A contained in the Federal Estate Tax regulations, 105, Sec. 81.10 (i). Information not now before us, such as the age of the life tenant, and the date of the decedent's death, will be required before this valuation can be made. In this connection, we call your attention to the fact that the provisions of Section 125 of Article 81 of the Annotated Code of Maryland (1939 Ed.), which provide for the separate valuation of a remainder interest pursuant to the rules of the Supreme Bench of Baltimore City are not applicable to this case. 30 Opinions of the Attorney General 157, 159.

We also hold that the entire value of the remainder interest should be established and that you should collect a tax on commissions based upon the valuation as thus determined.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—GIFT TO LINEAL DESCENDANT OR HIS HEIRS FOLLOWING A LIFE ESTATE — TAX APPLIES TO SUBSTITUTED GIFT—VALUATION.

May 5, 1947.

Mr. Harry D. Radcliff,
Register of Wills for Frederick County.

Your letter of February 21, 1947 states that Achsah Stier died on December 1, 1914. At her death, the decedent was survived by five children, i.e. Ida P. Sullivan, Nannie F. Stier, Marsaline Stier, Alma D. Stier and Dr. J. H. Stier. By her last will and testament, the decedent made certain specific bequests followed by a provision which, in substance, conveyed the residue of the estate (both real and personal property) to trustees. The limitation in trust provided that the corpus should "remain invested as now", the income therefrom to be paid "to my three unmarried daughters viz, Nannie F. Stier, Marsaline Stier and Alma D. Stier, for their support". The will further provided that "at the marriage or death of all three of said daughters I direct that all the above mentioned property real and personal shall be divided equally between my children now mentioned viz, Ida P. Sullivan, Nannie F. Stier, Marsaline Stier, Alma D. Stier and Dr. J. H. Stier, or their heirs."

The decedent's estate has never been settled and no inheritance tax has been paid thereon. However, the five children named in the last will and testament of Achsah Stier are now deceased, and the trust corpus is to be distributed. All of the distributees (the heirs of the named remaindermen) are collateral descendants of the decedent. In the light of this fact, you ask whether any inheritance taxes are now due the State.

At the time of the death of Achsah Stier no inheritance tax was applicable to dispositions passing to lineals. However, the law in effect at the time, Section 120 of Article 81, Annotated Code of Maryland (1912 Ed.), did impose an in-

heritance tax at the rate of 5% on every hundred dollars of the clear value of an estate passing to collateral distributees of a decedent. Moreover, Section 133 of Article 81, *supra*, provided for the separate valuation of life estates and remainder interests, required the payment of the tax upon the value of the life estate as thus ascertained, and further required the payment of the tax upon the vesting of the remainder interest, if no tax had been paid with respect to it.

In the present case, no inheritance taxes are now due if the named devisees in the will of the decedent took an indefeasibly vested interest in the estate, since these persons were the lineal descendants of the testatrix. The tax is applicable, however, if the limitations in favor of the named beneficiaries raised an interest which might be divested in favor of collaterals. In such a case, the tax is applicable if the remainder vests in collateral descendants, unless it has theretofore been paid pursuant to the provisions of the law permitting the separate valuation of life estates or estates for years and remainder interests. 13 Opinions of the Attorney General 278. The question presented here, therefore, is whether the named beneficiaries under the will of the testatrix took a completely vested interest.

In *Reiff v. Strite*, 54 Md. 298 (1880) a testator devised certain real and personal property to his wife for life, and after the widow's death the residue of the estate was to be paid over, as follows:

> "I further order and direct that the residue of my estate shall be divided into three equal shares, one of which shares, which is one-third, I bequeath to the children of my brother, John Strite, deceased, *or* to their heirs, to be equally divided among them, share and share alike. I give and bequeath one equal share, being also one-third, to the children of my brother, Joseph Strite, deceased, *or* their heirs, to be equally divided among them, share and share alike. I give and bequeath unto my

> brother, Samuel Strite, or his heirs, one equal share, it being also the one-third. It is further ordered, that when any money shall be in the hands of my executors, they shall pay it in equal distributions among the foregoing bequests."

One of the legatees entitled to share under the provision above quoted made a general assignment for the benefit of creditors before the death of the life tenant. Thereafter, the assignor died and a controversy arose between the assignees and those who claimed to be entitled to the property under the designation of "his heirs". The specific question involved, therefore, was the meaning and effect which should be given to the words "or his heirs" as found in the testator's will. The Court held that the disposition to the assignee which was subject to the prior life estate vested a conditional interest only, and that upon the death of the assignee during the life of the widow, it became divested and went over to those embraced by the description of "his heirs". In reaching this conclusion the Court said, at page 303:

> "In such case the general alternative words of the gift are applied to the event of death of the first legatee occurring before the period of possession or distribution as fixed by the will. The original or first legatee, surviving that period, becomes absolutely and indefeasibly entitled; but if he die before that period, his previous investiture of title becomes divested, and those intended to take by the alternative gift, by way of substitution, become vested with the estate.

In *Grace v. Thompson,* 169 Md. 653 (1935) the Court of Appeals, in distinguishing the *Reiff* case, *supra,* stated that where a gift over after a particular estate was direct followed by an alternative gift introduced by the word "or", it would be presumed that the alternative gift was a substitute for the direct gift.

In the present case, we are of the opinion that the children of the testatrix took an interest which was subject to divestiture in the case of their death before that of the life tenants. That a divestiture has taken place which, in substance, passed the estate from the decedent to her collateral descendant is, we believe, an occasion for the tax. In determining the amount of tax now due valuations should be made on the basis of the actual amounts received by the collaterals. *Fisher v. State,* 106 Md. 104 (1907) ; *Rosenburg v. Bouse,* 172 Md. 530 (1937). The applicable rate should be 5%.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—RECORDATION TAX—TAX ON INSTRUMENTS SECURING DEBTS IS TO BE COMPUTED ON EACH $500.00 OF THE PRINCIPAL AMOUNT OF THE DEBT, AND FRACTIONAL PARTS THEREOF ARE TO BE DISREGARDED.

May 16, 1947.

Mr. Joseph W. T. Smith, Clerk,
Circuit Court for Wicomico County.

We have your letter of May 14th informing us that you have received a circular letter from the Comptroller's Office informing you that under Chapter 914 of the Acts of 1947 you shall collect a recording tax of 55c for each $500.00 or fractional part thereof for each instrument conveying title to property, and in the case of an instrument securing a debt a tax of 55c for each $500.00 of the principal amount. You have asked if a mortgage securing a debt for $499.99 would be taxable under the law.

It is our opinion that the tax on instruments securing debts is applicable to each $500.00 of the principal amount

secured, and that fractional parts thereof are not subject to the levy. In dealing with Chapter 277 of the Acts of 1939, which amended the recordation tax law, we held that instruments covered by that law were taxable only in multiples of $100.00, and that fractional parts thereof should be disregarded in computing the tax. 24 Opinions of the Attorney General, 977. We think the same result must be reached in connection with the present Act.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

TAXATION—INHERITANCE TAXES—TENANTS BY ENTIRETIES. COLLATERAL INHERITANCE TAX IS PAYABLE ON SUCH INTEREST IN REAL ESTATE, OWNED BY HUSBAND AND WIFE AS TENANTS BY ENTIRETIES, AS IS RECEIVED BY HEIRS OF WIFE UPON HER DEATH BY MURDER BY HER HUSBAND.

May 20, 1947.

Mr. Walter C. Clarke,
Register of Wills for Montgomery County.

You state that in process of administration in your office are two estates of ladies who were murdered by their husbands. In each case, the decedent and her husband owned real estate as tenants by the entirety, which was claimed by the heirs of the wife on the theory that the murderer had forfeited his interest in the property by his wrongful act. In each case, equity proceedings were instituted and eventually compromises were reached whereby the heirs of the wives were successful in obtaining substantial interests in the real estate. You wish to know whether inheritance tax is payable on the value of the property thus received. In our opinion it is.

The cases are not in accord as to the rights of a murderer in property owned by tenants by the entirety with his victim, but the majority view is that the murderer defeats the right to claim by the law of survivorship and that the estate descends to the devisees or those who take under intestacy from the victim. Some cases hold that the entire property passes absolutely and others that a half interest goes to the heirs of the victim, and others that equity imposes a trust on the property, the legal title to which is in the murderer in favor of the heirs of the victim. That the Maryland law would give the entire interest to the property to the heirs of the murdered person either outright or on a trusteeship theory is strongly and definitely indicated by the case of *Price v. Hitaffer*, 164 Md. 505. There an Order of the Orphans' Court excluding from participation in the distribution of an estate the heirs and personal representatives of a husband who killed his wife was affirmed by the Court of Appeals. The Court stated that the question presented was: "Can a murderer, or his heirs and representatives through him, be enriched by taking any portion of the estate of the one murdered?" The Court pointed out that the case was one of first impression in this State and that the Court was met with conflicting decisions of other courts of last resort, which held divergent views and had reached opposite conclusions. The Court of Appeals adopted the view that one may not be enriched by his own wrong and said: "Neither is it conceivable that one be permitted by murder to acquire property through that act, which without the perpetration of the crime he might never come into possession of". In answering the contention that the literal language of the statute required an opposite result, the Court adopted the theory that an absurd consequence, manifestly contradictory to common reason will not be permitted to flow from a blind and unreasoning clinging to the bare or literal words of a statute.

The reasoning and results of the majority holdings outside the State and the case of *Price v. Hitaffer* lead us to conclude that inheritance tax is payable in the present cases on the value of the property received by the heirs of the

wives, since in legal contemplation the property interests received pass from the wives to those who take from them. In the case of *Hart v. Mercantile Trust Company,* 180 Md. 218, the Court ruled that in inheritance tax determinations substance and not form controls. Under the ruling in that case, the property interest received by those taking from the wives will be subject to tax on its value at the time of taking and at the applicable rate resulting from the relationship of the takers to the decedents.

HALL HAMMOND, *Attorney General.*

TAXATION—INHERITANCE TAX—STATUTE OF LIMITATIONS —CLAIM FOR INHERITANCE TAX ON REALTY NOT BARRED WHERE NO ADMINISTRATION—LIEN AGAINST REAL ESTATE LOST FOUR YEARS AFTER DEATH OF DECEDENT—CLAIM AGAINST PROPERTY LOST—ANCILLARY ADMINISTRATOR MUST COLLECT TAX—RESPONSIBILITY OF SURETY.

May 23, 1947.

Mr. Walter C. Clarke,
Register of Wills for Montgomery County.

We have your letter of February 18, 1947, in which you state that a decedent died domiciled in Washington, D. C., on September 26, 1941. At the time of his death, the decedent owned certain real estate located in Montgomery County, Maryland, which property passed to the decedent's widow and children. Some years subsequent to the death of the decedent, the widow and children sold the property in question to A. Thereafter, A sold the same property to B.

No ancillary administration had been taken out in this State on the estate of the decedent prior to the sale of the Maryland property by A to B. However, at the request or insistence of the title examiner, ancillary administration

proceedings were commenced in the Orphans' Court for Montgomery County and letters were granted on January 28, 1947. The petition for ancillary letters states, in substance, that it was filed pursuant to the provisions of Sec. 117 of Article 93 of the Annotated Code of Maryland (1939 Ed.).

You ask whether, under the facts stated above, the Maryland inheritance tax is barred by the statute of limitations and if not, whether the claim of the State for taxes due may be enforced against the real estate in question.

As a general proposition, limitations do not apply to a state when suing in its sovereign capacity unless an express statute provides to the contrary. 34 Am. Jur., Limitation of Actions, Sec. 393. This rule has been applied in *Maryland State Roads Commission v. Union Trust Company*, Daily Record, January 29, 1930, and on numerous occasions it has been held that statutes of limitations which bar the collection of taxes are to be strictly construed. *Gould v. Baltimore*, 58 Md. 46 (1882); Cf. *Moale v. Baltimore*, 61 Md. 224 (1884).

Following these principles, we have held that a general statute of limitations does not prevent the collection of the Maryland Inheritance Tax. 10 Opinions of the Attorney General, 284, 15 Opinions of the Attorney General, 317. This result has been reached despite the provisions of the Inheritance Tax Law making the exaction a lien upon real estate for a period of four years from the date of death of the decedent, 19 Opinions of the Attorney General, 505, our conclusion being that "there can be no case in which limitations can be pleaded to a claim for State taxes," 22 Opinions of the Attorney General, 652, 653.

In view of the established general rule and its application to the inheritance tax by this office, it was generally conceded that prior to 1941 there was no limitation upon the assessment or collection of such taxes in Maryland. Report, Maryland Tax Revision Commission of 1939, p. 119. However, in that year the General Assembly, by Sec. 2, Chapter

701 of the Acts of 1941 enacted what is now Section 160 of Article 81 of the Annotated Code of Maryland (1943 Supp.). So far as is material to this case, Section 160 *supra* provides as follows:

> "All State . . . taxes of every kind for which no other period of limitations is prescribed by this Article shall be collected within four years after they shall have become due, or else shall be utterly barred; . . ."

In supplying the answer to the question of whether limitations apply to the assessment or collection of the inheritance tax, Section 160 of Article 81, *supra,* poses a concomitant problem. Before any period of limitations can apply, the point of time from which the period runs must be ascertained. For the purposes of the Inheritance Tax, Section 160 of Article 81, *supra,* makes this point the date the tax becomes due. The question presented, therefore, is the determination of that point.

Section 133 of Article 81 of the Annotated Code of Maryland (1939 Ed.) deals with the procedure for collecting the inheritance tax where no formal administration is had in this State. That section provides that in the case of real estate it shall be the duty of the persons receiving the same to file an inventory in the Orphans' Court of the county or city in which the property is situated within ninety days after the death of the owner. Upon the filing of such an inventory, the Orphans' Court must appoint at least two appraisers to value the property in question for the purpose of determining the amount of the tax due, and the tax so ascertained to be due is payable at once to the Register of Wills.

If no inventory is filed pursuant to Section 133 of Article 81, *supra,* it is the duty of the Register of Wills of the county or city in which the inventory should have been filed to apply for the appointment of at least two appraisers to value any real property that may come to his attention, for the purpose of determining the amount of inheritance

tax due. Section 134 of Article 81 of the Annotated Code of Maryland (1939 Ed.). This Section then provides that "the tax so ascertained to be due shall become payable at once to the Register of Wills, and in addition thereto the person or persons liable for payment of said tax shall be and become liable by way of a penalty for the payment of an additional sum equal to 25% of the amount of tax so determined to be due."

In construing these Sections in a case involving real estate in which no administration was taken out, we have held that for the purposes of computing interest under the provisions of Section 112 of Article 81 of the Annotated Code of Maryland (1939 Ed.), the inheritance tax becomes due immediately upon the completion of the appraisal required to be made by Section 134 of Article 81, *supra*. 28 Opinions of the Attorney General, 240. The same principle is applicable with respect to the statute of limitations.

In our opinion, at least two appraisers should be appointed for the purpose of determining the value of the property subject to tax involved in this case. Thereafter the amount of the tax should be calculated, and to this there should be added a penalty equal to 25% of the amount of the tax. The total amount of tax and penalty thus ascertained will then become a claim of the State against the estate of the decedent and will remain as such for a period of four years.

Although the claim of the State for inheritance taxes and penalties due in this case is not barred by the statute of limitations, the question remains as to whether that claim may now be enforced against the property in question. Section 121 of Article 81 of the Annotated Code of Maryland (1939 Ed.) provides that the amount of the tax shall be a lien upon the real estate of the decedent for a period of four years from the date of his death. Section 122 of Article 81 of the Annotated Code of Maryland (1939 Ed.) permits the Orphans' Court of the county or city in which the property is located to require the sale of such property for the payment of the tax within the same period. Since

more than four years has elapsed from the date of the decedent's death, the lien and power of sale expressly conferred by these Sections is now lost.

The fact remains, however, that the ancillary administration proceedings in this case were instituted for the expressed purpose of giving notice to creditors of the decedent to file in the Orphans' Court having jurisdiction in the premises such claims as they might have against the estate of the decedent. Section 117 of Article 93 of the Annotated Code of Maryland (1939 Ed.). Thereafter, any creditor of the decedent may file with the Register of Wills all claims which he may have against the decedent, and the Register shall enter such claims in a permanent record book. Section 121 of Article 93 of the Annotated Code of Maryland (1939 Ed.). The entry of such claims upon the book provided therefor shall be taken as notice to the administrator of their existence. Section 121 of Article 93, *supra.*

If the liability for inheritance taxes is a "claim" against the decedent as that term is used in Section 117 of Article 93, *supra,* there would be no question but that the real estate situated in Montgomery County would be ultimately responsible for the satisfaction of that liability. The difficulty in this position is, however, that the inheritance tax is not laid against the decedent or his estate but is an exaction on the privilege of succeeding to property through transmission from the decedent. *Wingert v. State,* 129 Md. 28, 30 (1916) : *Helser v. State,* 128 Md. 228, 232 (1916) ; *Safe Deposit & Trust Co. v. State,* 143 Md. 644, 646 (1923). The tax has been described as an excise "on the transmission of the property and upon the estate the beneficiary is to receive and enjoy." *Fisher v. State,* 106 Md. 104, 121 (1907). See also: *Bouse v. Hutzler,* 180 Md. 682, 685 (1942) ; *Connor v. O'Hara,* —, Md. —, — A (2d) —, No. 141, October Term, 1947.

Since the incidence of the inheritance tax has been characterized as an imposition on the right to receive property, it is the general rule that the "debt" which it occasions is primarily that of the devisees receiving the property. By

statute in many states, this obligation has been imputed to the decedent's personal representative. 28 Am. Jur., Inheritance, Estate and Gift Taxes, Sec. 287, and in Maryland the situation is no different. Sec. 122 of Article 81 of the Annotated Code of Maryland (1939 Ed.). It is our opinion, therefore, that the liability for the Maryland inheritance tax is not the type of "claim against the decedent" that is the object of Section 117 of Article 93, *supra,* and that for this reason the real estate in question is not now subject to either an expressed or inchoate lien for its payment.

There remains the question of whether the ancillary administrator must pay the tax here involved. Section 122 of Article 81, *supra,* provides that every executor shall collect the inheritance tax from the parties liable to pay it (or their legal representatives) within thirteen months from the date of his administration. In our opinion, this Section is applicable to an ancillary administrator appointed in this State despite the fact that the only assets of the decedent situated here is real estate.

As previously stated, the "parties liable to pay said tax" in the present controversy are the heirs of the non-resident decedent. It is the patent duty, therefore, of the ancillary administrator in this case to collect the inheritance tax due from these persons. The claim is a valid one; it is not barred by limitation. That being the situation, we hold that the ancillary administrator must promptly fulfill his duty and collect the tax, or run the risk of exposing his surety to collateral liability.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—LICENSES—DISPOSITION OF PENALTIES—REVENUE RECEIVED FROM PENALTIES TO BE ALLOCATED TO LOCAL GOVERNMENTAL UNITS.

May 27, 1947.

Mr. Joseph O'C. McCusker,
Chief Deputy Comptroller.

Your letter of May 12, 1947, asks whether penalties collected because of violations of certain license laws should be distributed to the counties or incorporated cities or towns in which the licensed place of activity is located, or should be allocated to the general funds of the State.

Prior to the enactment of Chapter 487 of the Acts of 1947, all receipts from licenses issued for billiard tables, bowling alleys, carnivals, chain stores, cigarettes, circus, cleaning, dyeing and pressing, construction firms, garages, hawkers and peddlers, stallion or jackass, laundries, motion picture machines, moving picture shows, plumbers and gas-fitters, restaurant or eating places, shows, soda water fountains, theatres, traders and wholesale dealers in farm machinery were paid into general fund revenues. Because the activities covered by these licenses were thought to be "local" in scope, the Maryland Commission on the Distribution of Tax Revenues recommended that the revenue received therefrom should be allocated to the incorporated town or city or county in which the licensed activity was carried on. — Report of the Maryland Commission on the Distribution of Tax Revenues, pages 118-119. By Chapter 487 of the Acts of 1947, the General Assembly carried this recommendation into effect.

Section 7 of Article 56 of the Annotated Code of Maryland provides for the imposition of penalties for the failure to procure any license required by law. This Section is as follows:

> "All persons, firms and corporations, required to procure licenses under the laws of this State,

> who shall fail or neglect to procure the same within the time prescribed by law, shall pay, in addition to the prescribed license fee, an additional fee equal to ten percentum (10%) of said license fee for each and every month thereafter that the fee shall remain unpaid. Provided, however, that such licensees shall not be deemed to be in default under the provisions of this section until after the lapse of thirty days from the date on which they may be required to obtain such licenses."

Penalties enforced under this Section are collected by the Clerks of the Courts and are separately reported by the Comptroller.

It is clear, we think, that the Maryland Commission on the Distribution of Tax Revenues, intended to recommend that all collections made by the Clerks of the Courts in connection with the above enumerated licenses should remain (after deductions not here material) with the local units of self-government. In this connection, the Report of that Commission states as follows at page 118:

> "The Commission further recommends that the State License Bureau should continue to function as it does at present, and that the clerks of the courts should deduct 3% of collections which should be paid into the State general fund to defray the expenses of the Bureau. All net proceeds remaining in the hands of the clerks of the courts, after the deductions hereinabove mentioned have been made, should then be paid to the incorporated town or city in which the licensed activity is located. Where the licensed activity is not located in an incorporated town or city, the Commission recommends that the license receipts be paid to the county in which the activity in question is carried on."

That the Legislature carried this intention into the law

seems plain. For example, Chapter 487 of the Acts of 1947 states as follows:

> "All net proceeds received from the said licenses remaining after the deductions hereinabove authorized shall be paid by the said clerks to the incorporated town or city in which the licensed business or activity is located. Where the licensed business or activity is not located in an incorporated town or city, the net proceeds shall be paid to the county in which the licensed business or activity is located, provided, however, that the provisions of this section shall be construed to apply only to licenses issued after June 30, 1947."

In our opinion, the Legislature intended to allocate to the local units of self-government the additional fees or penalties collected under Section 7 of Article 56, supra, as well as the license revenue collected for the issuance of each of the above enumerated licenses. We hold, therefore, that the penalties collected by the Clerks of the Courts from persons who fail or neglect to procure any of the licenses listed above should be distributed to the incorporated city or town in which the licensed activity is located. If the licensed activity is neither located in an incorporated city nor a town, the proceeds of such penalties should be distributed to the county in which the licensed activity is situated.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION — RECORDATION TAX — DISTRIBUTION TO LOCAL POLITICAL SUB-DIVISIONS—FEES PAID TO CLERKS OF COURT FOR RECORDING INSTRUMENTS NOT DISTRIBUTABLE.

June 3, 1947.

Mr. M. Luther Pittman, Clerk,
Superior Court of Baltimore City.

We have your letter of May 27, 1947, in which you ask whether, under the provisions of Chapter 484 of the Acts of 1947, the Clerks of the Courts must pay over to the County Commissioners of each County and to the City of Baltimore all funds received by them for recording documents subject to the recordation tax.

The revenue received by the Clerks of Court from the recordation of instruments subject to the recordation tax may be grouped into two general classes. The first group includes all allowable charges made pursuant to Section 12 of Article 36 of the Annotated Code of Maryland (1943 Supp.); the second group includes all taxes collected pursuant to Section 220 of Article 81 of the Annotated Code of Maryland (1939 Ed.), as amended. "Excess fees", as that term has been defined, which are collected by the Clerks under Section 12 of Article 36, *supra,* are returned to State general funds. Prior to the effective date of Chapter 484 of the Acts of 1947, the proceeds from the recordation tax; i. e., the proceeds from the sale of recordation stamps and a charge of 50c for each instrument offered for record and recorded, were required to be paid over to the Comptroller.

The system of allocating the revenue received by the Clerks of the Courts from the recordation of instruments subject to the recordation tax, as outlined above, was materially altered by the General Assembly of 1947. This change was made pursuant to a recommendation of the Maryland

Commission on the Distribution of Tax Revenues. This recommendation provided as follows:

> "The Commission recommends that the proceeds of the recordation tax imposed on instruments which involve property located entirely within a local political sub-division should be allocated to the county or Baltimore City in which the tax is collected."

Pursuant to this recommendation, the General Assembly passed Senate Bill No. 11, which, as Chapter 484 of the Acts of 1947, provides, in part, as follows:

> "The proceeds from the sale of said stamps, together with the recordation charges herein provided, shall be accounted for and paid over to the county commissioners of the county or the Mayor and City Council of Baltimore in which the tax is collected; provided, however, that the revenue produced from the recordation of instruments conveying title to or creating liens or encumbrances upon real or personal property which is situated in two or more counties or in the City of Baltimore and one or more counties shall be accounted for and paid to the Comptroller for the general funds of the State."

It is clear, we think, that the provisions of Chapter 484 of the Acts of 1947 relating to the allocation to the counties and to Baltimore City of the proceeds of the recordation tax have no application to the revenue received by the Clerks of Court under Article 36 of the Annotated Code. The Report of the Commission on the Distribution of Tax Revenues dealt only with the proceeds received under Section 220 of Article 81, *supra;* its statutory counterpart goes no further. True, Chapter 484, *supra,* speaks of the proceeds from the sale of recordation stamps "together with the recordation charges herein provided." But the later phrase relates only to the charge of 50c which the Clerks

were required to collect for each instrument offered for record and recorded under the provisions of Section 220 of Article 81, *supra*, as amended by Chapter 253 of the Acts of 1945. Since this "charge" has been eliminated by the provisions of Chapter 914 of the Acts of 1947, the quoted phrase is surplusage and of no effect.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—RECORDATION TAX—COMPUTATION OF TAX—LEASE WITH OPTION TO PURCHASE—TAX BASED ON SUM REASONABLY REFLECTING CAPITALIZATION OF ANNUAL RENTAL.

June 3, 1947.

Mr. Ralph R. Crothers, Clerk,
Circuit Court for Cecil County.

Your letter of May 17, 1947, states that a document, characterized as "a lease with option attached" has been presented to your office for record. By the terms of this document, the lessee has agreed to pay to the lessor rent equal to the sum of "1¼ cents for each gallon of the lessee's gasoline sold from the said premises of each calendar month, during the term hereof." The document further provides that the term of the lease shall be five years and that the lessee may purchase the leased premises at any time during that term or any extension thereof, for the sum of forty thousand dollars. You ask the amount of tax due the State upon the recordation of this document or, in the alternative, the method by which the tax may be computed.

The recordation of a lease is a taxable transaction. In the case of a lease for a term of years, not perpetually renewable, the tax is based upon the capitalization at 10% of the

average annual rental over the entire term of the lease including any renewal term, plus the actual consideration, other than rent, paid or to be paid. Section 220 of Article 81 of the Annotated Code of Maryland (1939 Ed.), as amended by Chapter 253 of the Acts of 1945. However, where the average annual rental cannot be determined, the tax is based upon the assessed value of the property covered by the lease.

From the inception of the recordation tax, numerous problems in varying degrees of perplexity have come to our attention which related to the computation of the tax "where the average rental cannot be determined." In each case, we have attempted to base our conclusion upon the practicalities of the situation rather than upon some esoteric method of valuation and calculation. Thus, where no stated rental was required to be paid we have held that no tax is due irrespective of the existence of an oral arrangement relating to rents payable.—Opinion to Robert J. Spittel, Clerk of the Circuit Court for Baltimore County, 31 Op. A. G. page 70. The recordation of mere options have been held to be free of tax,—26 Opinions of the Attorney General, 425—and the tax has been calculated on rent due and consideration other than rent payable where the instrument in question was a lease with an option to purchase. —25 Opinions of the Attorney General, 399.

In those cases in which a lessor is able to meet the burden of establishing the value of the consideration independently of gross rentals, we have held that the recordation tax may be based on that consideration.—23 Opinions of the Attorney General, 511. However, we have pointed out that where the rent varies with sales to be made in the future, the Clerk must require the person offering the lease for record to estimate the total consideration.—22 Opinions of the Attorney General, 699. Thus, where a quarry was leased for ninety-nine years, the rent being stated in terms of a royalty on roofing slate sold or to be sold, we held that the tax should be based upon some reasonable estimate of what the lease was worth.—23 Opinions of the Attorney General, 577.

In the present case, we hold that you may accept the document in question for record upon the payment of a tax based on such sums as would reasonably reflect the capitalization at 10% of the average annual rental over the term of the lease. In making this calculation, you should ask the parties involved for a signed statement showing (a) the number of gallons of gasoline sold from the premises in previous years; (b) the number of gallons of gasoline sold by any station of comparable size and location in previous years: and (c) an estimate of the number of gallons of gasoline to be sold from the premises for the next five years. From this information, you should calculate the estimated annual rental upon which the amount of tax may be determined.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—TRADER'S LICENSES—MODE OF ISSUING LICENSE —CHAPTER 701 OF ACTS OF 1947 APPLICABLE TO TRADER'S LICENSES ONLY—LICENSE BASED ON STOCK IN TRADE—CONTENTS OF OFFICIAL RECEIPT OR CERTIFICATE—VALUE OF STOCK ESTABLISHED FOR PROPERTY TAXES PRIMA FACIE VALUE FOR ISSUING TRADERS' LICENSES.

June 12, 1947.

Mr. Matthew A. Powers, Chief Inspector,
State License Bureau.

Your letter of June 3rd, 1947, asks our interpretation of certain provisions contained in Chapter 701 of the Acts of 1947, which amended Section 1 of Article 56 of the Annotated Code of Maryland (1943 Supp.). The general subject to be considered is the mode of issuing traders' licenses.

The amount of license fee required to be paid by traders in this State is based upon the licensee's stock in trade.

Sections 44, et seq., Article 56 of the Annotated Code of Maryland (1939 Ed.). Prior to the enactment of Chapter 701, *supra,* the amount of stock in trade held by any person, firm or corporation required to obtain a trader's license was fixed for that purpose by the applicant for the license. The vice apparent in this situation was that, while the true value of the applicant's stock in trade was usually on record in the offices of the Supervisors of Assessments in the counties and the Bureau of Assessments in Baltimore City, the Clerks of Court, in issuing the licenses did not, as a general rule, take advantage of that information. Report of the Maryland Commission on the Distribution of Tax Revenues, page 19. Chapter 701, *supra,* was passed in an attempt to correct that situation.

The background of Chapter 701, *supra,* as outlined above, presents a proper setting for the consideration of the problems raised in your letter. You ask whether (a) the new law applies to all licenses issued by the Clerks of Court or only to traders' licenses; and (b) the general effect of Chapter 701, *supra,* on the method by which traders' licenses are to be issued in the future.

We have no difficulty in holding that the provisions of Chapter 701, *supra,* apply only to the method by which traders' licenses are to be issued. The scope of legislative history and intention dictates this result. Moreover, House Bill 58, which emerged as Chapter 701, *supra,* was titled specifically as "relating to the mode of issuing trader's licenses". In view of these facts, we hold that the controverted act has no application to the various licenses issued by the Clerks of Court, with the exception of traders' licenses.

The general effect of Chapter 701, supra, on the method by which traders' licenses are to be issued in the future imposes a series of more difficult problems. So far as is material to these issues, Chapter 701 provides as follows:

> "No such license shall be issued by the Clerks of the Circuit Courts for the counties and the

> Clerk of the Court of Common Pleas in the City of Baltimore, except to domestic corporations the shares of which are subject to taxation under the laws of this State, unless there shall be presented to the respective Clerk issuing the same at the time said license is applied for, a receipt or certificate from the office of the Supervisor of Assessments in the county in which the license is issued or the Bureau of Assessments in the City of Baltimore showing the values of the merchandise, fixtures and stock in trade for the business for which said license is applied for, for the calendar year next preceding the year in which said license is applied for. Said receipt or certificate shall also show that there are no unpaid taxes due the incorporated city or town or county in which the licensed activity is carried on or to the State of Maryland on the merchandise, fixtures and stock in trade as aforesaid. In determining the value of the merchandise, fixtures and stock in trade for the purpose of issuing all traders' licenses, the Clerks of the Circuit Courts for the counties and the Clerk of the Court of Common Pleas in the City of Baltimore shall accept as prima facie evidence thereof the values as shown on the receipt or certificate required to be exhibited to said Clerks as provided in this section."

The above quoted excerpt from Chapter 701 imposes a condition precedent to the issuance of any traders' license. That condition may be summarized as requiring the license applicant to present to the issuing Clerk an official receipt or certificate which will show (a) the value of the merchandise, fixtures and stock in trade of the applicant as fixed for the purposes of property taxation by the appropriate assessing official; and (b) that there are no unpaid taxes due the State or any of its political sub-divisions on that merchandise, fixtures and stock in trade. The new

law also requires the issuing Clerk to accept the values shown on the official receipt or certificate as prima facie evidence of the value upon which traders' licenses are to be issued.

We are of the opinion that Chapter 701, *supra,* in no way changes the base upon which the amount of traders' licenses are to be calculated. True, the Act requires the official receipt or certificates to reveal the value of the "fixtures" which may be owned by the applicant. But Section 1 of Article 56 of the Annotated Code of Maryland (1943 Supp.), which was amended by Chapter 701, *supra,* has never been the statutory authority for the imposition of the license. As stated above, that function is performed by Sections 44, et seq., of Article 56 of the Annotated Code of Maryland (1939 Ed.). We conclude, therefore, that the amount required to be paid for traders' licenses should continue to be calculated upon the applicant's stock in trade.

Chapter 701, *supra,* states that the official receipt or certificate required to be exhibited to the issuing Clerk shall show "that there are no unpaid taxes due the incorporated city or town or county in which the licensed activity is carried on or to the State of Maryland on the merchandise, fixtures and stock in trade" of the applicant. The question here presented is whether this provision relates to unpaid taxes for the year in which the license is sought and obtained or unpaid taxes for the year before the license is issued.

It is a generally recognized rule that if a statute is ambiguous and susceptible to one or two constructions, one of which will permit it to operate within the framework of existing law and the other of which will, in effect, stultify its terms and make it inoperative, the former interpretation is to be desired. In the present case, Chapter 701, *supra,* could mean that the official receipt or certificate should show that all taxes due for the current year, i.e. the year in which the license is sought and obtained, have been

paid. In many cases, however, this construction would nullify the terms of the new Act and make it unworkable and inoperative.

An example of the fact that Chapter 701, *supra*, would be inoperative if it were construed as suggested above is presented in the case of a corporation required to take out a trader's license. Under our law, the stock of every corporation engaged in any commercial business in this State is required to be assessed at its fair average for the twelve months preceding the date of finality. Section 12 of Article 81 of the Annotated Code of Maryland (1943 Supp.), as amended by Chapter 637 of the Acts of 1947. The date of finality on all such personal property is January 1—Section 26 (c) of Article 81 of the Annotated Code of Maryland (1939 Ed.); and the assessment is required to be made by the State Tax Commission—Section 10 (5) of Article 81 of the Annotated Code of Maryland (1943 Supp.). As a matter of practice, these assessments are based, in the first instance, upon information contained in the taxpayer's annual report and the taxes levied upon the assessments thus made are due (with exceptions not here material) on August 1 for the year which the assessment was made, provided the bill is mailed on or before July 1 of that year.—Section 46 (c) of Article 81 of the Annotated Code of Maryland (1939 Ed.). In the ordinary case, therefore, corporations required to obtain traders' licenses on May 1 have no current taxes "due" on their stock until August 1 of that year and, so far as they are concerned, the first construction of Chapter 701, *supra*, outlined above, would be inoperative.

We hold that the official receipt or certificate required to be presented to the issuing Clerk by an applicant for a traders' license should show that there are no unpaid taxes due the State or any of its political sub-divisions from levies upon assessments made for the taxable year preceding the year for which the license is requested. If no assessment has been made for the taxable year preceding the year for which the license is requested, we hold that

the official certificate should show that there are no unpaid taxes due the State or any of its political sub-divisions from levies upon the last assessment made on the stock in trade of the applicant. If no past assessment has ever been made on the stock in trade of the applicant, the official certificate to be exhibited to the issuing Clerk should state this as a fact.

Chapter 701, *supra,* states that in determining the value of merchandise, fixtures and stock in trade for the purposes of issuing all traders' licenses, the Clerks of Court shall accept as prima facie evidence thereof the values as shown on the official receipt or certificate required to be exhibited to him. This is, perhaps, the most important feature of the new law since it represents the legislative cure for the malady which, as a matter of practice, had heretofore obtained in the issuance of traders' licenses. Under this new provision of the law, the Legislature has attempted to dovetail the assessments of stock in trade for property taxation, with the stated value of that stock in trade used for the purposes of securing traders' licenses. As a result, the issuing Clerks are required to accept as prima facie evidence of the amount of a trader's stock in trade for the purposes of issuing traders' licenses the value established for that property by the appropriate assessing officer or agency. Such value should be accepted by the issuing Clerk in all cases, therefore, as the basis upon which traders' licenses are to be issued in the future, unless the issuing Clerk is convinced, upon clear and convincing contrary evidence, that a different valuation is appropriate.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—RESERVATION OF LIFE ESTATE—RATE OF TAX ON DISPOSITIONS TO LINEAL DESCENDANT AND SPOUSE AS TENANTS BY THE ENTIRETIES.

June 16, 1947.

Mr. J. Walter Grumbine,
Register of Wills for Carroll County.

Your letter of June 11, 1947, asks whether the estate of Marian M. Lippy is subject to the Maryland inheritance tax by reason of an inter vivos transfer made by the decedent in 1940, by which the grantor reserved a life estate and conveyed vested remainders to her son and daughter-in-law as tenants by the entireties.

We have held on numerous occasions that the inheritance tax applies to property which was the subject of an inter vivos transfer made subsequent to April 4, 1936, where the decedent-grantor reserved a life estate.—24 Opinions of the Attorney General, 831, 24 Opinions of the Attorney General, 894, 25 Opinions of the Attorney General, 655, 26 Opinions of the Attorney General, 404. In such cases, we have pointed out that the tax should be paid in the same manner as if the property had been owned outright by the decedent on the date of his death.—24 Opinions of the Attorney General, 831, 832; and that the provisions of the law requiring a separate valuation for life estates and remainder interests were not applicable. Moreover, we have held that where property passed to a lineal descendant and his spouse as tenants by the entireties the applicable rate is 1% on the interest passing to the lineal and 7½% on the residue.—28 Opinions of the Attorney General, 248.

In the present case, we hold that the inheritance tax should be paid on the property owned by Marian M. Lippy as life tenant, based on the appraised value of that property as shown in the inventory thereof filed in the office of the Register of Wills. We further hold that the applicable rates should be 1% of the value of the property received by the

decedent's son and 7½% of the value thereof received by the decedent's daughter-in-law.

HALL HAMMOND, *Attorney General.*

TAXATION—MOTOR VEHICLE TAX—DISTRIBUTION OF TAX FOR SCHOOL PURPOSES—ALLOCATION OF MOTOR VEHICLE TAX TO LOCAL POLITICAL SUB-DIVISIONS.

June 17, 1947.

Dr. Thomas G. Pullen, Jr., State Supt.,
State Department of Education.

Your letter of June 5, 1947, asks our opinion with respect to the dual effect of Chapters 541 and 99 of the Acts of 1947. Both Acts deal, in part, with the method by which receipts from motor vehicle license taxes are to be divided. So far as is material here, Chapter 541, *supra,* provides:

> "* * * provided, further, that the county commissioners of each county and the Mayor and City Council of Baltimore shall allocate and credit to the school funds of said county or the City of Baltimore the percentage of the amounts received from the Commissioner of Motor Vehicles on account of the license fees on Class A and Class D motor vehicles which the school tax rate in said county or in the City of Baltimore bears to the total county or Baltimore City tax rate, and such amounts shall, for the purposes of the above proviso, be considered as levied by the Board of County Commissioners of said county and by the Mayor and City Council of Baltimore; * * *."

Chapter 99, *supra*, states, in part, as follows:

> "The Department shall pay to the County or Baltimore City in which the owner of a passenger vehicle subject to the fee of $15.00 resides, the sum of $5.00, and if the owner also resides within the corporate limits of any municipality or special taxing area in a county, the municipality or special taxing area shall be entitled to receive from the county the sum of $2.50.
>
> The Department shall pay to the County or Baltimore City in which the owner of a passenger vehicle subject to the fee of $23.00 resides, the sum of $8.00, and if the owner also resides within the corporate limits of any municipality or special taxing area in a county, this municipality or special taxing area shall be entitled to receive from the county the sum of $4.00. * * *
>
> There shall be returned to the county or Baltimore City in which the owner of motorcycles, motor bicycles, bicycles having motor attachments or similar vehicles, resides, the sum of $2.00 and if the owner also resides within the corporate limits of any municipality or special taxing area in a county, the municipality or special taxing area shall be entitled to receive from the county the sum of $1.00."

The specific question asked by you is whether the amounts of the motor vehicle license revenue required to be paid to the municipalities and special taxing areas should be deducted before or after those revenues are allocated to the school funds, as required by Chapter 541, *supra*.

Where two Acts of the same legislative session are in apparent conflict, legislative intention must, if possible, be ascertained to resolve the difference. Countless rules have been established for the purpose of molding the elusive concept of legislative intention into the exigencies of par-

ticular cases. One such rule is that where two Acts deal with the same subject matter, one of which contains merely general provisions and the other of which contains specific provisions, the latter Act will prevail.

In the present case, Chapter 99, *supra,* provides that municipalities and special taxing areas shall be entitled to receive certain specified sums from motor vehicle license revenues. If the allocations detailed in Chapter 541, *supra,* were made before the payments specified in Chapter 99 were deducted, it might well be that the municipalities and special taxing areas would receive something less than the amounts they otherwise would obtain under the specific provisions of that law. In our opinion, this result was not the end product intended by the Legislature.

We hold, therefore, that the specific amounts of motor vehicle license revenue required to be paid to the municipalities and special taxing areas by Chapter 99, *supra,* should be deducted from the total received by the County Commissioners and paid before any allocation is made to school funds as required by Chapter 541.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INSURANCE—PREMIUM TAX—DEATH BENEFIT PAYMENT IS NOT DEDUCTIBLE AS RETURNED PREMIUMS.

June 18, 1947.

Mr. Hazelton A. Joyce,
Deputy Commissioner of Insurance.

You have asked our opinion as to the meaning of "returned premiums" in Section 102 (b) (1) of Article 81 of the Annotated Code and as to what may be deducted as

"returned premiums" in computing the tax upon gross direct premiums levied by Section 102 (a) of that Article. We understand the facts to be as follows:

The taxpayer is a life insurance company which has been engaged in the sale of life insurance policies and annuity contracts in the State of Maryland (and in other states) since long prior to 1941. On May 31, 1935, the taxpayer issued a deferred life income annuity contract to a resident of Maryland, aged 49. Said contract was to mature in 1951, when the annuitant attained the age of 65. The annual consideration was $3,000 payable annually until maturity at which time a monthly income of $442.80 was to become payable to the annuitant during the remaining lifetime of the annuitant. The contract also provided that upon the death of the annuitant prior to maturity, the company would pay to the beneficiary the amount provided under a "table of death benefits" designated therein. The amount of such "death benefit" was computed on the basis of the net premiums (90% of the gross premiums) accumulated at interest at the rate of 3½% per annum. In April, 1946, said annuitant died after having paid eleven annual premiums of $3,000 each, or aggregate premiums in the amount of $33,000. Upon the annuitant's death, there was paid to the beneficiary designated under said contract the sum of $36,720, representing aggregate net premiums in the amount of $29,700 plus accumulated interest in the sum of $7,020. In its premium tax return for the calendar year 1946, taxpayer claimed a deduction for said sum of $29,700, representing the aggregate net premiums included in said payment of $36,720; no deduction was taken with respect to any part of the $7,020 representing the amount of interest accumulated.

The question presented is whether the $29,700 of the death benefit payment computed on the basis of 90% of gross premiums paid is deductible from the tax on gross direct premiums as "returned premiums", which are permitted to be deducted by Section 102 (b) (1) of Article 81.

We are of the opinion that on the facts as detailed above no part of the death benefit payment of $36,720 is de-

ductible from the Maryland tax on gross direct premiums. Section 102 (a) of Article 81 states that the tax shall be levied upon gross direct premiums "without deduction for any cause whatever except as herein provided". Section 102 (b) lists three deductions:

> (1) returned premiums (not including surrender values).
>
> (2) dividends paid or credited to policy holders or applied to purchase additional insurance or to shorten the premium paying period.
>
> (3) returns or refunds to policy holders because of retrospective ratings or safe driver rewards.

These three deductions are obviously designed to take care of situations where premiums received are reduced either because of refunds or credits. We construe the term "returned premiums" to mean premiums that for some reason such as cancellation of the policy are not earned and are returned to the policyholder for the reason that they were not earned under the policy. In other words, the return of premiums deductible under Section 102 (b) (1) is a return of unearned premiums. That such is the meaning of the sub-section is demonstrated by the exclusion of "surrender values", which are a return of earned premiums.

In the present case, all of the premiums had been earned and paid according to the terms of the policy without being reduced by any refund or credit. The policy had matured and the payment to the beneficiaries was made because of the death of the insured and not because the premiums were not earned. It was what is commonly known as a death benefit payment and not a return of premiums. We do not believe that such a death benefit payment can be converted into "returned premiums" because it is measured by net premiums (90% of gross premiums). All death or other benefits paid on a life or annuity contract are based to some degree upon premiums paid, and we do not believe that the Legislature ever intended the tax on gross premiums to be

reduced by the extent to which benefit payments represent a return of monies paid into the company in the form of premiums. Under such an interpretation of the law, the tax would cease to be a tax on premiums.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

TAXATION — RECORDATION TAX — COMPUTATION OF TAX — TAX CALCULATED ON FRACTIONAL PART OF $500.00.

July 9, 1947.

Mr. Alan W. Ross, Clerk,
Circuit Court of Calvert County.

Your letter of June 19, 1947, asks our advice with respect to the proper computation of the recordation tax.

Chapter 914 of the Acts of 1947 provides that "in the case of instruments conveying title to property, the tax shall be at the rate of $.55 for each $500 or fractional part thereof of the actual consideration paid or to be paid". You specifically ask whether the tax should be calculated on fractional parts of less than $500.

Under Chapter 11 of the Acts of 1937, the recordation tax was imposed at the rate of $.10 for each $100 or fractional part thereof. The hardship attendant upon the calculation of the tax on a fractional part of $100 led to a change in the law—Chapter 227 of the Acts of 1939. Thereafter, only multiples of $100 were considered in computing the tax—24 Opinions of the Attorney General 977.

The wording of the present law is similar to that which obtained in 1937. Accordingly, we hold that the tax should be imposed on a fractional part of $500 if such fractional

part is included in the actual consideration paid or to be paid.

HALL HAMMOND, *Attorney General.*

TAXATION — RECORDATION TAX — VETERANS' ADMINISTRATION—APPLICABILITY OF TAX TO DOCUMENTS TO AND FROM VETERANS' ADMINISTRATION.

July 21, 1947.

Mr. M. Luther Pittman, Clerk,
Superior Court of Baltimore City.

Your letter of June 19, 1947, asks whether the recordation tax is applicable to documents offered for record in which (1) the Veterans' Administration is the grantee, and (2) the Veterans' Administration is the grantor.

In my opinion, the recordation tax is inapplicable to those cases in which the Veterans' Administration is the grantee of instruments offered for record. *Pittman v. Home Owners' Loan Corporation,* 175 Md. 512; affirmed 328 U. S. 21. To the contrary, the tax would apply in those cases in which the Veterans' Administration is the grantor of documents offered for record and recorded. *Tawes v. Home Owners' Loan Corporation,* 180 Md. 401.

HALL HAMMOND, *Attorney General.*

TAXATION — INHERITANCE TAX — REVOCABLE TRUST — INTANGIBLE PERSONAL PROPERTY CONSTITUTING CORPUS OF REVOCABLE TRUST SUBJECT TO TAX IF GRANTOR DIED DOMICILED IN MARYLAND.

July 23, 1947.

Mr. Walter C. Clarke,
Register of Wills for Montgomery County.

Your letter of June 27, 1947, states that Lillian C. Severin, a resident of Montgomery County, died testate in November, 1946. On September 4, 1930, the decedent, then a resident of the District of Columbia, established a trust which named The Riggs National Bank of Washington, D. C., as trustee. Under the terms of this instrument, the trustee was directed to hold, manage, invest and reinvest the trust corpus (consisting of intangible personal property) and to pay the net income therefrom to the grantor or her appointees for life with remainders over upon the death of the grantor to her two brothers. Further remainders over were specified in case of the death of the two prime remaindermen. The trust also reserved to the grantor "the right to terminate this agreement in whole or in part upon written notice to the grantor", and further provided that upon revocation the trustee should "assign, set over, transfer and deliver unto said grantor, or upon her written order, the monies, stock, bonds, promissory notes or other securities then held by it under the terms of this Agreement, or such part thereof affected by such revocation".

The will of the decedent was probated in your office on November 27, 1947. This document makes certain specific and general bequests but fails to mention the trust described above. Because of this fact and since the trust has, from its creation to the present time, been administered under the laws of the District of Columbia, a contention has been advanced that the trust corpus is not subject to the Mary-

land inheritance tax. You have sought our opinion for the purpose of determining the validity of this contention.

Section 111 of the Annotated Code of Maryland (1943 Supplement), as amended by Chapter 742 of the Acts of 1945, provides, so far as is material to this case, that the inheritance tax shall apply to all intangible property over which the decedent retained any dominion during his lifetime. The reservation of the power of revocation in an inter vivos transfer is considered, for the purposes of the tax, to be equivalent to dominion retained by the decedent over the property transferred. Accordingly, the trust corpus in this case was, in legal contemplation, the property of the decedent and for this reason the tax applies.

It is clear, we think, that this result should not be altered merely because the trust was created prior to the effective date of Chapter 124 of the Acts of 1936. The contention that this fact will avoid the tax in a case of this character has long since been put to rest. 21 Opinions of the Attorney General 741, 22 Opinions of the Attorney General 750, 23 Opinions of the Attorney General 633, 24 Opinions of the Attorney General 855, 28 Opinions of the Attorney General 282. Moreover, since the decedent retained complete dominion and control over the property during her life, the fact that the corpus was physically located without the State of Maryland does not foreclose tax liability. We have held repeatedly that the intangibles of a resident decedent situated outside of this State are subject to the Maryland inheritance tax. 10 Opinions of the Attorney General 289, 21 Opinions of the Attorney General 742, 28 Opinions of the Attorney General 282. This rule has been held to be applicable where the property in question was the corpus of a revocable trust, 29 Opinions of the Attorney General 226, and the result has been the same even though the will of the decedent neither referred to the trust nor attempted to dispose of the rest. 26 Opinions of the Attorney General 467, 27 Opinions of the Attorney General 282.

For the reasons above stated, we hold that the value of the trust corpus in question is subject to the collateral inheritance tax.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION — INHERITANCE TAX — PRECATORY TRUSTS — WORDS OF RECOMMENDATION INSUFFICIENT TO CREATE TRUST.

July 24, 1947.

Mr. Harry D. Radcliff,
Register of Wills for Frederick County.

We understand from your letter of July 3, 1947, that Karl Jacobson, a resident of Frederick County, died testate on December 28, 1946. By his Last Will and Testament, the decedent devised and bequeathed the residue of his property in trust and directed that the income therefrom should be paid to his wife for life with remainders in fee to the grantor's children upon the death of the life tenant, share and share alike. The Will also contained an elaborate pattern (not here material) for the disposition of the remainder interests in the event that the remaindermen died (1) before the life tenant and without a surviving spouse or children; (2) before the life tenant and survived by a spouse and no children; (3) before the life tenant and survived by children only; and (4) before the life tenant and survived by both a spouse and children. One paragraph of the Will reads as follows:

> "I request my wife and children to help support my sister, Sarah Seligson, now living at Tel Aviv, Palestine, by sending her fifty dollars a month, as long as she lives and after her death to continue

> such payments to her daughter, Rose Goodman, of Tel Aviv, Palestine, as long as she lives."

You ask whether the collateral inheritance tax is payable on the "bequest" made to Sarah Seligson and to Rose Goodman.

It is clear, we think, that in the instant case there was no general bequest made directly by the decedent to his sister and her child. The result must be, therefore, that the collateral inheritance tax is inapplicable unless the words contained in the decedent's Will are sufficient to raise a precatory trust in favor of these persons. In our opinion, no such trust has been created.

That words of recommendation or request addressed to a devisee under certain circumstances are sufficient to make him a trustee for the person in whose favor such expressions are used has long been settled. However, before such a trust may arise from the use of precatory words, the Court "must be satisfied from the words themselves taken in connection with all the other terms of the dispositions, that the testator's intention to create an express trust was as full, complete, settled and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner." *Miller, Construction of Wills,* Section 172 (p. 470). See also *Pratt v. Shepard Hospital,* 88 Md. 610; *Williams v. Committee of Baptist Church,* 92 Md. 497; *Clark v. Clark,* 99 Md. 356.

It is generally settled that where a decedent has made a complete and absolute disposition of his property, the use of words expressing a testamentary wish or desire is insufficient to raise a precatory trust. Thus, in the recent case of *Sands v. Church,* 181 Md. 536, the Court of Appeals said, at page 541:

> "One of the fundamental rules of construction is that the intention of the donor must govern if consistent with the rules of law, and this intention must be gathered from the entire instrument. It is

> recognized that where a writing imports the granting of absolute ownership to the donee, and there are additional words expressing the donor's wish as to the use of the property, no precatory trust has been created."

This rule is especially applicable to those cases in which a testator has created a testamentary trust in one section of his Will and has made an absolute bequest coupled with words of recommendation in another section of the same document. *Nunn v. O'Brien,* 83 Md. 198, 201.

In the present case, the Will of the testator evidences a complete and premeditated plan of disposition. Had the decedent wished to grant an annuity to his sister and to her child he could have done so in simple terms. Moreover, if the decedent had wished to make his sister and her child the beneficiaries of a testamentary trust, ample provisions could have been contained in the trust which was established in his Will to accomplish this purpose. To hold that a precatory trust has been raised here would in the light of admitted facts, go far beyond the settled principles of law applicable to this case.

In our opinion, the testamentary request that the decedent's sister and her child be paid certain specific sums until their death is not sufficient to establish either a direct bequest to those parties or a precatory trust in their favor. For the reasons above stated, therefore, we hold that the collateral inheritance tax is inapplicable to the "dispositions" made to those parties.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION — SALES TAX — CHARITABLE ORGANIZATIONS — MARYLAND SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, A CHARITABLE ORGANIZATION.

September 4, 1947.

Mr. Walter E. Kennedy, Chief,
Sales Tax Division.

You have requested our opinion with respect to whether purchases made by the Maryland Society for the Prevention of Cruelty to Animals are subject to the Maryland Retail Sales Tax.

Section 261(i) of Article 81 of the Annotated Code of Maryland provides that the sales tax does not apply to sales made "to any person operating a non-profit * * * charitable * * * institution or organization situated in this State", unless the property sold is used for purposes other than the furtherance of the charitable work of the vendee. Unlike the Federal Income Tax (I.R.C., Sec. 107(i), the Federal Estate Tax (I.R.C., Sec. 812(d)), the Federal Gift Tax (I.R.C., Sec. 1004(a)(2)), or the Maryland Inheritance Tax (Sec. 110 of Article 81 of the Annotated Code of Maryland), the Maryland Sales Tax does not, by statutory direction, exempt a society for the prevention of cruelty to animals from its impact. To escape the levy, therefore, the Maryland Society for Prevention of Cruelty to Animals must meet the necessary legal and factual requirements of a "non-profit, charitable institution" as that term is used in Section 261(i), *supra*. In our opinion, the Maryland Society meets those requirements.

The word "charitable," as the term has been used in the field of taxation, generally has been given a broad meaning. This has been true particularly with respect to Federal Estate Tax, 1 Paul, *Federal Estate and Gift Taxation* (1942), Sec. 12.06, page 648, and with respect to the Federal Gift Tax, *M. D. Thatcher Estate Co.*, 38 B.T.A. 336. It

has been suggested that this broad interpretation has come down from the Roman law through the English law, and is dependent, to some extent, on the comprehensive meaning of the word "charitable," as that term has developed in connection with the law of trust. 1 Paul, *supra*, page 648, 649. In the latter field, gifts to societies for the prevention of cruelty to animals have, in general, been upheld as charitable gifts. *Minus v. Billings*, 183 Mass. 126, 66 N.E. 593 (1903); *Marsh v. Means*, 3 Jur. M.S. (Eng.) 790 (1857); *Re Joy*, 60 L.T.N.S. (Eng.) 175 (1888); 10 Am. Jur., *Charities*, Sec. 76.

The Maryland Society for the Prevention of Cruelty to Animals was incorporated as an eleemosynary institution on February 2, 1870. Its activities have been characterized as "including the care, relief and protection of every living creature except man". No part of the income of the Society (a large portion of which is derived from private donations) enures to the benefit of any stockholder, director or officer. We hold that these features stamp the Maryland Society for the Prevention of Cruelty to Animals as a nonprofit, charitable organization within the intendment of Section 261(i) of Article 81, *supra*.

In determining that purchases made by the Maryland Society for the Prevention of Cruelty to Animals are exempt from the sales tax, we are not unmindful of the fact that exemptions from taxation are to be strictly construed. Nor do we fail to perceive the legal rationality for a subtle distinction between an estate or inheritance tax, in which the term "charitable" might well embrace a society for the prevention of cruelty to animals, and a sales tax, in which the opposite might be true. Be this as it may, the fact remains that kindness and consideration for dumb animals are now universally accepted and encouraged by both the people in general and by the City, State and Federal Governments. To say that the Maryland Society does not qualify for sales tax exemption in the light of these facts would, we believe, transcend the sound public policy inherent in

Section 261 (i) of Article 81, *supra*, and stultify the legislative intention which fostered it.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—SALES TAX—EXEMPTED ARTICLES—SALES OF X-RAY FILM USED IN TREATMENT OF DISEASE NOT SUBJECT TO TAX.

September 5, 1947.

Mr. W. E. Kennedy, Chief,
Sales Tax Division.

You have asked our opinion on whether X-ray film and chemicals purchased by a physician solely for the purpose of taking X-ray pictures in connection with medical treatment due to accident or illness are subject to the Maryland Retail Sales Tax.

Section 261 (i) of Article 81 of the Annotated Code of Maryland exempts from the Sales Tax the following:

> "Sales of medicines sold on prescriptions of physicians, or medicines compounded, processed or blended by a druggist offering the same for sale at retail, or sales of drugs or medical supplies to physicians or hospitals or by physicians and hospitals to patients in connection with medical treatments, and all other medicines as this term may be defined by regulations of the Comptroller."

Section 301 (a) of Article 81, *supra*, empowers the Comptroller to make such rules and regulations as may be necessary to carry out the provisions of the Sales Tax. Under the authority of this Section, the Comptroller has defined

medical supplies by Rule 19, which, however, fails to characterize X-ray films and chemicals.

The term "medical supplies defies dogmatic characterizations. It is well recognized, however, that the term "medicine" or "medical" is not limited to substances which possess curative or remedial properties. On numerous occasions, the term "medicine" has been held to include the science of preserving health and treating disease, *People v. Kabana*, 321 Ill. App. 158, 52 N. E. 2d 320, or the science and art of dealing with the prevention, cure and alleviation of disease, *State ex rel Wheat v. Moore*, 154 Kan. 193, 117 P. 2d 598; *Kahn v. Metropolitan Life Ins. Co.*, 132 N. J. Law 503, 41 A. 2d 329.

"If medicine" or "medical" embraces the concept of preservation of health and the prevention of disease, as well as the curative process, it is clear, we think, that any material which is directly consumed in the art of detection or diagnosis of human maladies is a "medical supply." This would follow from the fact that the term "supplies" has been defined, in general, to embrace that which is used directly in carrying on a given work or that which is necessary to enable an existing entity to function properly. *Smull v. Delaney*, 25 N. Y. Supp. 2d 387, 175 Misc. 795.

Viewed in this light, we hold that X-ray film and chemicals which are purchased for the purpose of consumption in the art of preservation of health or the prevention of disease are "medical supplies" as that term is used in Section 261(1) of Article 81, *supra*. In reaching this result, however, we are not to be understood as limiting in any way the express terms of Rule 19 referred to above. To the contrary, we are in accord with the dichotomy there set forth, but are of the opinion that X-ray films and chemicals, when used as outlined above, fall on the non-taxable side of the line and are thus similar, in legal contemplation, to cotton, gauze, bandages and other like articles.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—STATUTE OF LIMITATIONS INAPPLICABLE TO TAX ON REAL ESTATE NOT SUBJECT TO INVENTORY.

September 16, 1947.

Mr. John H. Bouse,
Register of Wills for Baltimore City.

Your letter of August 4, 1947, asks whether Section 160 of Article 81 of the Annotated Code of Maryland (1943 Supp.) bars the collection of inheritance taxes imposed by reason of the ownership of real estate by a decedent who died on November 22, 1936.

Your letter states that the decedent died intestate, leaving only collateral heirs: that the decedent's sister was appointed administratrix of his estate and served in that capacity until she was released and discharged on January 14, 1947; that a member of the local Bar is now serving as administrator of the estate. Your letter further states that the administratrix filed real and personal inventories and an administration account, and that on October 26, 1937, collateral inheritance taxes were paid upon the personal estate distributed to the decedent's next of kin. It also appears that in addition to the real estate listed in the aforesaid inventories, the decedent owned, at the time of his death, an undivided one-seventh interest in certain fee simple and leasehold property. The existence of this property, which has never been included in an inventory filed in your office and has never been appraised for the purpose of calculating the collateral inheritance tax, has recently been brought to your attention by the administrator of the estate.

A contention advanced by the administrator to the effect that the collection of the inheritance taxes based on the value of the real estate in question is barred by limitations has prompted you to request our opinion.

In a case recently decided, we ruled that if real estate owned by a decedent at the date of his death is neither

appraised nor inventoried as required by law, limitations on the collection of inheritance taxes do not begin to run until the completion of the appraisal required to be made by Section 134 of Article 81, *supra*.—Opinion to Walter C. Clarke, Register of Wills for Montgomery County, Daily Record, June 17, 1947. We think that opinion is controlling here.

In the instant case, no inventory of the real estate in question has ever been filed as required by Section 133 of Article 81, *supra*. It was, however, the duty of the administrator to call your attention to the existence of this property when he learned of it.—Section 119A of Article 81, *supra*. Thereafter, it was and is your duty to apply for the appointment of at least two appraisers to value the property for the purpose of determining the amount of inheritance taxes due.—Section 134 of Article 81, *supra*. When this step has been taken, the inheritance tax will be due in accordance with the provisions of Section 134 of Article 81, *supra*, and limitations will begin to run.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—LIFE TENANT AND REMAINDERMAN—SEPARATE VALUATION OF ESTATES TAX PAYABLE WHEN REMAINDER INTEREST VESTS IN POSSESSION.

September 16, 1947.

Mr. John H. Bouse,
Register of Wills for Baltimore City.

Your letter of August 9, 1947, states that a decedent died September 6, 1940, leaving the residue of his property in trust. So far as is material here, the trust provided that

the income should be paid to the decedent's wife for life and that upon her death a one-eighth interest in the corpus should continue to be held by the trustee for the benefit of Davis Brashears, a minor, provided that he was living at the death of the life tenant. The trust further provided that if Brashears did not predecease the life tenant, the share held in trust for his benefit should be used "for the education of the said Davis Brashears" upon the limitation that "the said trust shall upon its sole and uncontrollable discretion pay unto said Davis Brashears or his legal guardian such sum or sums as they may deem necessary for his education, and when the said Davis Brashears shall obtain the age of twenty-one years all the balance of the funds remaining in the hands of the trustee shall be paid unto the said Davis Brashears absolutely". The trust also provided that "if the said Davis Brashears shall die before obtaining the age of twenty-one years, the unexpended balance of the fund remaining in the hands of the trustee shall be paid unto the Trustees of the Masonic Home Bonnie Blink, Baltimore County, Maryland".

The life tenant died on May 6, 1947, survived by Davis Brashears, who is now sixteen years of age. Since the collateral inheritance tax on Brashear's remainder interest was not paid at the date of the decedent's death, you ask whether such a tax is now due and payable.

Section 125 of Article 81 of the Annotated Code of Maryland (1939 Edition) provides, in substance, that whenever a life estate or an interest for a term of years is left to one person and remainder interest to another, the remainderman may apply to the court having jurisdiction in the premises for the valuation of his interests and pay the inheritance tax on the value thus determined. If this procedure is not adopted by the person entitled to the property after the termination of the preceding estate, Section 125, *supra,* provides:

> "But if said person entitled to the property after the termination of the preceding estate shall

> fail to apply to the Orphans' Court within a reasonable time after the valuation of the preceding estate, or to pay the tax so assessed after application within thirty days from the date of such determination, then such person shall at the time when the same vests in possession at the termination of the preceding estate, pay a tax on the whole value thereof, without deduction of the tax or taxes previously paid."

The Section further provides that in such cases, the court having jurisdiction shall value the property as of the date when the same vests in possession and shall assess the tax thereon.

It is clear, we think, that to be liable for the tax under the part of Section 125 quoted above, the property interests following the life estate or an interest for a term of years must vest in possession. This follows not only from the theory that an inheritance tax is imposed on the right to receive property from a decedent, but also from the fact that Section 125, *supra,* requires the payment of the tax when the remainder "vests in possession at the termination of the preceding estate" and also requires the property to be valued for the purpose of the tax "as of the date when the same vests in possession".

Viewing it in this light, the only question raised here is whether the one-eighth interest which was continued in trust for Davis Brashears has now vested in possession. In our opinion it has not. While it may be true that the remainder is completely vested in interest subject to being divested, Miller, *Construction of Wills,* Section 286, page 807, note 1; 3 Restatement of the Law of Property, Section 253 (d), and may be sold, *In Re Banks Will,* 87 Md. 425 (1898), the fact remains that, with the exception of those amounts distributed for his education, Brashears will never reduce his interest in the trust corpus to possession until he attains the age of twenty-one years.

We hold that no collateral inheritance tax is collectible at the present time from Davis Brashears or his trustee. However, the tax will apply to all amounts distributed to Brashears by the trustee for the former's education. The trustee should, therefore, be required to report all such distributions at the time that they are made and should also be required to pay the tax on all amounts thus distributed. In addition, the collateral inheritance tax will apply to the full unexpended balance of the trust estate remaining in the hands of the trustee at such time as the remainderman reaches the age of twenty-one years.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—DOMESTIC MUTUAL FIRE INSURANCE COMPANIES—CHAPTER 901 OF THE ACTS OF 1947 DOES NOT EXEMPT FROM TAXATION PREMIUMS WRITTEN BEFORE JUNE 1ST., 1947, THE EFFECTIVE DATE OF THE ACT.

October 9, 1947.

Mr. Hazelton A. Joyce, Deputy Commissioner,
State Insurance Department.

You recently asked for an opinion as to the liability of domestic mutual fire insurance companies, now exempted by Chapter 901 of the Acts of 1947, for the payment of the Maryland 2% premium tax from January 1, 1947, to May 31, 1947.

In 30 Opinions of the Attorney General, 201, in dealing with the same companies when they were eliminated from those exempted from the tax, the question of retroactivity was raised and ruled out.

There is no provision in Chapter 901 to overcome the presumption that a statute shall not be applied retroactively

in the absence of compelling evidence that the Legislature so intended.

Therefore, the conclusion to be reached in our opinion is that such companies are subject to taxation on premiums written from January 1, 1947, to May 31, 1947, the effective date of the Act being June 1, 1947.

HALL HAMMOND, *Attorney General.*

TAXATION—INHERITANCE TAX—TAXABILITY OF SHARES OF STOCK IS TO BE DETERMINED BY RECORD TITLE.

November 5, 1947.

Mr. John H. Bouse,
Register of Wills for Baltimore City.

In your letter of November 1st you ask whether you must collect inheritance tax on the appraised value of certain stock in the name of a Maryland decedent. The facts presented to you are that actual ownership of all the stock was not in the decedent, although the certificates were in his name alone, but that another individual was actually the part owner.

It seems entirely clear to us that you must be bound by the record title and must collect the tax on the full value of the stock unless a court of competent jurisdiction holds upon proper proof that the decedent was not the owner of all the stock. See 28 Opinions of the Attorney General, 300, where we held that the Register of Wills for Montgomery County was bound by the record title to real estate, although there was shown to him an unrecorded agreement that the beneficial interest was in a surviving brother. We there said:

> "In the absence of Court determination otherwise, it is our opinion that an unrecorded collateral

instrument cannot be received to alter the effect of a recorded deed."

In our opinion the same ruling must be made here.

HALL HAMMOND, *Attorney General.*

TAXATION—GASOLINE TAX—ELECTRIC COOPERATIVES ARE REQUIRED TO PAY GASOLINE TAX.

November 13, 1947.

Mr. Joseph O'C. McCusker,
Chief Deputy Comptroller.

Your letter of October 8, 1947, asks whether the Choptank Electric Cooperative, Inc., is exempt from the payment of the gasoline tax imposed by Chapter 560 of the Acts of 1947.

Choptank Electric Cooperative, Inc., is an electric cooperative formed under Sections 460, et seq, of Article 23 of the Annotated Code of Maryland (1943 Supplement). Section 489 of Article 23, *supra,* provides as follows:

> "(Exemption from Excise and Income Taxes—License Fee.) Each cooperative and each foreign corporation doing business in this State pursuant to this sub-heading shall pay annually, on or befor the first day of July, to the State Tax Commission, a fee of ten dollars ($10), but shall be exempt from all other excise and income taxes whatsoever."

The tax exemption provided for by Section 489, *supra,* applies only in those cases in which the cooperative is the taxpayer. The question here presented, therefore, is

whether the legal incidence of the gasoline tax has fallen upon the Choptank Electric Cooperative, Inc.

It is now well settled in this State that the legal incidence of the gasoline tax falls upon the dealer and not upon the ultimate consumer. *Shell Oil Co. v. Brownley,* 181 Md. 8 (1942). For this reason, we have ruled that there is no constitutional inhibition upon the taxation by the State of gasoline purchased by the Federal Government from dealers located in Maryland. 28 Opinions of the Attorney General 309, 311. Accordingly, we hold that the legal incidence of the gasoline tax does not fall on the Choptank Electric Cooperative, Inc., and that for this reason Section 489 of Article 23, *supra,* does not give to that Company an exemption from the tax.

HALL HAMMOND, *Attorney General.*

TAXATION — CORPORATIONS — CHARITABLE CORPORATIONS MUST FILE ANNUAL REPORTS WITH STATE TAX COMMISSION.

November 20, 1947.

Mr. Albert A. Ward, Secretary,
State Tax Commission.

You asked our opinion as to whether a domestic charitable corporation must file with the State Tax Commission an annual report under Section 187 of Article 81 of the Annotated Code.

It is our opinion that a domestic charitable corporation must file an annual report under said Section 187. Prior to 1941 Section 187 required a report of "Every corporation subject to assessment on its property or any part thereof

by the State Tax Commission, and any corporation the shares of whose stock are subject to assessment by the State Tax Commission, and any corporation, firm or individual against whom any tax is to be calculated by the State Tax Commission under this Article shall file with the said Commission an annual report * * *."

The Tax Revision Commission of 1939 on pages 52 and 53 of its Report dated January 28, 1941 made the following recommendation:

"ANNUAL REPORTS

"Section 187 requires all domestic corporations to report to the State Tax Commission, except the following:

Credit unions.
Corporations having no capital stock.
Charitable, benevolent and fraternal institutions.

"Credit unions report to the Bank Commissioner; insurance companies having no capital stock, including fraternal beneficiary associations, report to the Insurance Commissioner; the others report to no one. Many have long since ceased to function but the Commission has no record, and no practicable way of obtaining a record, of their status.

"Section 187 should be amended so as to require all domestic corporations, and all foreign corporations subject to the jurisdiction of this State, to make annual reports of some kind to the Department. The reports would, among other things, serve to keep a central agency advised as to the status of the corporation, the location of its office and the names and addresses of its officers and directors."

As a result of this recommendation Section 187 was amended by Chapter 912 of the Acts of 1941 to read in part as follows:

> "Every domestic corporation, every foreign corporation subject to the jurisdiction of this State and every firm or individual against whom any assessment for ordinary taxes is to be made by the State Tax Commission under this Article, shall file with the State Tax Commission an annual report * * *."

In view of the above history of Section 187, it is our opinion that the words "every domestic corporation" include a charitable corporation.

RICHARD W. EMORY, *Deputy Attorney General.*

TAXATION—GROSS RECEIPTS TAX—DOES NOT VIOLATE IMPORT-EXPORT CLAUSE OF FEDERAL CONSTITUTION.

November 21, 1947.

State Tax Commission.

Several railroads subject to the franchise tax levied by Sections 94½ to 99 of Article 81 have seized upon two recent decisions of the Supreme Court of the United States to assert that the Import-Export Clause of the Federal Constitution (Article I, Section 10, Clause 2) renders it unconstitutional for the State of Maryland to include in the measurement of said tax, receipts derived from the transportation of goods destined for exportation or consigned from importation. The two recent decisions upon which these railroads particularly rely are *Richfield Oil Corp. v. State Board of Equalization,* 1946, 329 U.S. 69, 91 L. Ed. 123, and *Joseph v. Carter & Weekes Stevedoring Company,* 1947, 330 U.S. 422, 91 L. Ed. 720. These decisions are elaborately discussed by Professor Thomas Reed Powell in

"More Ado About Gross Receipts Taxes", appearing in 60 Harv. L. Rev. 501 and 710, at pp. 713 and 743.

The *Richfield Oil* case involved the validity under the Import-Export Clause of the California Retail Sales Tax as applied to a sale for export. The California statute imposed upon the vendor, Richfield Oil Corporation, the duty of collecting the tax for the State from each vendee. The vendee in this case was the New Zealand government which purchased oil for delivery "to the order of the Naval Secretary, Naval Office, Wellington, into N.Z. Naval tank steamer R. F. A. Nucula at Los Angeles, California". Richfield Oil Corporation carried the oil by pipe line from its refinery in California to storage tanks at the harbor from which tanks the oil was pumped into the steamer Nucula. The Supreme Court held that the Import-Export Clause prohibited the imposition of the California Sales Tax upon this sale. Mr. Justice Douglas wrote the opinion in which six justices concurred. Mr. Justice Black filed a dissenting opinion. Mr. Justice Murphy took no part in the case. Mr. Justice Douglas discussed the Commerce and Import-Export Clauses at some length and concluded that while the Commerce Clause permits a State tax which is not discriminatory, the Import-Export Clause prohibits "any" State tax regardless of whether that tax is discriminatory:

> "It seems clear that we cannot write any such qualifications into the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. Only one exception is created—'except what may be absolutely necessary for executing its inspection Laws.' The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against "any' tax a prohibition against 'any discriminatory' tax."

Mr. Justice Douglas then turned to the question of whether at the time the tax accrued the oil was an export. Since the

oil was delivered into the hold of the vessel from the vendor's tanks and since "that delivery marked the commencement of the movement of the oil abroad", he concluded that the commencement of the export would occur no later than the delivery of the oil into the vessel. He further decided that the Sales Tax in question was an impost upon an export even though under California law the tax was an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales and not a tax upon the consumer or upon the goods sold:

> "Appellee concedes that the prohibition of the Import-Export Clause would be violated if the goods were taxed as exports or because of their exportation, or if the process of exportation were itself taxed. We perceive, however, no difference in substance between any tax so labeled and the present tax. * * * The incident which gave rise to the accrual of the tax was a step in the export process."

The *Joseph* case involved the validity of the New York City gross receipts tax as applied to gross receipts derived from stevedoring. The stevedoring company was engaged in loading and unloading vessels carrying goods in interstate and foreign commerce. The Supreme Court in a five to four decision held that the Commerce Clause prohibited such an unapportioned tax on the gross proceeds from interstate business, where the taxes were not in lieu of ad valorem taxes on property. The majority of the Court after noting that "on precedent, the *Puget Sound* case (*Puget Sound Stevedoring Co. v. State Tax Commission*, 1937, 302 U.S. 90, 82 L. Ed. 68) is controlling", held:

> "Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross re-

ceipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company."

Mr. Justice Black and Mr. Justice Murphy dissented. Mr. Justice Douglas wrote an opinion, in which Mr. Justice Rutledge concurred, dissenting in part. In his dissent, Mr. Justice Douglas stated it to be his opinion that a State tax upon the gross receipts from stevedoring does not violate the Commerce Clause but that such a tax as applied to gross receipts from loading and unloading ships engaged in foreign commerce is prohibited by the Import-Export Clause.

The Maryland gross receipts tax levied by Sections 94½ to 99 of Article 81 is a franchise tax upon railroads and certain other public utilities for the privilege of doing business each year "measured by the gross receipts for the preceding calendar year". Taxable gross receipts are limited to operating revenues coming from business in this State. Where actual receipts from business in this State are not known, a reasonable and fair method of apportionment is used. The tax is in lieu of property taxes on operating property and in lieu of income taxes (operating revenues subject to the tax are excluded from gross income).

The Maryland gross receipts tax has been in effect since 1872. It has never been passed upon by the Supreme Court of the United States, but the Court of Appeals of this State, in reliance upon the *State Tax on Railway Gross Receipts* (*Philadelphia & Reading Rd. Co. v. Pennsylvania*), 1873, 15 Wall. 284, 21 L. Ed. 164, and *Maine v. The Grand Trunk Railway Company*, 1891, 142 U. S. 217, 35 L. Ed. 994, has held that the Maryland tax does not violate the Commerce Clause of the Federal Constitution. See *The Cumberland & Pennsylvania Railroad Co. v. State*, 1901, 92 Md. 668, wherein the Court of Appeals, after discussing the decisions of the Supreme Court of the United States at length, held (p. 691):

"But understanding the *Maine case* as we do, and being profoundly impressed with the absolute

> soundness of the principles announced in the *Gross Receipts case*, and approved in the *Maine case*, we are bound, in duty to the State, to uphold the tax in question, leaving it to the Supreme Court to say if invoked, whether we have misinterpreted their meaning."

The Court of Appeals reaffirmed its opinion that the Maryland gross receipts tax does not violate the Commerce Clause in *The Postal Telegraph Cable Co. v. County Commissioners*, 1917, 131 Md. 96, 103.

As previously stated, the present attack upon the tax is that it violates the Import-Export Clause. We, therefore, will not concern ourselves in this opinion with the Commerce Clause.

The Import-Export Clause reads as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. * * *"

Most of the judicial decisions interpreting this Clause have been concerned with when the import process ends or when the export process begins. Imposts or duties levied before the import process ends or after the export process begins have consistently been held unconstitutional. It is now well established that the import process continues until the goods are sold or unpacked. *Brown v. Maryland*, 1827 12 Wheat. 419, 6 L. Ed. 678; *Hooven & Allison Co. v. Evatt*, 1945, 324 U. S. 652; 89 L. Ed. 1252. It is equally well established that the export process begins when goods are delivered to a common carrier for transshipment overseas. *Coe v. Errol*, 1886, 116 U.S. 517, 29 L. Ed. 715; *Railroad Commission v. Texas & Pacific Rwy Co.*, 1939, 229 U.S. 336, 57 L. Ed. 1215. Thus it must be conceded that goods in transit through Maryland from or to foreign points are immune from taxation by this State if in the case of imports the goods are not sold or the original package broken, and

if in the case of exports the transportation is not interrupted except as may be necessary for transshipment. Undoubtedly, a sizable portion of the traffic carried by railroads paying the Maryland gross receipts tax is so immune from taxation by this State.

The question remains as to whether the franchise tax required to be paid by railroads measured by their gross receipts for the preceding year is an impost or duty on the goods being carried, and we are of the opinion that this question should be answered in the negative. Generally speaking, if the tax is not laid on the articles themselves while in course of importation or exportation, the test of the validity of the tax is whether it "so directly and closely" bears on the process of importing or exporting as to be in substance a tax on the importation or exportation. See *Thames & Mersey Marine Insurance Co. v. United States,* 1915, 237 U.S. 19, 25, 59 L. Ed. 812; Cooley, "The Law of Taxation" (1924 Edition), Vol. I, Sec. 112. Otherwise, every tax which in some way affects the price of an import or export would be an unconstitutional impost or duty; property taxes, income taxes, sales taxes and all taxes paid by railroads would be unconstitutional because they each directly affect the cost of transportation and thereby indirectly affect the goods transported.

The only judicial decision to our knowledge which is directly in point is the case of *Inter-Island Steam Navigation Company v. Territory of Hawaii,* 1938, C.C.A. 9, 96 F.2d 412, which involved a public utility tax equal to one-twentieth (1/20) of one percent of the gross income during the preceding year plus one-fiftieth (1/50) of one percent of the par value of the utility's outstanding stock. The purpose of this tax was to pay the cost of regulation. The utility involved in this case was a steamship company, which asserted, among other objections to the tax, that it violated the Import-Export Clause. The Circuit Court of Appeals of the United States for the Ninth Circuit held that the tax had too remote and indirect an effect upon im-

ports and exports to be an unconstitutional impost or duty. The Court said: (p. 419)

> "It is next contended that the fees are an unconstitutional burden on imports and exports. Article 1, section 9, of the Constitution, provides that: 'No tax or Duty shall be laid on Articles exported from any State.' Article 1, section 10, provides: 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws.' Appellant says that these clauses 'forbid not only property taxes but any fees, charges or occupation taxes which in substance and effect burden imports or exports.' See Angle-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218, 227, 53 S.Ct. 373, 375, 77 L. Ed. 710. Assuming, without deciding, that the clauses are applicable to a Territory, we think such a rule has no application here. The fees are not laid on the property imported or exported, on the proceeds thereof, or on the privilege of importing or exporting. The fact that appellant must pay a fee based on receipts from transporting articles imported and exported by others, has only an indirect and remote effect, if any, on the imports and exports."

This decision of the Circuit Court of Appeals was affirmed by the Supreme Court of the United States in an opinion reported at 305 U.S. 306, 83 L. Ed. 189. Apparently, the Import-Export Clause argument was not pursued in the Supreme Court because Mr. Justice Black in sustaining the constitutionality of the tax discussed only the Commerce Clause.

In a number of cases the Supreme Court has sustained a tax which affects imports or exports as directly as does

the Maryland gross receipts tax on railroads. An ad valorem property tax upon vessels engaged in foreign trade has consistently been sustained in spite of the fact that it affects imports and exports as directly, or more so, than the Maryland tax upon railroads. *The Wheeling, Parkersburg & Cincinnati Transportation Co. v. Wheeling,* 1879, 98 U.S. 273, 25 L. Ed. 412; *Southern Pacific Company v. Kentucky,* 1908, 222 U.S. 63, 56 L. Ed. 96. In *New York v. Wells,* 1908, 208 U.S. 14, 52 L. Ed. 370, the Court sustained the assessment against an importer of a franchise tax on capital employed in the business where such capital included cash in hand or in bank and the amount receivable upon bills and accounts payable, although such cash and receivables resulted from sales of imported goods in the original package. In *Peck & Co. v. Lowe,* 1918, 247 U.S. 165, 62 L. Ed. 1049, the Court sustained the levying of the federal income tax upon income earned by a domestic corporation from shipping goods to foreign countries. The Court pointed out (247 U.S. 175) that "at most, exportation is affected only indirectly and remotely". In *Matson Navigation Co. v. State Board,* 1936, 297 U.S. 411, 80 L. Ed. 791. the Supreme Court unanimously sustained a California franchise tax computed at the rate of four percent (4%) of net income for the preceding year. The taxpayer was a steamship company engaged in intrastate, interstate and foreign commerce. The tax commissioner attributed to California 22.2% of the Company's net income from interstate and foreign commerce and included that amount in the computation of the tax. The Import-Export Clause was not expressly raised in the *Matson case* probably because of *Peck & Co. v. Lowe, supra,* in which the Court had sustained the levy of the federal income tax upon a person in the export business.

While the taxes and the situations involved in the *Wheeling, Wells, Peck* and *Matson* cases may be distinguished from the Maryland gross receipts tax upon railroads, these decisions furnish examples of a tax being sustained in spite of the fact that it indirectly affects imports and ex-

ports. We believe that the Maryland tax is in the same category.

We are unable to agree with counsel for the railroads that the Supreme Court by its decisions in the *Richfield Oil* and *Joseph* cases has indicated that a gross receipts tax such as the Maryland tax is unconstitutional under the Import-Export Clause. The *Richfield Oil* case was a sales tax case and the tax was in substance a direct tax on the article exported. While the *Joseph* case involved a gross receipts tax, it was decided under the Commerce Clause. Counsel for the railroads argue that because the five justices who formed the majority opinion in the *Joseph* case concurred with the Import-Export opinion of Messrs. Justice Douglas and Rutledge in the *Richfield Oil* case, the *Joseph* case should be regarded in effect as a seven to two decision invalidating a gross receipts tax under the Import-Export Clause. It may be argued with greater force that the failure of Mr. Justice Douglas' Import-Export argument to prevail in the *Joseph* case demonstrates that a majority of the Court is of the opinion that such a gross receipts tax does not violate that clause of the Constitution.

Until the Supreme Court indicates with certainty that the Import-Export Clause prohibits a State to include in the admeasurement of a franchise tax measured by gross receipts, revenues from the transportation of goods in the process of importation or exportation, it is our duty to advise you that the Maryland tax as presently assessed is constitutional. We are fully in accord with Professor Powell's warning that "would-be prophets must remember, however, that in addition to logic, judgment and principle they must reckon with personalities". 60 Harv. L. Rev. 749. Nevertheless, we are of the opinion that should the railroads see fit to pursue this question to the Supreme Court, the State will prevail and your present method of assessing the tax will be sustained.

HALL HAMMOND, *Attorney General.*

RICHARD W. EMORY, *Deputy Attorney General.*

TAXATION—SALES TAX—PURCHASES MADE BY NON-PROFIT EDUCATIONAL INSTITUTION FREE OF TAX.

November 25, 1947.

Mr. Walter E. Kennedy, Chief,
Retail Sales Tax Division.

Your letter of October 24, 1947, asks whether the American Journal of Physiology is a "person operating a non-profit * * * charitable, scientific, literary or educational institution or organization situated in this State" within the intendment of Section 261 (i) of Article 81 of the Annotated Code of Maryland (1939 Edition), as enacted by Chapter 281 of the Acts of 1947.

The American Journal of Physiology is published by the American Physiological Society. This Society was founded in 1887 and was incorporated in 1923 under the laws of the State of Missouri. Its purpose was and is to promote and advance physiology and facilitate personal intercourse between American physiologists and to publish and distribute physiological literature.

The profit, if any, which arises from the publication of the American Journal of Physiology is used for the betterment of such other educational or scientific purposes as may come within the corporate powers of the American Physiological Society. No part of this income enures to the benefit of any private shareholder or individual.

In our opinion, the American Journal of Physiology meets the test required by Section 261 (i) of Article 81, *supra,* and that as a result it should receive an appropriate exemption certificate.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—NO TAX PAYABLE ON CHARITABLE BEQUEST MADE BEFORE 1943.

December 18, 1947.

Mr. J. Walter Grumbine,
Register of Wills for Carroll County.

Your letter of October 15, 1947, asks whether any inheritance taxes are due from the estate of Harvey A. Stone or from the estate of Lizzie I. Stone.

From your letter, we understand that Mr. Stone, a resident of Carroll County, died testate on November 18, 1934. By his will, the testator provided that after the payment of his "just debts and funeral expenses, including the erection of a suitable and appropriate tombstone over my grave" the estate should go to his wife, for life, and thereafter to "Western Maryland College, a body corporate of the State of Maryland . . . on condition that the said College pay all the expenses of a suitable funeral for my said wife and of an appropriate tombstone over her grave to be selected by said College".

On May 17, 1935, Lizzie I. Stone, the widow of the decedent and the executrix of his estate, filed a real estate inventory in the Orphans' Court for Carroll County which valued the decedent's real property at $11,000. On the same day, Mrs. Stone executed a deed by which she conveyed her life estate in and to a part of the aforesaid real estate (said part being appraised at $7,000) to Western Maryland College, the deed being recorded on June 26, 1947. A short time thereafter, the decedent's widow entered into an agreement with Western Maryland College which provided that the College, in consideration for the conveyance set forth in the deed dated May 17, 1935, obligated itself to pay to Mrs. Stone a monthly annuity of $60 during her lifetime.

The First Administration Account of Harvey A. Stone was settled on August 26, 1935. By this account, the resi-

due of the decedent's personal estate, which amounted to $3,040, was distributed to Lizzie I. Stone "for and during the term of her natural life".

Lizzie I. Stone died on October 3, 1947. In view of the fact that no inheritance taxes have ever been collected from either the estate of Harvey A. Stone or from the estate of his widow on the dispositions described above, you ask whether such taxes are now due.

It is clear that no inheritance taxes were due by reason of the disposition made to Lizzie I. Stone under the terms of her husband's will since at the time of his death there was no lineal inheritance tax in effect in this State. However, the incidence of the tax did follow the gift in remainder, there being no exemption for bequests made to a charitable institution in 1934. This tax could have been paid, at the election of the remainderman, either at the time the administration account was filed (Sec. 137 of Article 81 of the Annotated Code of Maryland (1924 Ed.) as amended) or upon the termination of the preceding life estate (Sec. 138 of Article 81 of the Annotated Code of Maryland (1924 Ed.) as amended).

The death of Mrs. Stone on October 3, 1947, terminated her life estate in all of the property which comprised the residual estate of Harvey A. Stone, with the exception of the interest in the real estate theretofore conveyed by her to Western Maryland College. Since the remainderman elected to postpone the payment of the tax on the disposition to be received by it until after the termination of the preceding estate, it would, under ordinary circumstances, be liable for a tax of seven and one-half percent upon the entire value of the estate which shifted upon the termination of the life interest.

In the present case, however, the general rules outlined above are inapplicable, the reason being that the remainderman is a non-profit educational institution. Chapter 964 of the Acts of 1943 which expressly exempts bequests made to such institutions specifically provides that "the exemp-

tions granted by this Act shall apply, in addition to property passing at death hereafter, to property passing or passed at deaths which occurred before the passage of this Act, in those instances where the property has not yet been distributed or where the inheritance tax previously imposed has not been paid". Although the remainder interests granted to Western Maryland College under the will of Harvey A. Stone had vested prior to the passage of Chapter 964, *supra,* we are of the opinion that the inheritance tax incident to the passage of that interest has been forgiven by the Legislature and that no such tax is now due and payable—*Safe Deposit and Trust Company v. Bouse,* Superior Court of Baltimore City, Daily Record, July 19, 1943.

The same result must follow, in our opinion, with respect to the portion of the real property left by Mr. Stone to his wife for life and later conveyed by the life tenant to Western Maryland College in consideration for the monthly annuity. Assuming that this conveyance accelerated the point of time at which the remainderman was responsible to file an inventory and report the tax due—24 Opinions of the Attorney General 921—and further assuming that the collection of this tax, in the ordinary case, would not be barred by limitations—Opinion to Walter C. Clarke, Register of Wills for Montgomery County, Daily Record, June 17, 1947,—the fact remains that all taxes previously imposed on dispositions made to charities prior to May 6, 1943, were forgiven by Chapter 964 of the Acts of 1943—*Safe Deposit and Trust Company v. Bouse, supra.*

It is our opinion in the present case, therefore, that no inheritance taxes are now due from the estate of Harvey A Stone or from the estate of Lizzie I. Stone on the dispositions made by these persons to Western Maryland College.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—RECORDATION TAX—SEPARATION AGREEMENT—RECORDATION TAX APPLIES TO PERSONAL PROPERTY PASSING UNDER SEPARATION AGREEMENTS.

December 18, 1947.

Mr. Ellis C. Wachter, Clerk,
Circuit Court for Frederick County.

You have asked whether, in our opinion, a separation agreement which has been offered for record in your office is subject to the tax imposed by Section 220, et seq., of Article 81 of the Annotated Code of Maryland (1943 Supp.), as amended by Chapter 914 of the Acts of 1947.

Under the instrument in question, the husband, so far as is here material, has agreed (1) to convey to his wife certain real property situated in Frederick, Maryland; (2) that all of the personal property belonging to both parties and located in a dwelling in Frederick, Maryland, shall (with certain minor exceptions) become the property of the wife; (3) to pay to his wife $10,698.94 in consideration of an assignment, to be made by his wife, of her interest in a chattel mortgage now jointly owned by the parties. In consideration for the undertakings of the husband (including those outlined above) the wife has agreed (1) to release her inchoate right of dower in and to any property which the husband may hereafter acquire; and (2) to assign to her husband all of her interest in and to a chattel mortgage now jointly owned by the parties.

Section 220 of Article 81, *supra,* imposes a tax upon every instrument of writing conveying title to real and personal property, or creating liens or encumbrances upon real or personal property. The term "instruments of writing" is specifically defined in the Act to include "agreements".

In the present case, the separation agreement conveyed no title to real estate other than the release of a dower interest and this, we have held, is insufficient to incur recordation tax liability.—23 Opinions of the Attorney General 588. Moreover, while the instrument in question might

be considered as an assignment of a mortgage, such an act is without the ambit of the recordation tax. However, the agreement does purport to convey title to certain personal property, i.e., "all of the personal property belonging to both parties and located in the dwelling" at Frederick. In our opinion, this transfer requires the imposition of the recordation tax.

At common law, all personal property of a wife was, in legal contemplation, owned by the husband. *Bayne v. Edelen,* 62 Md. 100 (1884). That this rule has been changed by the enactment of Section 4 of Article 45 of the Annotated Code of Maryland (1939 Ed.) is well settled. *Sezzin v. Stark,* — Md. —, 49 A (2d) 742, 750 (1946). In the present case, therefore, the tax would apply only to the fair market value of the personal property owned by the husband and transferred under the terms of the separation agreement to his wife. Cf. 23 Opinions of the Attorney General 624.

Because it is difficult to determine the ownership of property of this description used during the existence of the marriage relationship, it has been held resort may be had to rebuttable presumptions. Thus, for the purposes of the Federal Estate Tax, it has been presumed that all of such property belonged to the husband (T. D. 2529; unpublished ruling) unless the widow can sustain the burden of proof to the contrary, Montgomery, Federal Taxes, Estates, Trusts and Gifts (1947-48) p. 635. In the present case, however, we think that equity and fairness requires us to go no further than to hold that you would be justified in assuming that one-half of the property in question was owned by the husband on the date that the transfer was made.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION — INHERITANCE TAX — AGREEMENTS FIXING VALUE OF ASSETS—TAX IMPOSED ON APPRAISED VALUE OF ESTATE ASSETS RATHER THAN AGREED VALUE.

December 18, 1947.

Mrs. Vernie R. Smouse,
Register of Wills for Garrett County.

Your letter of October 9, 1947, and enclosures reveal that Cora V. Rumbaugh died testate on July 2, 1946. By her last will and testament, the decedent directed "an appraisement be made of my property"; that the decedent's daughter, Susan Custer, "be permitted to take the property in Friendsville, in which I now reside, at the appraised value thereof, if she should desire to do so"; and that the remaining property of the testator "be sold by my executor . . . and that the sum total received from the sale of any property in addition to the appraised value of any property not sold, shall be, together with any money of which I may be possessed, my total estate". The will further provided that the sum total of the decedent's estate "be divided into four equal parts" and that three shares thereof be distributed equally to three of the testator's children, the remaining share to be given to two of her grandchildren.

On October 7, 1946, inventories of both the decedent's real and personal property were filed. These inventories revealed, among other things, that the decedent, at the time of her death, owned twenty-one shares of the capital stock of the First National Bank of Friendsville, Maryland, which were appraised at $200 a share, and that the real estate owned by the decedent (and left under the terms of her will to Susan Custer) was appraised at $3,200.

Subsequently, a suit was filed in the Circuit Court for Garrett County which asked, among other things, "that

appraisers may be appointed by this Court to appraise the property owned by the said Cora V. Rumbaugh at the time of her death". Thereafter, an agreement was entered into between the parties to the aforesaid proceedings which (1) "remanded to the Orphans' Court for settlement" the entire proceedings, (2) reduced the appraised value of the bank stock from $200 a share (as shown on the inventory) to $175 a share, and (3) increased the appraised value of the real estate from $3,200 (as shown on the inventory) to $3500. No reappraisal of the aforesaid assets has been made either by the Orphans' Court for Garrett County or under the specific direction of the Circuit Court for Garrett County.

You ask whether, in calculating both the inheritance tax and the tax on commissions, your office should be governed by the value of the decedent's property as shown on the inventory filed in the administration proceeding or the compromise agreement filed in the Circuit Court for Garrett County.

Section 118 of Article 81 of the Annotated Code of Maryland (1943 Supp.) provides that where any species of property (other than money or real estate) shall be subject to the inheritance tax, "the tax shall be paid on the appraised value thereof as filed in the office of the Register of Wills" unless the appraisement is modified by the Orphans' Court appointing such appraisers "for good cause shown". In the ordinary case, the appraised value of such assets cannot be changed by subsequent events—25 Opinions of the Attorney General 634—nor by agreements entered into by parties in interest, unless such events or agreements warrant a reappraisement by the Orphans' Court. Since that is not the case here, we hold that the inheritance tax should be based on the value of the bank stock as shown on the filed inventory rather than on the value stated in the settlement agreement.

Section 120 of Article 81 of the Annotated Code of Maryland (1943 Supp.) provides that the inheritance tax "shall be paid on the appraised value of said real estate as shown

in the inventory thereof filed in the office of the Register of Wills of the county in which administration is granted". Exception to this general rule is made where the real estate is sold during administration for certain purposes, but this exception is not applicable here. We find no statutory authority, therefore, which would permit the inheritance tax in this case to be calculated on any value other than that shown on the filed inventory.

The tax on commissions imposed by Sections 104-108 of Article 81 of the Annotated Code of Maryland (1939 Ed.) is measured by the entire taxable estate.—30 Opinions of the Attorney General 250; 26 Opinions of the Attorney General 416. In this case it is clear, we think, that this estate is comprised of the assets owned by the decedent as appraised in the inventories filed with the Orphans' Court. We hold, therefore, that the tax on commissions is to be calculated on the basis of the appraisements made in the administration of the decedent's estate rather than upon the stipulated value of the assets of that estate as shown in the agreement filed in the equity proceeding.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—SEPARATE VALUATION OF ESTATES—VESTING OF SECONDARY LIFE ESTATE REQUIRES IMPOSITION OF TAX.

December 23, 1947.

Mr. Frisby N. Willson,
Register of Wills for Kent County.

Your letter of November 19, 1947, states that Allan A. Harris, a resident of Kent County, died testate on August 13, 1947. By his will, the decedent left his estate in trust,

upon the condition that the trust income should be paid to his widow for life. At the death of the life tenant, the income from one-half of the trust estate was to be paid to the decedent's daughter-in-law, Margaret P. Harris, for life, or until her death or remarriage. The trust further provided that if the secondary life tenant should predecease the life tenant, her interest should pass to her children absolutely. The trust also provided that at the death of the life tenant, the income from the second one-half of the trust estate should go to the decedent's grandchildren. When the respective grandchildren attain the age of 25 years, the trust is to terminate and their shares are to be paid to each absolutely.

Upon the death of Allan A. Harris, a direct inheritance tax on the net value of the decedent's estate was paid. This calculation of the tax, however, failed to take into account the value of the secondary life estate. It now appears that the prime life tenant has died, and that the secondary life estate has vested in possession. Under these circumstances, you ask whether any additional inheritance taxes are now due.

The question presented here has been the subject of exhaustive analysis by this office. Cf. 30 Opinions of the Attorney General 154; 31 Opinions of the Attorney General 228. The established rule was stated as follows in 30 Opinions of the Attorney General 154, at page 156:

> "As we read the statutes the beneficiaries have three alternatives. The life estate of the son must be valued now, in any event. When this has been done the remainderman can secure the benefits of Section 125 by paying the tax on the proportion of the estate remaining after deduction of the value placed on the life interest to the son, without reference to or credit for tax on the contingent life estate of the son's wife. *If this is done and the contingent interest becomes vested at the death of the son a tax on that life estate can be paid at that*

time without credit for the interests previously taxed. On the other hand, both the son and his wife can have their respective life estates valued at this time and the remainderman can pay the tax on the proportion of the estate remaining after the deduction of the value placed on each of the two life estates. It would seem, under the rather rigid requirements of Section 124 which compel valuation in accordance with the equity rules of the Supreme Bench of Baltimore City, that it would be difficult to accurately reflect the present obviously speculative and uncertain worth of the wife's life interest and it would apparently be necessary to value that interest as if it were vesting in possession at this time." (emphasis supplied)

In the present case, we hold that since the secondary life estate has never been valued and since no inheritance taxes have ever been paid with respect thereto, such interest must now be valued in accordance with Section 125 of Article 81 of the Annotated Code of Maryland (1939 Ed.) and the tax paid at the collateral rates. Moreover, in computing the tax now due, no credit can be given for the interest previously valued or the taxes previoulsy paid.

HALL HAMMOND, *Attorney General.*

RICHARD W. CASE, *Asst. Attorney General.*

TIME

TIME—COUNTY COMMISSIONERS—COUNTY COMMISSIONERS ARE AUTHORIZED TO ADOPT DAYLIGHT SAVING TIME.

May 5, 1947.

Mr. Charles E. Hogg,
Counsel to the County Commissioners
of Howard County.

You have asked us whether the County Commissioners of Howard County have power in their discretion to "adopt daylight saving time". Your question arises because Baltimore City, by amendment to its charter, has adopted daylight saving time for the summer months so far as purely municipal affairs are concerned, as have Anne Arundel County and Baltimore County, under Acts of the General Assembly of 1947 applicable to these Counties. It is suggested by you that Chapter 448 of the Acts of 1947 grants power to local political subdivisions sufficient to permit the adoption by them of daylight saving time.

It is our view that the County Commissioners of Howard County have the authority in their discretion to adopt daylight saving time so as to make it the standard in accordance with which its local offices and purely municipal transactions shall be operated and regulated without regard to Chapter 448. It would have to be conceded that the standard of time provided by Article 94, Section 1 of the Code would govern and control all matters except those having to do solely with local governmental action and procedures, save for the provisions of that Chapter. However, by that enactment the Legislature of 1947 provided that, whenever any political subdivision shall adopt daylight saving time, such time so fixed locally shall be standard under the provisions of the State-wide Act, and shall prevail in that com-

munity as to all activities governed by State-wide law. We reach the conclusion, therefore, that by a combination of the inherent right to fix locally the time that shall be observed for local matters and the application of such local time, so fixed, to State-wide activities under the authority of Chapter 448, that daylight saving time can be the prevailing and effective time for Howard County.

As a legal as well as a practical matter, the time which is effective in any locality has necessarily and obviously been treated as a local matter. For practical convenience, so as to eliminate from calculation the slight variables involved in determining true sun time, an arbitrary measure has been adopted known as "mean solar time." This is defined by the motion of a fictitious sun known as "the mean sun", which is imagined to move with perfect uniformity, being sometimes behind the true sun and sometimes in advance of it. Because of the fact that mean solar time naturally changes with the longitude, there was until 1883 no general standard time or time zones in the United States; on the contrary there were some 77 different times generally observed in various localities throughout the country. These times were fixed by local sun time or by the time used in a nearby large city or by railroad time. For example, there was one time observed in Baltimore City, and another in Hagerstown, which used Philadelphia time for reasons of convenience. In 1883 the railroads agreed to a division of the country into four time zones with a uniform time throughout each zone. By common acceptance, on the day that the new standard time was accepted by the railroads the country as a whole adopted it. This was done generally as a matter of acceptation and usage and not by force of any law.

The Baltimore Sun on November 19, 1883 carried a front page story of how all the clocks in Baltimore at noon of the previous day had been moved up 6 minutes and 28 seconds to conform to the new standard time. The time so adopted had no legal force or sanction except public opin-

ion and common usage. In December, 1883 Baltimore City, by resolution reciting the action of the railroads and stating that local time should "be accommodated to the interests of the people whom it is designed to direct", made local time officially conform to the popularly adopted uniform standard time. See Article 1, Section 89 of the Baltimore City Code of 1927.

In 1884 the State adopted Article 94, Section 1 of the Code to provide that standard time throughout the State "shall be that of the 75th meridian of the longitude west from Greenwich, by which all courts, banking institutions and public offices and all legal or official proceedings shall be regulated." In an opinion in 27 Opinions of the Attorney General 49, we held that this language operated to make the standard time of the State the time set by the 1942 Federal Act creating daylight saving time throughout the country. Moreover, during the summer of 1918 and 1919 daylight saving time was generally acquiesced in in the State by those not compelled by federal law to follow it. The federal laws on the subject then and now apply only to common carriers in interstate and foreign commerce, officials and departments of the United States Government, and all acts done by persons under federal statutes, orders, rules and regulations. They have no compulsory application to any other class of acts or proceedings and the Supreme Court has held in the case of *Massachusetts State Grange v. Denton*, 272 U.S. 525, that those laws did not supersede or inhibit State laws fixing different standards for State purposes.

All this has been recited to show that the establishment of time, as far as acts and procedures within the jurisdiction of the governmental subdivision involved are concerned, is a matter of local regulation or local practice. The federal statutes so treat it and all decisions and legislative enactments which we have encountered recognize this principle. This is illustrated by the Baltimore City Ordinance of 1883 and a similar Ordinance of 1922 (No. 701, approved

April 1st), and the cases hereinafter cited. The 1922 Ordinance read as follows:

> "The official time of the City of Baltimore shall conform to Standard time based upon the time of the seventy-fifth meridian, except, that from 2 A. M. of the last Sunday in April until 2 A. M. of the last Sunday in August of the year 1922, the official time throughout the City of Baltimore shall be advanced one hour and all courts, public offices, legal and official proceedings, *in so far as the same are subject to, or under the control of the Mayor and the City Council of Baltimore,* shall be regulated thereby and all time shown by the public clocks shall agree therewith."

It was attacked in the Circuit Court No. 2 of Baltimore City and an injunction sought to prohibit it going into effect in the case of *Cohn v. Mayor and City Council.* Judge Stein dismissed the application for an injunction and the Court of Appeals dismissed an appeal. A similar ruling was made in the case of an Ordinance of the City of Pittsburgh, reported in the case of *Smith v. City of Pittsburgh,* Pa. Dist. Rep 454, in which the Court refused an injunction pointing out that the clocks of that City had been universally advanced one hour since the last Sunday in April, and that all theatres, public buildings and activities generally were following advance time. The Court said:

> "There is nothing unlawful or in violation of the Act of Assembly fixing the standard time for any individual or institution or the public generally to move back their activities one hour and to set their clocks forward accordingly. Whenever, however, any specific hour of the day is fixed for the performance of any legal duty, it must, of course, be taken to be eastern standard time."

This was the time fixed by the State-wide law of Pennsylvania.

A similar holding was made in *Cist v. City of Cincinnati.* Ohio 1920, 129 N.E. 595. The City of Cincinnati provided advanced time for its local offices and purely municipal transactions, and the court held that its power to do so was clear, pointing out that the State-wide law continued to govern and control all matters except those having to do solely with local actions and procedures.

The situation is somewhat analogous to those legal areas of Federal and State inter-relation wherein the Federal Government has inherent power to take over and monopolize the making of law but has chosen not to enter or completely occupy the field. Then, the State may legislate. Here the State could undoubtedly pre-empt the field of time-setting, but not only has it not done so, in the light of legal and factual background, but by the passage of Chapter 448 has impliedly, at least, given a legislative approval to the old legal custom of local time-fixing and has said that time fixed locally will be official and binding for matters, things and acts as to which the State has set a standard.

The judicial holdings and statutes seem to make it plain to us that in the absence of Chapter 448 of the Acts of 1947, Howard County, by action of its County Commissioners, could adopt daylight saving time for the control and government of its local affairs. This being so it seems plain beyond the bounds of argument that Chapter 448 would make the time so adopted by Howard County standard time as that term is considered in the provisions of Article 94 of the Annotated Code of Maryland.

HALL HAMMOND, *Attorney General.*

TRIAL MAGISTRATES

TRIAL MAGISTRATES—SALARIES—COUNTY COMMISSIONERS MAY REDUCE TO THE STATUTORY MINIMUM THE SALARY OF THE TRIAL MAGISTRATE, SUCH REDUCTION NOT BEING APPLICABLE TO THE PERSON THEN IN OFFICE.

May 19, 1947.

Mr. Raymond L. Benson,
Westminster, Md.

You state that the County Commissioners of Carroll County had set the salary of the Trial Magistrate for Carroll County, sitting at Westminster, whose term ended April 30th last, at $2800.00 year, and ask if it is permissible, under the provisions of Article 52, Sections 100 and 103, for the Commissioners to set the salary at $2400.00 as the amount to be paid to you, who took that office as of May 1st.

Section 100 sets salaries for the various magistrates in the various counties. The Westminster Magistrate's salary is set in Section 100 at $2400.00 annually. Section 103 provides that "all salaries herein provided shall be considered minimum salaries and may be increased at any time by the County Commissioners from county funds". It is clear that the provisions of Section 103 are permissive only and do not require the payment of any amount larger than that established in Section 100 for the office involved. Of course, once a salary has been fixed as to an incumbent it cannot, under the constitutional provision, be increased or decreased during his term of office. I know of no constitutional or statutory bar to reducing the salary to the minimum required by Section 100 as far as a future holder of the office is concerned.

There seems to us to be no necessary implication that a permissive authority to increase does not allow a decrease

to the minimums below which the Legislature has said a county shall not go. We should hesitate to write into the law the requirement that a salary once fixed should forever after be the minimum for that particular office.

It is our view that the County Commissioners had the authority to set the salary for the position you now hold at $2400.00 per year, the minimum established by Section 100.

HALL HAMMOND, *Attorney General.*

The above opinion was affirmed in the case of *Tubman vs. Berwager*, No. 112, October Term, 1947.

TRIAL MAGISTRATES — PROBATED ACCOUNTS — PLAINTIFF MAY ACT THROUGH AN AGENT WHO IS NOT AN ATTORNEY AT LAW, IN FILING SUIT UNDER ARTICLE 35, SECTION 65 OF THE CODE.

August 15, 1947.

Dr. J. Fred Andreae,
Trial Magistrate.

We have your letter of August 11th in which you ask if "a layman has the privilege of using the 'Speedy Judgment Act' Article 35, Section 52-A, Acts 1937, Chapter 523."

The Act to which you refer is codified as Section 65 of Article 35 of the Code (1939 Ed.). It provides, in substance, that in any action ex contractu brought before a Justice of the Peace, if the plaintiff or his agent shall have filed at the time of bringing the action an itemized statement of the account and original contract, if any, between the parties, and affidavit setting out distinctly the cause of action and the sum claimed to be due, and the defendant shall have been served with a copy of the statement, the contract, and affidavit, and of the summons, that the plaintiff shall be entitled to a judgment for the amount so claimed with interest and costs, unless the defendant shall file within six days succeeding the return day an affidavit of defense

denying the right of the plaintiff as to the whole or some specified part of the claim, provided that a notice be given in the summons to the effect that judgment by default may be entered unless an affidavit of defense is filed within six days next succeeding the return day.

We find no provision in this Act limiting its use to cases in which attorneys appear for plaintiffs. The precise wording of the law is that the necessary papers be filed by "the plaintiff or his agent."

In *Rehm v. Cumberland Coal Co.*, 169 Md. 365, judgment was obtained against the defendent in the People's Court of Baltimore City in favor of the plaintiff which had instituted suit through a collection agency, as its agent. The contention advanced in that case was that the suit should have been instituted by an attorney at law and, in upholding the judgment, the Court of Appeals held that while a Justice of the Peace was a judicial officer, his office was entirely disassociated from the idea of a "court", and that the acts of the collection agency did not amount to the unlawful practice of law.

It is our opinion that a person, other than an attorney at law, including a collection agency, may act as the agent for a plaintiff in filing a suit under Section 65 of Article 35 of the Code.

Your inquiry and our answer are confined to the matter of filing suits and do not relate to the making of the required affidavits. The oaths are to be made by those who have personal knowledge of the facts recited in them and we presume that they are usually furnished by the plaintiffs themselves or persons in their employ.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

TRIAL MAGISTRATES—MAY SUSPEND SENTENCE AT TIME OF TRIAL BUT MAY NOT, IN THE ABSENCE OF STATUTE, REVOKE THE SUSPENSION AT A LATER DATE AND COMMIT THE OFFENDER TO PRISON.

September 2, 1947.

Mr. Harry B. Clark,

State's Attorney for Talbot County.

We have your letter in which you ask if the Trial Magistrate for Talbot County is authorized to suspend sentence and place a party on probation subject to the supervision of the Division of Parole and Probation.

Article 52, Section 94, of the Code, as amended by Chapter 16 of the Acts of 1941, provides, in part, that:

> "Trial Magistrates shall have and possess power to suspend sentence or costs or both sentence and costs in any case within their jurisdiction, provided that such suspension is made at the trial of the case and not after judgment has been pronounced."

While the power to suspend sentences is undoubtedly conferred by this statute, we know of no authority by which a Trial Magistrate may place a person on probation under the supervision of the Division of Parole and Probation. Section 86 of Article 41 of the Code provides that whenever the Circuit Court for any County or the Criminal Court of Baltimore shall suspend the sentence of any person convicted of crime and shall direct such person to continue under the supervision of the Director of Parole and Probation, it shall be the duty of the Director to supervise the conduct of such person. By its own terms, the application of this statute is limited to cases in the Circuit Courts for the Counties and the Criminal Court of Baltimore.

You ask the further question that if a Trial Magistrate imposes a fine and prison term upon a person convicted by

him and suspends the latter upon payment of the fine and the costs and subsequently the person is brought before the Magistrate for another infraction of the law, may the Magistrate rescind the suspension in the previous case and require that time to be served in addition to the punishment imposed for the second offense. By the enactment of Chapter 629 of the Acts of 1941, Section 14 of Article 52 of the Code was repealed and three new Sections, known as Sections 14, 14A and 14B, were added to that Article. Section 14 empowered Justices of the Peace of Baltimore City, except Traffic Court Magistrates, to suspend sentence or costs or both sentence and costs generally or for a definite time, provided such suspension was made at the time of trial and not after judgment was pronounced. Said Justices were authorized to make such orders and to impose such terms as to costs, recognizance for appearance or matters relating to residence or conduct as they deemed proper. Section 14A authorized said Justices of the Peace to order the payment of fines and costs in instalments, and Section 14B authorized said Justices to suspend the imposition of sentence, place persons on probation before commitment, and to impose such conditions upon the sentences and probation as they deemed proper. They were authorized to alter and supplement said conditions, provided that the period of probation and suspension did not exceed two years from the date of such suspension or probation. They were authorized to terminate the period of probation for violation of the conditions thereof and to issue a warrant requiring the probationer to be brought before them to answer charges involving such violations and to revoke such probation or suspension, and to impose any sentence which may have been imposed originally for the crime with which such person was charged. By its own terms, these Sections were made applicable only to Justices of the Peace in and for Baltimore City, except Traffic Court Magistrates. However, Chapter 711 of the Acts of 1947 extended their application to Justices of the Peace for Prince George's County. They are inapplicable elsewhere.

In 27 Opinions of the Attorney General 292, we ruled that under the Act of 1941, a Justice of the Peace of Baltimore City having found a person guilty and committed him to jail for failure to pay a fine, was not authorized thereafter to place him on probation. In the same opinion, it was stated that a Justice of the Peace may not reconsider his judgment and order a fine paid on the instalment plan after he had committed the accused to jail for nonpayment of the fine.

It is well settled that a Trial Magistrate, in the absence of statute, has no authority to modify a judgment rendered by him. 24 Opinions of the Attorney General 438, 21 Opinions of the Attorney General 580, 18 Opinions of the Attorney General 318.

That portion of Section 94 of Article 52 authorizing Trial Magistrates to suspend sentences is contained, with additional language, in Section 14. If the power bestowed by Section 14 upon the Justices of the Peace who are mentioned in it were sufficient to authorize them to place a person on probation, to modify the terms and conditions imposed, and to revoke the suspension or probation and commit the offender to jail, then it seems to us that Section 14B is an unnecessary addition to the Code. It is apparent, therefore, that the mere authority to suspend a sentence does not include the authority to revoke that suspension at a subsequent time. By the very enactment of Section 14B, we think it may be said that the General Assembly did not consider that those minor judicial officers possessed the authority which Section 14B was designed to confer upon them. It is our view that in the absence of statute a Trial Magistrate may not reopen a case after judgment has been entered and that if the judgment so entered has been suspended, lacking such statutory authorization, he may not revoke the suspension and require the execution of the sentence. If our conclusion were otherwise, the result would be a declaration on our part that Section 14B of Article 52 of the Code added nothing to the powers conferred by Section 14.

In 20 Opinions of the Attorney General 424, we dealt with the question of the authority of a Justice of the Peace to strike out a suspension of sentence under the provisions of Chapter 175 of the Acts of 1933, codified as Section 14 of Article 52 (1939 Code). By that Act, Justices of the Peace were invested with "power to suspend, in their discretion and with approval of the State's Attorney, the sentence of any person, who has been convicted before them and has not appealed from said conviction, and to put said person on parole". This provision was repealed by Chapter 629 of the Acts of 1941, and it is our view that the conclusions stated in that opinion, dealing with a specific Act of the General Assembly, are inapplicable to the portion of Section 94 of Article 52 above quoted. The present law deals with the suspension of sentences and does not relate to paroles. To the effect that suspension of sentence and parole are not equivalent terms, see *Crooks v. Sanders,* ——— S.C. ———, 115 S.E. 750, 28 A.L.R. 940. See also Article 41, Section 74(e).

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

UNIVERSITY OF MARYLAND

UNIVERSITY OF MARYLAND AND MARYLAND UNIVERSITY HOSPITAL NOT SUBJECT TO NATIONAL LABOR RELATIONS ACT.

April 18, 1947.

Dr. H. C. Byrd, President,
University of Maryland.

In your recent letter, you ask us if the University of Maryland and the University Hospital are exempt from the provisions of the National Labor Relations Act.

Section 2 of the Act, as codified by Chapter 7, Section 152 Title 29, United States Code Annotated, provides:

> "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States or any State, or any political sub-division thereof, * * *."

The employees of the University and the Hospital fall within the category of employees of the State of Maryland. They are paid from State funds and are, or may become, members of the State Employees' Retirement System or the Teachers' Retirement System of the State of Maryland.

It is also clear from the various Acts of the Legislature affecting the University of Maryland that the college is a State institution. Chapter 128 of the Acts of 1914 authorized the foreclosure of a mortgage by the State of Maryland on certain lands of the Maryland Agricultural College

(now the University of Maryland), and in that Act the following recital is made:

> "The said college is maintained and carried on wholly and entirely by State appropriations and by appropriations coming to the college through the State from the Federal government, and it is desired that the title to all its property be completely vested in the State, *so that it become entirely a State institution.* * * *."

The Courts have recognized this principle on several occasions. In *University of Maryland v. Murray,* 169 Md. 478, the Court of Appeals, in discussing another question involving the University, made this observation:

> "That the corporation thus created (the University of Maryland) is an instrumentality or agency of this State is plain, and we do not understand it to be disputed."

See also *University of Maryland v. Williams,* 9 G. & J. 365, *and Appeal Tax Court v. University of Maryland,* 50 Md. 457.

In view of the above, we hold that the University of Maryland and the University Hospital are exempt from the provisions of the National Labor Relations Act.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

UNIVERSITY OF MARYLAND—BOARD OF REGENTS—THE FARM ORGANIZATION, WHOSE REPRESENTATIVE HAS CEASED TO BE A MEMBER OF THE BOARD, MAY SUBMIT NOMINEES FOR APPOINTMENT TO FILL THE VACANCY.

October 23, 1947.

Hon. Wm. Preston Lane, Jr.
Governor of Maryland.

We have your letter of October 10, with which you enclosed a letter dated October 3, 1947, from Mr. J. Herbert Snyder, Secretary of the Maryland State Grange.

It appears that there is a vacancy on the Board of Regents of the University of Maryland, which vacancy was occasioned by the death of Mr. Thomas Roy Brookes. In the letter addressed to you by the Secretary of the Maryland State Grange, that organization has undertaken to nominate three persons, one of whom it is evidently expected that you will appoint to the vacancy occasioned by Mr. Brookes' death. The question raised by you is whether the nominees are to be submitted by the Grange alone or by the Grange and by the Maryland Farm Bureau.

Chapter 925 of the Acts of 1941 repealed and reenacted, with amendments, Section 235 of Article 77 of the Annotated Code. By this amendment, the membership of the Board of Regents was increased from nine to eleven members. The Act provides, in part:

> "That the two additional members first appointed and their successors shall be selected from lists of nominees, which shall be submitted to the Governor by the Maryland State Grange and the Maryland Farm Bureau, respectively, and shall contain the names of at least two nominees for each office to be filled."

While the Act of 1941 was considered by us in two opinions, reported in 30 Opinions of the Attorney General 271

and 28 Opinions of the Attorney General 52, neither of those involved the question with which you are now concerned.

It is our opinion that the purpose and intent of the amendment made by the Act of 1941 was to give representation on the Board of Regents of the University of Maryland to each of the organizations designated; namely, the Maryland State Grange and the Maryland Farm Bureau, and to that end the two organizations were permitted to submit separate lists each containing at least two nominees for the appointments to be made. If Mr. Brookes was nominated and appointed as a representative of the Maryland State Grange, then, in our opinion, you may select a successor from a list submitted by the Grange, without calling upon the Farm Bureau for nominees.

HALL HAMMOND, *Attorney General.*

WATER POLLUTION CONTROL COMMISSION

WATER POLLUTION CONTROL COMMISSION — COMMISSION DOES NOT HAVE POWER TO DEMAND THAT ALL PERSONS SUBMIT PLANS FOR TREATMENT FACILITIES FOR COMMISSION'S APPROVAL PRIOR TO DISCHARGE UNLESS IT POSSESSES FACTS THAT LEAD COMMISSION TO BELIEVE POLLUTION WILL RESULT.

November 21, 1947.

Mr. Paul W. McKee, Executive Secretary,
Water Pollution Control Commission.

In your letter of November 6th, you put the following question:

> "Does the Maryland Water Pollution Control Commission have the power, under Chapter 697, Acts of 1947, to demand that all persons submit plans for treatment facilities to the Commission for their approval before any discharges can be made into the waters of the State?"

Your question is so broadly stated that the answer must be in the negative. Nowhere in Chapter 697 is such broad authority given to the Commission. Section 33 does provide, in part, as follows:

> "Every person the Commission has reason to believe is causing or *is about to be causing* pollution shall furnish to the Commission all pertinent information required by it in the discharge of its duties under this sub-title."

Under this portion of the law, the pertinent information which the Commission may require would include plans

for treatment facilities if the erection or enlargement of some plant or industry leads the Commission to reasonably believe that pollution will be caused by the plant or its operation. In other words, the Commission cannot automatically require submission of plans, but may do so only when facts or knowledge lead it to believe that pollution results or is about to result from the operation, actual or potential, of some undertaking.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

WORKMEN'S COMPENSATION LAW

WORKMEN'S COMPENSATION LAW—STATE EMPLOYEES, ENGAGED IN EXTRA-HAZARDOUS OCCUPATIONS, ARE COVERED BY THE WORKMEN'S COMPENSATION LAW.

August 19, 1947.

Mr. Joseph O'C. McCusker,
Secretary, Board of Public Works.

We have your letter of August 16th in which you state that the Employment Commissioner advised the Board of Public Works that this Department had rendered an opinion to the effect that State employees, suffering injuries in the course of their work, were not covered by any legislation providing for the payment of compensation. Your letter states further that at a meeting of the Board on August 13th last it was reported that in three cases the State Industrial Accident Commission had awarded compensation for injuries, with instructions to the institutions to make payment. You ask for a copy of the opinion referred to.

Apparently it is one which we rendered to the Employment Commissioner on July 23, 1946, and concerned Mr. DeLancey B. Scrivner, Secretary of the State Industrial Accident Commission. Mr. Scrivner claimed that he was injured while placing a drawer in a filing cabinet. Former Attorney General Curran advised the Employment Commissioner that, under Merit System Rule 50, the State Industrial Accident Commission had jurisdiction of only those employees engaged in extra-hazardous employment within the meaning of Article 101, and that as to all other employees, the Employment Commissioner had jurisdiction and that there was nothing in Article 64A of the Code to justify the payment of the surgical and medical expenses of a State employee, whether injured in the line of duty or otherwise. We enclose a copy of the opinion.

That opinion is not to be understood as holding that there is no legislation under which compensation may be paid to injured State employees. It is expressly provided by Section 46 of Article 101 of the Code that whenever the State, County, City or any municipality shall engage in any extra-hazardous work, within the meaning of that Article, whether for pecuniary gain or otherwise, in which workmen are employed for wages, that Article shall be applicable thereto. This provision was included as a part of the original Workmen's Compensation law, enacted by Chapter 800 of the Acts of 1914.

In 13 Opinions of the Attorney General 293, we said that:

> ". . . the liability imposed by the Workmen's Compensation Law is clearly applicable against departments of the State Government under the provisions of Section 35 of the Act, and it would seem the duty of every State department employing workmen in extra-hazardous employments to make provision for the prompt payment of such awards as may be passed by the State Industrial Accident Commission."

See Also 23 Opinions of the Attorney General 670, and 25 Opinions of the Attorney General 704.

The last mentioned opinion dealt with an injury sustained by Frank Greenwood while employed at the Springfield State Hospital. His claim was disallowed by the State Industrial Accident Commission upon the ground that he was not subject to the provisions of the Workmen's Compensation Law. From that decision Greenwood appealed to the Circuit Court for Carroll County, and the Circuit Court held that his employment was extra-hazardous, within the meaning of the Workmen's Compensation Law, and it reversed the order of the Commission. We concurred in the ruling of the Circuit Court, and recommended to the Superintendent of the Hospital that the amount of compensation due Greenwood be included in its budget.

In *Merrill v. Military Dept.*, 152 Md. 474, an award to a member of the National Guard, under the Workmen's Compensation Law, was upheld by the Court of Appeals. In the recent case of *Lease v. Upper Potomac River Comm.*, 179 Md. 543, the Court of Appeals held that Section 46 of Article 101 of the Code was applicable in the case of an injured employee of the appellee. In the more recent case of *Clauss v. Board of Education of Anne Arundel Co.*, 181 Md. 513, a workman engaged in repairing a school building was held entitled to compensation under the provisions of Section 46.

From the above, it is readily apparent that the Workmen's Compensation Law extends its coverage to employees of the State as well as those of its citizens, and that both the Court of Appeals and this Department have long recognized the existence of the State's liability under Article 101 of the Code. The opinion to which you were referred by the Employment Commissioner, therefore, is to be understood as an expression of our views on the facts of the case there presented and not as a general statement of law applicable to all State employees.

It has long been the practice of this Department to represent the various institutions and agencies of the State in proceedings before the State Industrial Accident Commission, and the cases to which you refer, while they are not designated by names, may well be in our hands for attention. We will follow through to their conclusion the cases referred to us, and advise you of the outcome.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Asst. Attorney General.*

ZONING

ZONING—(1) HOWARD COUNTY NOW ELIGIBLE UNDER PROVISIONS OF CHAPTER 609 OF THE ACTS OF 1947 TO PARTICIPATE UNDER STATE-WIDE PLANNING AND ZONING ACT.

ZONING—(2) CANNOT ADOPT ZONING REGULATIONS WITHOUT DEVELOPING A PROGRAM OF PLANNING.

December 9, 1947.

Hon. P. G. Stromberg.

Your request of December 4th presents two questions relating to planning and zoning in Howard County. First, you ask, is Howard County eligible to participate under Chapter 599 of the Laws of 1933?

Examination of the original Act of 1933 shows that Howard County was one of several Counties excepted from the provisions of the Act. However, between 1941 and 1947, four Counties by Acts of the General Assembly have eliminated their exemption from the provisions of this Act. The latest of these was Howard County (by Chapter 609 of the Acts of 1947). Section 1 of the Act of 1933 defines "municipality", in its general accepted sense, as including counties by stating: "The term 'municipality' or 'municipal' includes or relates to *counties*, towns, villages or other incorporated political subdivisions." Since municipality, as referred to in the original Act, includes counties, it is clear that Howard County, by virtue of the provisions of Chapter 609 of 1947 may create a planning commission, and the Board of County Commissioners may promulgate zoning regulations in accordance with the provisions of the Act of 1933.

The question next presented, is, may Howard County initiate a zoning program without concurrently developing a program of planning?

Section 2 of said Chapter 599 of the Acts of 1933 provides:

> "Grant of Power to Municipality. Any municipality is hereby authorized and empowered to make, adopt, amend, extend, add to, or carry out a municipal plan as provided in this Act and create by ordinance a Planning Commission with the powers and duties herein set forth. The Planning Commission of a city shall be designated City Planning Commission; of a town or village, Town or Village Planning Commission; and of any other municipality, such designation as its council may specify."

Then the Act, by its succeeding Sections, provides for the personnel of the Commission, and defines its powers and duties and sets forth other rules and regulations under which the Commission shall function.

The zoning power is found in Section 12 of the Act. It provides in part as follows:

> "For the purpose of promoting health, safety, morals or the general welfare of the community the legislative body of counties, cities and other incorporated areas are hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

The Act then provides certain regulations, or so to speak, yardsticks as to the zoning power vested in the legislative body (County Commissioners). Sub-section (c) of Section 12 provides: "Such regulations shall be made in accordance

with a comprehensive plan . . ." Sub-section (f) then states:

> "In order that the municipality may avail itself of the zoning powers conferred by this Act, it shall be the duty of the Planning Commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such Commission shall make a preliminary report and hold public hearings thereon before submitting its final report and the council shall not hold its public hearings or take action until it has received the final report of such commission."

It is our opinion, therefore, that it is necessary that a planning program be instituted concurrently with any zoning program, since the overall provisions of the Act of 1933 require that the functions of the zoning authority are dependent to a large extent on the planning commission.

However, we do not mean to imply that before the legislative body can act in pursuance of a zoning ordinance, the planning commission shall have completed a master plan for the physical development of the County or have undertaken or completed all of its functions authorized to said Commission under the provisions of the Act. It is necessary that a planning commission work out and prepare a zoning program as comprehensive or as limited as current circumstances indicate is proper and feasible before the County Commissioners can exercise the power to zone.

HALL HAMMOND, *Attorney General.*

JOSEPH D. BUSCHER, *Asst. Attorney General.*

INDEX
TO
OPINIONS

A

Page

Acknowledgments—

Registers of Wills may take 96

Acts: Construed or Referred to—

1777, Chapter 6 175
1829, Chapter 87 99
1842, Chapter 270 100
1846, Chapter 400 100
1847, Chapter 185 270
1853, Chapter 185 270
1865, Chapter 181 100
1866, Chapter 294 270
1867, Chapter 184 100
1867, Chapter 294 270
1868, Chapter 406 100
1874, Chapter 181 ..... 107, 179
1876, Chapter 381 108
1896, Chapter 50 160
1896, Chapter 51 180
1898, Chapter 129 180
1898, Chapter 407 175
1901 (Special Session), Chapter 2 160
1906, Chapter 244 226
1908, Chapter 487 180
1910, Chapter 207 293
1912, Chapter 124 160
1912, Chapter 823 199
1914, Chapter 128 508
1914, Chapter 800 517
1916, Chapter 687 294
1916, Chapter 704 218
1918, Chapter 85 294
1927, Chapter 118 135
1927, Chapter 568 119
1929, Chapter 226 220
1933, Chapter 175 507
1933, Chapter 584 315
1933, Chapter 599 ..... 72, 519
1935, Chapter 90 414
1935, Chapter 409 143
1935, Chapter 480 106
1936 (Special Session), Chapter 124 459
1937, Chapter 11 456

A—(Continued)

Acts: Construed or Referred to—(Continued)

1937 (Special Session), Chapter 11 223
1937, Chapter 523 502
1939, Chapter 227 456
1939, Chapter 277 429
1939, Chapter 353 140
1939, Chapter 433 308
1939, Chapter 584 245
1939, Chapter 715 72
1939, Chapter 720 195
1941, Chapter 53 218
1941, Chapter 247 72
1941, Chapter 377 ..... 93, 364
1941, Chapter 408 106
1941, Chapter 487 346
1941, Chapter 629 505
1941, Chapter 701 ..... 220, 433
1941, Chapter 703 161
1941, Chapter 782 391
1941, Chapter 834 195
1941, Chapter 912 476
1941, Chapter 925 510
1943, Chapter 333 354
1943, Chapter 334 162
1943, Chapter 411 305
1943, Chapter 413 353
1943, Chapter 546 92
1943, Chapter 708 ..... 105, 119
1943, Chapter 753 414
1943, Chapter 754 162
1943, Chapter 877 ..... 72, 316
1943, Chapter 925 195
1943, Chapter 964 487
1943, Chapter 996 62
1943, Chapter 1007 293
1944 (Special Session), Chapter 13 316
1945, Chapter 9 371
1945, Chapter 47 258
1945, Chapter 53 180
1945, Chapter 123 103
1945, Chapter 185 349
1945, Chapter 249 230
1945, Chapter 253 ..... 287, 395, 410, 421, 442, 443
1945, Chapter 270 177
1945, Chapter 385 411

A—(Continued)

Acts: Construed or Referred to—(Continued)

1945, Chapter 456 ..... 270, 275, 277, 289
1945, Chapter 467 154
1945, Chapter 499 150
1945, Chapter 502 ..... 72, 316
1945, Chapter 510 420
1945, Chapter 548 315
1945, Chapter 556 148
1945, Chapter 558 255
1945, Chapter 562 292
1945, Chapter 719 148
1945, Chapter 742 ..... 389, 412, 459
1945, Chapter 755 359
1945, Chapter 765 177
1945, Chapter 766 341
1945, Chapter 777 195
1945, Chapter 779 182
1945, Chapter 781 ..... 157, 239, 371
1945, Chapter 800 ..... 357, 512
1945, Chapter 872 107
1945, Chapter 929 ..... 98, 107, 179
1945, Chapter 930 ..... 157, 239, 371
1945, Chapter 932 336
1945, Chapter 934 ..... 161, 164, 166, 170, 171
1945, Chapter 953 357
1945, Chapter 964 350
1945, Chapter 980 209
1945, Chapter 986 362
1945, Chapter 1015 370
1945, Chapter 1044 133
1945, Chapter 1052 190
1945, Chapter 1064 174
1946 (Special Session), Chapter 3 205
1947, Chapter 9 383
1947, Chapter 99 ..... 65, 284, 365, 451
1947, Chapter 105 231
1947, Chapter 123 119
1947, Chapter 165 143
1947, Chapter 281 ..... 134, 327, 485
1947, Chapter 287 ..... 239, 371
1947, Chapter 299 381
1947, Chapter 324 152
1947, Chapter 402 195
1947, Chapter 448 496
1947, Chapter 484 440

A—(Continued)

Acts: Construed or Referred to—(Continued)
1947, Chapter 487 ..... 223, 437
1947, Chapter 501 64
1947, Chapter 502 ..... 205, 313
1947, Chapter 507 144
1947, Chapter 510 ..... 340, 369, 372
1947, Chapter 514 ..... 139, 256
1947, Chapter 541 451
1947, Chapter 560 ..... 286, 350, 351, 366, 367, 373, 375, 473
1947, Chapter 609 519
1947, Chapter 637 448
1947, Chapter 658 284
1947, Chapter 664 299
1947, Chapter 695 364
1947, Chapter 696 ..... 241, 338, 364
1947, Chapter 697 514
1947, Chapter 701 444
1947, Chapter 704 383
1947, Chapter 706 89
1947, Chapter 711 505
1947, Chapter 727 106
1947, Chapter 780 70
1947, Chapter 786 319
1947, Chapter 810 182
1947, Chapter 856 206
1947, Chapter 896 ..... 69, 316
1947, Chapter 901 471
1947, Chapter 914 ..... 428, 442, 456, 489
1947, Chapter 915 316
1947, Chapter 918 158
1947, Chapter 921 212
1947 (Special Session), Chapter 66 379

Aircraft—
See Aviation.

Alcoholic Beverages—
Husband and Wife—Must be licensed as partnership 58
Joint Owners—Application must be signed by all as landlords 58
Licensee—May be authorized to enlarge premises 68
Licensee—Must remain resident of county 58
Licenses—Clubs and corporations may substitute one officer or another in license without transfer of license 60
Licenses—Hotels and restaurants; may sell for consumption off the premises and deliver same 67
Licenses—Outside solicitation prohibited 66
Licenses—Protests; paying taxes on automobile qualifies person to sign protest in Queen Anne's County 64

A—(Continued)

License—Transfer 68
Place of Business—Garage or storeroom 66
Protests—Against granting or renewing licenses 64
Sales by Receivers 62
Solicitation—Prohibited by retailers 66

Ambulances—
See Motor Vehicles.

Army Reserve—
See State Employees.

Aviation—
Dusting crops by aircraft 69

B

Bail—
May be given by Surety Company 146

Baltimore City—
Ordinance 701, April 1, 1922 498
Police Beneficial Association—Exempt from insurance laws 186

Baltimore City Charter (1946)—
Sections 102-122 315

Baltimore City Code (1927)—
Article 1, Section 89 498

Baltimore County—
Planning Commission—Authority of; Zoning Commissioner 72

Banks and Trust Companies—
Foreign—Must procure license to do business as sales finance company 80
Industrial Finance Companies—Refund in case of death of borrower, where loan is secured by insurance 81
Voting Trusts—Formation of 76

Bids—
See Public Works.

Board of Public Works—
See Public Works.

Boilers—
See Engineers.

Bonds—
See Criminal Law—Non-support; Justices of the Peace; Sheriff.

B—(Continued)

Budget—
Emergency Fund—May be used to pay State's share of salaries of Supervisors of Assessments 89

Budget Amendments—
See State Roads Commission.

C

Charles County—
School Buses—When may carry parochial school students 158

Chauffeurs—
See Motor Vehicles.

Clerks of Court—
Acknowledgments—May take 96
Deeds, Mortgages, etc.—Fees for recording and extracting 91
Lost or Mislaid Property—Disposition of 94
Retirement System—Age limit not applicable to deputy clerks 93

Conflict of Laws—
Repeals by implication not favored; Acts reconciled 383

Conservation—
Crabs—License 106
Fishing—Riparian owner may fish without license 97
Game and Inland Fish Commission—Hearings on regulations 113
Hunting License—Owner of farm land residing in State may hunt thereon without license 103
Hunting License—Who may hunt without 103
Hunting License—Wild water fowl 118
Oysters—Culling of unmerchantable 115
Oysters—Leases; 1945 recodification 98
Oysters—Shell tax payable by packers 111
Oysters—Taking in Wye River 107

Constitution of Maryland—
Bill of Rights:
Article 5 121
Declaration of Rights:
Articles 5, 21, 23 123

Constitution of Maryland—
Sections construed or referred to:
Article 1:
Section 5 124

C—(Continued)

Constitution of Maryland—(Continued)
Article 2:
Sections 10-13 196
Section 20 180
Article 3:
Section 17 143
Section 35 ..... 240, 297
Article 4:
Sections 42, 43 193
Article 13:
Section 2 217

Constitution of Maryland—
Article 15:
Section 6 121
Article 16 135

Constitutional Law—
Justices of the Peace—Qualifications for Magistrate for Juvenile Causes for Montgomery County directory only 133
Member of General Assembly—Eligible for membership on Upper Potomac River Commission 143
Picketing—Bill to prohibit picketing residence is valid 129
Referendum—Sales Tax Act not subject to 134
Women on Juries—Certain counties exempted 121

Construction Contractors—
See Licenses.

Contempt—
Fines for payable to State 174

County Commissioners—
Rent Control—May not exercise power as long as Federal Act applies 144

Crabs—
See Conservation.

Criminal Law—
Bail—Corporate surety may give 146
Disturbance of the Peace—Acting in disorderly manner 150
Non-Support—Jurisdiction of court when accused violates probation 148

Crops—
Dusting by aircraft 69

D

Deeds—
See Clerks of Court.

D—(Continued)

Dental Examiners—
Licensees—To register annually 152

Disorderly Manner—
See Disturbing the Peace.

Disturbing the Peace—
Acting in disorderly manner 150

E

Education—
Parochial Schools—When students of may ride public school buses in Charles County 158
Teachers Colleges—Salaries of faculty not subject to Standard Salary Board 157

Elections—
Primaries—Candidates for Judge of Orphans' Court may not seek nomination of party with which not affiliated 160
Registration—Cancellation where person has failed to vote for 5 years 171
Registration List—Need not be prepared for special election 165
Special Elections—Notice to sheriff 169
Special Elections—Registration books in Baltimore to be closed for 164
Special Election—Registration list need not be prepared for 165

Electric Cooperatives—
See Taxation.

Employees—
See State Employees; State Roads Commission.

Employment Service—
See Merit System.

Engineers—
Board of Examiners—Engineers operating steam heating plants subject to jurisdiction of 173

Examinations—
See Public Accountants 83

F

Federal Funds—
See State Roads Commission.

Fees—
See Clerks of Court.

Financial Responsibility—
See Motor Vehicles.

F—(Continued)

Fines and Forfeitures—
Contempt—Fines for payable to State 174
Governor may remit 179

Fines and Penalties—
Unemployment Compensation Law—Fines payable to State 177

Fish—
See Conservation.

Freeways—
See State Roads Commission.

G

Game and Inland Fish Commission—
See Conservation; Pensions.
Regulations—hearings on 113

Gasoline Taxes—
Counties—Expenditures distributable to 367
Distribution to municipalities 351, 366

General Assembly—
Upper Potomac River Commission—Eligible for membership on 143

Governor—
Fines and Forfeitures—May remit 179

Gross Receipts Tax—
See Taxation.

H

Hairdressers—
Two Acts amending same section reconciled to make both effective 383

Harness Racing—
See Racing Commission.

Hawkers and Peddlers—
See Licenses.

Health—
Hospitals—May use appropriations for hospital survey and construction 182

Highways—
See State Roads Commission.

Hospital Insurance—
See Insurance.

Hospitals—
See Health.

H—(Continued)

Housing Authority—
See Retirement System.

Howard County—
Zoning—May act under State law 519

Hunting License—
See Conservation.

I

Industrial Finance Companies—
See Banks and Trust Companies.

Inheritance Tax—
See Taxation.

Insurance—
See Taxation.
Baltimore Police Beneficial Association—Exempt from insurance laws 186
Hospital and Medical Insurance—Only domestic corporations may qualify for non-profit plan 185
Taxation—Membership fees in mutual company are part of gross direct premiums subject to taxation 187
Title Insurance—Maryland company may do business outside State 188

J

Junior College—
See Montgomery County.

Juries—
Women on—Certain counties exempted 121

Justices of the Peace—
See Constitutional Law 133
Appointments by Governor—Vacancies 192
Baltimore City—Bond required 190
Bond—For Justices in Baltimore City 190
Clerk in office of Internal Revenue may be 295
Vacancies—Appointments by Governor when Legislature not in session 192
Vacation—Sick leave is independent of annual leave 203

L

Labor Disputes—
Picketing of residence may be prohibited 129

L—(Continued)

Laws—
Racing Commission—Two acts amending same section will be given effect when not repugnant 205

Libraries—
Employees must join State Teachers' Retirement System 209

Licenses—
See Conservation; Marriages; Racing Commission; Real Estate Commission; Taxation.
Application and effect of various sections of Article 56 224
Construction contractors; limitations; penalties 218
Hawkers and Peddlers—When operations conducted in more than one County; selling gasoline to oyster boats 213
Pin Ball Machines—Comptroller to enforce in Caroline County 212
Soda Fountain—Required in city market 211
Traders 214

Lost Property—
See Clerks of Court.

M

Marriages—
License—Waiver of 48-hour requirement as to members of Armed Forces 230
Minors—License may be granted for pregnant girl under 17 years of age 231

Maryland-National Capital Park and Planning Commission—
See Pensions.

Maryland Training School for Boys—
Escaped Boys—State not liable for acts of 233

Medical Examiners—
"Physician" may not be applied to person not qualified to practice medicine 235

Medical Insurance—
See Insurance.

Merit System—
See State Roads Commission.
Classification—Procedure for classifying employees of Employment Service 244
Employment Service—Classification of employees 244
Labor Registry—Veterans' preference applicable to 252
Retirement System—Mandatory retirement not applicable to deputy clerks and deputy registers of wills 240

M—(Continued)

Merit System—(Continued)
Salary Scales—Not retroactive 239
Sick Leave—Accumulated sick leave not allowable for pregnancy 237
Vacation—Compilation of time for unused 251
Veterans—Preference applicable to positions not filled by competitive examination 252

Minors—
See Marriages; Maryland Training School for Boys.

Montgomery County—
Junior College—Veterans may be charged same tuition fee as non-residents 254
Magistrate for Juvenile Causes—Qualifications directory only 133

Mortgages—
See Clerks of Court.

Motor Vehicles—
See State Roads Commission; Taxation.
Ambulance—May be designated as emergency vehicle 280
Appeals—State has no general right of appeal in cases involving violation of motor vehicle laws 293
Chauffeurs—Special chauffeur's license required only when vehicles are used as public or common carriers 291
Financial Responsibility—Department may not determine who is liable for damages 288
Financial Responsibility—Department may suspend license where no insurance but may not determine whether insurance is liable under policy 267
Financial Responsibility—Effect of release from liability 265
Financial Responsibility—Not applicable to accidents occurring in reservation of U. S. Naval Academy 270
Financial Responsibility—When certificate of insurance may be withdrawn 277
Financial Responsibility—Where employee is driving car of customer of employer, both of whom are insured; denial of responsibility by both companies; suspension not required 275
Fines—For violating parking ordinances payable to localities 282
Overweight—No refund of fees for 365
Registration—Truck chassis, with revolving crane, used incidentally on highways, not subject to 290
Registration—Vehicle may not be registered under shuttle relay unless tractor and semi-trailer owned by same person 284
Registration—When soldiers, etc., not required to register vehicles 260
Titling Tax—Payable on fair market value of vehicle won in contest 258

M—(Continued)

Motor Vehicles—(Continued)
Titling Tax—Payable on transfer of vehicles from partnership to corporation formed by members of partnership 285
Trackless Trolleys—Must obey traffic control signs 263
Traffic Control Signs—Trackless trolleys and street cars to obey 263

Municipalities—
See State Roads Commission.

N

National Labor Relations Act—
See University of Maryland.

Naval Reserve—
See State Employees.

Nomination—
See Elections.

Non-Support—
See Criminal Law.

O

Officers—
Sheriffs—Act increasing salaries not applicable to incumbents 297

Offices—
Justice of Peace—Clerk in office of Collector of Internal Revenue may be 295

Old Age Assistance—
See Public Welfare.

Overtime—
Employees of State Roads Commission 369

Oysters—
See Conservation.

P

Parochial Schools—
See Education.

Peddlers—
See Licenses.

Pensions—
See Retirement System; State Police.

P—(Continued)

Pensions—(Continued)
Game and Inland Fish Commission—Employees may not have pensions increased from Game Protection Fund 303
Maryland-National Capital Park and Planning Commission—Officers and employees may participate in 298
State Senator—May receive service retirement as Court Clerk and elect not to join Retirement System as Senator 300
Traffic Court Clerk—Legislative Act required to increase 307
Transfer from one retirement to another 299

Petty Loans—
See Small Loans.

Physician—
See Medical Examiners.

Picketing—
See Labor Disputes.

Planning—
See Baltimore County.

Police Commissioner—
Pension to Clerk in Traffic Court—May not be increased without Legislative Act 307
Taxicab Bureau—Driver's license may be suspended or revoked 305

Primaries—
See Elections.

Property, Mislaid—
Disposition 94

Public Accountants—
Board of Examiners may use examinations prepared by Institute of Accountants 83

Public General Laws—
(References are to the 1939 Edition and 1943 supplement of the Annotated Code.)

Articles and sections construed or referred to:
Sections 15-17 (1860 Code, Article 71) 100

Article IA:
Section 9 69
Section 86 (a) 316

Article 2B:
Section 1(i) 67

P—(Continued)

Public General Laws—(Continued)

Section 2 62
Section 13(4) 58
Section 13(15) 59
Section 17 67
Section 27 58
Section 29 ..... 59, 60
Section 31 61
Section 34 68
Section 53 64
Section 57 59
Section 62 68
Section 63 279
Section 100 ..... 66, 67

Article 5:
Section 66 415

Article 11:
Section 35 78
Section 153 336
Section 186 81

Article 13:
Section 9 ..... 340, 372
Section 11 335

Article 15A:
Section 8 362

Article 16:
Section 194 174
Section 233A 342
Section 252 416

Article 17:
Section 1 420
Section 53A 342
Section 65 420
Section 67 93
Sections 71, 72 91
Section 565E 58

Article 18:
Section 11 96

P—(Continued)

Public General Laws—(Continued)

Article 19:
Section 35 221

Article 21:
Section 14 411

Article 23:
Section 8 189
Section 131 77
Sections 460-489 473

Article 26:
Section 1 175
Section 42 146

Article 27:
Section 89 148
Sections 128-131 150

Article 32:
Section 5A 152

Article 33:
Section 8 170
Section 23 ..... 164, 168
Section 26 166
Section 29 171
Section 58 161
Section 115 169
Section 196 166

Article 35:
Section 65 502

Article 36:
Section 12 440
Section 12(A)(14) 91

Article 38:
Section 5 174

Article 39:
Section 86 97
Sections 106, 111A 106

Article 41:
Section 48 180
Section 86 504

P—(Continued)

Public General Laws—(Continued)

Article 43:
Section 63 154
Section 139 235

Article 45:
Section 4 490

Article 48A:
Section 137 146
Section 214 186
Section 235 185

Article 51:
Sections 6-10 125

Article 52:
Section 1 191
Section 4 295
Section 12 293
Sections 14-14B 505
Section 93 195
Section 94 ..... 504, 506
Section 100 501
Section 103 501

Article 56:
Section 1 444
Section 1B 223
Sections 1, 7 220
Section 7 437
Section 8 ..... 213, 222
Sections 24-33 214
Section 40 214
Sections 40-73 224
Section 44, et seq 445
Sections 103-111 228
Sections 282, 289 211
Section 290 225
Section 291 ..... 218, 226
Section 343 321

Article 57:
Section 1 154

Article 58A 335

Article 59:
Section 4 155

P—(Continued)

Public General Laws—(Continued)

Article 62:
Section 5A 230
Section 7 231

Article 64A: 516
Section 5 371
Section 10 252
Section 12 249
Section 16 ..... 157, 239
Sections 16-18 371
Section 17 239
Section 22 ..... 237, 251, 341, 371

Article 65:
Section 5 339
Section 41 ..... 339, 341
Section 95 354

Article 66½:
Section 2(1) 281
Section 2(4) 292
Section 2(22) 263
Section 2(54) 290
Section 2(65) 263
Section 21 290
Section 25A 258, 286
Section 74-76 365
Section 78 292
Section 81 291
Sections 110A, 110B 278
Sections 110A-110H 270
Section 110B 269, 276, 289
Section 110C 267
Section 110D 266
Section 110H 267
Section 135 283
Sections 137-138 349
Section 138 363
Sections 138-141 263
Section 157 381
Sections 188-191 349
Section 234 281
Section 260 146
Section 264 293

P—(Continued)

Public General Laws—(Continued)
Section 269 283
Section 285 283
Section 456 ..... 266, 267

Article 70A:
Sections 16, 17 153

Article 72: (History of) 98
Section 1 ..... 108, 179
Section 4 115
Section 5(i) 107
Section 7 118
Section 9(a) 112
Section 12(b) 101
Section 16 117
Section 16(f) 112
Section 50, 52 100

Article 73B: 364
Section 1 ..... 330, 338
Section 3 ..... 301, 304
Section 5 93
Section 7 ..... 242, 300, 338
Sections 17-18 298
Sections 25-28 299

Article 75:
Sections 161-163 180

Article 75A:
Sections 3, 4 83

Article 77:
Sections 95, 97 210
Section 174 209
Section 235 510

Article 78B:
Section 7 313
Sections 14, 16 313
Section 15A 205, 206
Section 16 ..... 311, 317
Section 19 319

Article 81:
Section 12 448
Section 26 448

P—(Continued)

Public General Laws—(Continued)

Section 46 448
Sections 94½-99 476
Sections 101-103 187
Section 102 453
Sections 104-108 493
Section 109 403
Section 110 ..... 387, 407, 463
Section 111 ..... 389, 412, 459
Section 112 434
Section 118 ..... 392, 414, 492
Section 119 415
Section 119A 468
Section 120 ..... 390, 393, 398, 425, 492
Sections 121, 122 434
Sections 124, 125 390
Section 125 ..... 425, 469, 495
Section 133 433
Section 134 ..... 434, 468
Sections 137-138 487
Section 160 ..... 219, 433, 467
Section 187 474
Section 220 ..... 287, 421, 440, 443, 489
Sections 220, 221 ..... 394, 410
Section 225 223
Section 240 223
Section 260 327
Section 261 ..... 463, 465, 466, 485
Section 301 465
Section 301(h) 327

Article 83:
Section 19(2) 287
Sections 141-152 80

Article 88B:
Section 18A 342, 344

Article 89B:
Section 1A 376
Section 2A 353
Section 13 368
Section 14 ..... 366, 377
Section 21 380
Section 48A 350
Sections 150-155 346
Section 156 368

P—(Continued)

Public General Laws—(Continued)

Article 93:
Section 25 96
Section 117 432
Section 121 435
Section 276 96
Section 291 241
Section 353 323

Article 94:
Section 1 496

Article 95A:
Section 9 177
Section 12 245
Section 13 177

Article 96½: 357
Sections 8, 8B 512

Article 99:
Section 4 304
Section 5 113
Section 15 105
Section 17 103
Sections 17, 20 118
Section 18 303
Section 104 97

Article 100:
Section 77 370
Section 78 ..... 340, 369

Article 101:
Section 46 517

Public Local Laws—

Articles and sections construed or referred to:

Article 4: Baltimore City (1938 Edition)
Section 517 173
Section 737 191

Article 4: (1938 Edition)
Section 738 203
Section 947 308

P—(Continued)

Public Local Laws—(Continued)
Article 9: Charles County (1930 Edition)
Section 241A, 241B 158
Article 12: Section 493 297
Article 16: (Montgomery County)
Section 1189A 379
See 547B 133
Article 18: Queen Anne's County (1930 Edition)
Sections 317-321 108

Public Welfare—
Old Age Assistance—Claims against estate not barred by 3-year limitation 153

Public Works, Board of—
Bids—May permit erroneous bid to be reformed or withdrawn 86

R

Racing—
Revenues—Distribution 205
Two acts amending same section will be given effect when not repugnant 205

Racing Commission—
Licenses—Harness racing 312
Licenses—Trotting and pacing 311
Relief Fund—How may be spent 319

Real Estate Commission—
Licenses—Persons subdividing and selling own property not required to secure 321

Recordation Tax—
See Taxation.

Referendum—
Sales Tax Act—Not subject to 134

Registers of Wills—
Acknowledgments—May take 96
Conditional Wills—Not required to be filed where contingency failed to occur 324
Joint Wills—When admissible to probate 323

Registration—
See Elections.

Relief Fund—
See Racing Commission.

R—(Continued)

Rent Control—
County Commissioners may regulate rents as long as Federal Act applies 144

Retail Sales Tax—
See Sales Tax.

Retirement System—
See Clerks of Court; Merit System; Pensions.
Housing Authority—Employees not eligible for membership 330
Libraries—Employees must join State Teachers' Retirement System 209

Riparian Owner—
May fish without license 97

Roads—
See State Roads Commission.

S

Sales Finance Company—
See Banks and Trust Companies 80

Sales Tax—
See Taxation.
Act imposing not subject to referendum 134
Compilation—Tokens may be used but not to change rate of tax 327
Tax—Tokens may be used to facilitate collection of tax but not to change rate 327
Tokens—How may be used 327

School Buses—
See Education.

Schools—
See Education.

Sheriffs—
Bond—Payment of premium in a fi fa proceeding is for court to determine 331
Eligible for re-election 331
Salaries—Act increasing not applicable to incumbents 297

Sick Leave—
See Merit System.

Small Loans—
Industrial Companies—Who must obtain license 336
Licensee—May close office on Saturday 335

S—(Continued)

Small Loans—(Continued)

Social Security Act—
Lump sum payments to beneficiaries not subject to inheritance tax 418

Soda Fountains—
See Licenses.

Soldiers—
See Marriages; Motor Vehicles.

Speed Limits—
See State Roads Commission.

State Employees—
Army and Navy Reserve—Employees not to be paid while on active duty as members of 339
Holidays—Hourly paid employees entitled to pay on 340
Retirement—Compulsory retirement not applicable to employees not members of system 338

State Hospital—
Unclaimed Funds—Do not escheat to State 342

State Police—
Pension Fund—Unclaimed money reverts to 344
Unclaimed Money, etc.—Revert to pension fund 344

State Roads Commission—
Abandonment of highway 347
Budget Amendment—Ferry system; use of construction fund 359
County Roads—Authority to construct and maintain 375
County Roads—Duties where Federal Funds are involved 372
Employees—Not members of Retirement System may continue work after 70 years of age 364
Employees—Overtime 369
Excavation of Highway—Permit; bond 379
Federal Funds—May enter into indemnity contract to secure 350
Freeways—Authority to prohibit trucks from using 346
Gasoline Tax—Distribution to municipalities 366
Gasoline Tax—Expenditure of distributable to counties 367
Highways—Abandonment of 347
Merit System—Restoration of veteran to service 352
Municipal Streets—Authority to construct and maintain 375
Municipalities—Distribution of gasoline taxes 351
Municipalities—Must obtain permit to erect traffic control device on State highway 363
Municipality—Liability for relocation of water main 378

S—(Continued)

State Roads Commission—(Continued)
Openings—Permit; bond 379
Overweight Vehicles—No refund of fee to State contractor 365
Parking—No authority to establish taxicab stands on highways 348
Retirement System—Employees over 70 not members of may continue work 364
Speed Limits—Authority to reduce 381
Taxicab Stands—No authority to establish on highways 348
Traffic Control Devices—Municipality must obtain permit to erect on State highway 363
Trucks—Authority to prohibit use of Freeways 346
Veterans—Restoration to service 352
Water Mains—Liability of City to relocate 378

Statute of Limitations—
Inheritance Tax; not barred where no administration 431

Statutes—
Conflict of Laws—Repeals by inplication not favored; Acts reconciled 383

Street Cars—
See Motor Vehicles.

Supervisors of Assessments—
See Budget.

Surety Company—
May give bail 146

T

Taxation—
See Insurance.
Corporations—Charitable must file annual reports 474
Electric Cooperatives—To pay gasoline tax 473
Gasoline Tax—Electric Cooperatives to pay 473
Gross Receipts Tax—Does not violate import and export clause of U. S. Constitution 476
Inheritance Tax—Bequest in trust to pay funeral bill not exempt 387
Inheritance Tax—Bequest to be used for charities outside State taxable 406
Inheritance Tax—Claims against estate; no tax due where property transferred to settle claims 403
Inheritance Tax—Death of remainderman before life tenant, remainder interest subject to tax; valuing such interest 422
Inheritance Tax—Gift to lineal descendants or heirs following life estate; substituted gift taxable 425

T—(Continued)

Taxation—(Continued)

Inheritance Tax—Intangible personalty constituting corpus of revocable trust subject to tax 458
Inheritance Tax—Life estate; devise to son in trust for maintenance of wife and children 401
Inheritance Tax—Life tenant and remainderman separate valuation of estates 468
Inheritance Tax—Lump sum payment to beneficiaries under Social Security Act not taxable 418
Inheritance Tax—No tax on charitable bequest made before 1947 486
Inheritance Tax—Payable on sales value of real estate rather than appraised value 392
Inheritance Tax—Recommendation in sufficient to create precatory trust 460
Inheritance Tax—Reservation of life interest, rate of tax on disposition to son and daughter-in-law 450
Inheritance Tax—Revaluation of remainder interest; no further tax on enhancement 390
Inheritance Tax—Real estate sold two years after administration; no further tax 397
Inheritance Tax—Sale of life interest before death of life tenant; tax applicable to remainder interest at date of sale of life estate 413
Inheritance Tax—Separate valuation of estates; secondary life estate 493
Inheritance Tax—Statute of limitations; not barred where no administration 431
Inheritance Tax—Statute of limitations inapplicable to tax on real estate not subject to inventory 467
Inheritance Tax—Tax is on appraised value rather than agreed value 491
Inheritance Tax—Tax payable by heirs of wife murdered by husband where property held by husband and wife by the entireties 429
Inheritance Tax—Taxability of shares of stock determined by record title 472
Inheritance Tax—Transfer by decedent to self and wife as tenants by entireties deemed in contemplation of death 388
Inheritance Tax—U. S. bonds in name of decedent and mother taxable on one-half of value 411
Insurance—Domestic mutual fire company exempt from premium tax after June 1, 1947 471
Insurance—Premium tax; death benefit payments not deductible 453
Licenses—Disposition of penalties 437
Motor Vehicle Tax—Distribution for school purposes; allocation to local subdivisions 451
Recordation Tax—Agreements conveying title to creating liens on property to secure commissions not taxable 419

T—(Continued)

Taxation—(Continued)
Recordation Tax—Applies to personal property passing under separation agreement 489
Recordation Tax—Computation on each $500 or fractional part 456
Recordation Tax—Computation of tax; lease with option to buy 442
Recordation Tax—Distribution to localities; fees not distributable 440
Recordation Tax—Documents to Veterans' Administration not taxable, but from, taxable 457
Recordation Tax—Tax to be on each $500 and fractional parts to be disregarded 428
Recordation Tax—Transfer of real estate to corporation for stock subject to tax 394
Recordation Tax—Where deed recorded before imposition of tax, counterpart of deed may be recorded without tax 410
Sales Tax—Exempted articles; X-ray film 465
Sales Tax—Non-profit educational institution exempt from 485
Sales Tax—Society for Prevention of Cruelty to Animals exempt from 463
Traders' Licenses—Mode of issuing; value of stock 444

Taxicab Bureau—
See Police Commissioner.

Taxicab Stands—
See State Roads Commission.

Teachers' Colleges—
See Education.

Title Insurance—
See Insurance.

Titling Tax—
See Motor Vehicles.

Time—
Daylight Saving—County Commissioners may adopt 496

Trackless Trolleys—
See Motor Vehicles.

Traders—
See Licenses.

Traders' Licenses—
See Taxation.

Traffic Court—
See Pensions.

T

Trial Magistrates—
Probated Accounts—Plaintiff may act through agent not attorney 502
Salaries—County Commissioners may reduce to minimum for person not then in office 501
Sentence—May suspend at time of trial 504

Trucks—
See State Roads Commission.

U

Unemployment Compensation—
Fines under payable to State 177

United States—
Naval Academy Reservation—Financial Responsibility Act does not apply to motor vehicle accidents on 270, 275

University of Maryland—
Board of Regents—Nomination by Farm Bureau and Grange 510
University and Hospital not subject to National Labor Relations Act 508

V

Vacation Leave—
See Merit System.

Veterans—
See Merit System; Montgomery County; State Roads Commission.
Re-employment—Must apply within 90 days after separation 512

W

Water Pollution Control Commission—
Powers of Commission 514

Welfare—
See Public Welfare.

Wild Water Fowl—
See Conservation.

Wills—
See Register of Wills.

Women—
See Constitutional Law.

Workmen's Compensation—
State Employees—Covered when in extra-hazardous occupation 516

W—(Continued)

Wye River—
Taking oysters in 107

Z

Zoning—
Howard County—Eligible to act under State-wide law 519